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NOTES ON RECENT MISSOURI CASES

NATURE OF THE HOMESTEAD RIGHT.—Homestead exemption laws are strictly of American origin; their object is to protect the home of each citizen where his family may be sheltered and live beyond the reach of financial misfortune.[1] At the time of their inception [2] the principle that the real estate of a decedent shall be liable for his debts was generally in force in England and the United States. Such had been the common law of the Colonies,[3] and, although probably not a part of the common law as adopted in Missouri,[4] that principle has been in force by statute in this state since 1825.[5] Since the homestead statutes must take effect in derogation of this principle it is apparent that they should be given no broader construction than is necessary to carry out the purposes of their enactment. Some decisions, indeed, are to the effect that they should be construed liberally in favor of the debtor.[6]

Missouri homestead laws date from the statute of 1863,[7] which provided for an exemption of the homestead from sale under execu-

1. 21 Cyc. 459, note 5.
2. The first homestead statute was enacted by the Republic of Texas in 1839.
3. 4 Kent's Comm. (13th ed.) 463.
4. Missouri adopted the common law and British statutes as of the year 1607. Revised Statutes 1909, § 8047.
5. Revised Statutes 1825, p. 106.
6. 21 Cyc. 461, note 26.
7. Laws of 1862-3, p. 22. Marshall, J., apparently overlooked this statute in his dissenting opinion in *Keene* v. *Wyatt* (1900) 160 Mo. 1, 10, 60 S. W. 1037.

tion or other process, during the life of the head of the family, and continued that exemption after his death for the benefit of his widow during life, and for the minor children during their minority. Apparently no case involving this statute ever came to the Supreme Court,[8] and it was replaced two years later by the statute of 1865,[9] which provided for an exemption during the life of the head of the family, and provided further that "if any such head of the family shall die leaving a widow and minor children, his homestead shall pass to and vest in such widow and children free from the payment of his debts, and such widow and children shall take the same estate of which the deceased died seised, provided, that such children shall, by the force of this chapter, only have an interest in such homestead until they shall attain their majority." [10] The statute of 1863 probably established only a period of exemption. That of 1865 shows a different intent. In the case of *Skouten* v. *Wood*,[11] the court, construing that statute, held that where there were no minor children the widow took the estate of which her husband died seised, that she could dispose of it, and that upon her death it would pass to her heirs. The interest of minor children under this statute seems to have been regarded as a right to occupy jointly with the widow during minority,[12] or exclusively against her vendee during that period,[13] though there is a *dictum* in one case [14] to the effect that they took the estate jointly with the widow, their estate being determinable upon their attaining their majority. The homestead did not become liable for debts after the death of the widow, and the attainment of majority by the children—the exemption was absolute; [15] and the estate vested in the widow whether there were any debts or not.[16] Thus the statute of 1865 took the homestead tract out from under the operation of the general statutes of descent and gave it to the heirs of the widow rather than to those of the husband. This feature caused the amendment of 1875.[17]

The statute of 1875 restricted the period of exemption to the life of the widow and the minority of the children, and provided further that "all the right, title, and interest of the deceased head of the family, except *the estate of homestead thus continued*, shall be subject to the laws relating to devise, descent, dower, partition, and sale for

8. See opinion by Napton, J., in *Vogler* v. *Montgomery* (1874) 54 Mo. 577.
9. Laws of 1865, Chap. 111.
10. This act was copied from the Vermont statute. The Missouri courts were inclined to follow those of Vermont in construing the statute. See *Gragg* v. *Gragg* (1877) 65 Mo. 343.
11. (1874) 57 Mo. 380.
12. *Canole* v. *Hurt* (1883) 78 Mo. 649; *Rogers* v. *Marsh* (1880) 73 Mo. 64.
13. *Roberts* v. *Ware* (1883) 80 Mo. 363.
14. *Keyte* v. *Peary* (1887) 25 Mo. App. 394.
15. *French* v. *Stratton* (1883) 79 Mo. 560.
16. *Freund* v. *McCall* (1881) 73 Mo. 343.
17. Laws of 1875, p. 61, § 1; re-enacted in Revised Statutes 1879, § 2693.

the payment of debts against the estate of the deceased." Thus the homestead tract, except for the period of exemption, was replaced under the operation of the laws mentioned. Such was the view taken in the case of *Poland* v. *Vesper*,[18] where the court said, "It is the homestead right which is exempt, nothing more. There remains an estate in the land which descends to the heirs of the deceased, and by the express provisions of the statute is subject to the laws relating to partition and sale for the payment of debts of the deceased." Under this decision, which was uniformly followed, while the act of 1875 was in force,[19] although the homestead tract could not be reached by creditors of the head of the family during his life,[20] after his death it could be sold to pay his debts, subject to the homestead right, the purchaser being entitled to possession after the death of the widow and the coming of age of the children. Apparently, then, the act of 1875 gave the widow a life estate in the homestead tract free from the debts of the husband, the children estates for years similarly free, and the heirs of the deceased a vested remainder subject *at once* to sale for the payment of such debts.

The statute of 1875 was amended by that of 1895[21] which struck out those words which had replaced all the interest in the homestead tract, except the estate of homestead, under the operation of the laws relating to descent, sale for payment of debts, etc., and substituted for them this provision, "that is to say, the children shall have the joint right of occupation with the widow until they arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband."

The first case under the statute as amended was that of *Broyles* v. *Cox*.[22] The husband died in 1896,[23] seised in fee of certain premises as a homestead, and indebted beyond the value of the remainder of the estate. The court held that the fee could not be sold subject to the homestead right during the widowhood of the wife or the minority of the children. One year later, in the case of *In re Powell's Estate*,[24] the court reaffirmed this view. The basis of this decision was stated by Valliant, J., as follows: "The precise question here presented was decided by this court in *Broyles* v. *Cox* wherein it was shown that the

18. (1878) 67 Mo. 727.
19. *Hannah* v. *Hannah* (1891) 109 Mo. 236, 19 S. W. 87; *Murphy* v. *De France* (1891) 105 Mo. 53, 15 S. W. 949 (semble); *Schaeffer* v. *Beldmeier* (1891) 107 Mo. 314, 17 S. W. 797; *Tucker* v. *Wells* (1892) 111 Mo. 399, 20 S. W. 114.
20. *Macke* v. *Byrd* (1895) 131 Mo. 682, 33 S. W. 448; *Ratliffe* v. *Graves* (1895) 132 Mo. 76, 33 S. W. 450.
21. Revised Statutes 1899, § 3620.
22. (1899) 153 Mo. 242, 54 S. W. 488.
23. It had been previously decided in *Brown* v. *Brown's Adm'r* (1878) 68 Mo. 388, 390, that the law governing was the statute in force at the date of the husband's death. Accord, *Brewington* v. *Brewington* (1908) 211 Mo. 48, 109 S. W. 723.
24. (1900) 157 Mo. 151, 57 S. W. 717.

land could not be sold subject to the homestead rights, *even under the law as it was under the act of* 1875." We have already seen the error of this statement,[25] and the court *in banc* promptly overruled this point in the decisions of *Broyles* v. *Cox* and *In re Powell's Estate* when it was called to their attention in *Keene* v. *Wyatt*,[27] a year later. Since the case of *Keene* v. *Wyatt* involved only the statute of 1875 the construction put upon the act of 1895 by *Broyles* v. *Cox* and *In re Powell's Estate* was not considered there. But the question came up again in *Balance* v. *Gordon*[27] and the court reaffirmed its former holding, and adjudged void a sale of the homestead tract subject to the homestead rights, made during the widowhood of the wife or the minority of the children. And in this case the decision is rested upon the fact that the amendment of 1895 struck out that clause of the act of 1875, which expressly replaced the homestead tract under the operation of the general laws of descent and sale for payment of debts.

The recent case of *Armor* v. *Lewis*[28] is in line with the decision in *Balance* v. *Gordon*. In *Armor* v. *Lewis*, the probate court ordered a sale of the homestead "subject to the rights of the widow and minor children," to pay claims against the estate. The administrator sold the tract under this order. In a proceeding to determine title under this sale the trial court held that no title passed to the purchaser by the administrator's deed. The Supreme Court, Bond, J., dissenting, affirmed this decision on appeal. Lamm, C. J., who wrote the opinion, says, "We think this judgment should be affirmed (1) on authority and (2) on reason." And under the first of these heads he cites *Broyles* v. *Cox*, *In re Powell's Estate*, and *Balance* v. *Gordon*. In the first two of these cases, as we have seen, the court proceeded upon the mistaken notion that their decision was the same as would have been proper under the Act of 1875. In *Balance* v. *Gordon* in addition to relying on these two cases, the court took the position that the remedy of a creditor against the homestead estate of the decedent was given by the Act of 1875 and taken away by that of 1895. We have already seen that this remedy was in force long before the first homestead statute was ever exacted. True, the statute of 1865 took it away but the Act of 1875 replaced the homestead tract under the general laws, subjecting it to sale for payment of debts, repealing the Act of 1865, and the Act of 1895, although it did not re-enact those repealing words, did not revive the Act of 1865. The Act of 1895 must, therefore, stand out as a statute of exemption against the background of the provisions for sale of the property of a

25. *Poland* v. *Vesper*, *supra*, and cases cited under Note 19, *supra*.
26. (1901) 160 Mo. 1, 60 S. W. 1037.
27. (1912) 247 Mo. 119, 132 S. W. 358.
28. (1913) 161 S. W. 251.

decedent to pay his debts, and it should be given no construction broader than is necessary to carry out the purposes of its enactment—to provide a home for the widow and children during widowhood and minority. By the express provisions of the statute the right of the widow and children is limited to a right to occupy during widowhood and minority; the fee, therefore, must be in the heirs by way of remainder—a remainder which is vested, under the definition of that interest as laid down by the Missouri courts.[29]

In demonstrating that the result of *Armor* v. *Lewis* is in accord with "the reason of the thing," the learned writer of the majority opinion states, "It has been held that the homestead and the fee are not two separate and divisible interests," and cites *Bank* v. *Guthrie*.[30] But that was a case of an attempted sale, during the life of the householder, of the homestead tract subject to his homestead right, whereas the present case arises after the death of the head of the family. The further proposition relied upon is that the sale of the fee subject to the homestead rights sacrifices the interests of the widow and children. It is difficult to see how the sale of the fee cheapens the interest of, or lessens the protection afforded to these persons. Their right to occupy is not interfered with, and that is all the statute of 1895 leaves them. True, the vested remainder of the heirs of the husband may be sacrificed, but the heirs are not the object of the beneficent provisions of the statute.

Two objectionable results of *Armor* v. *Lewis* are apparent. First, the administration of the estate must be kept open for an indefinite number of years, while the debts go on at interest, or else the homestead property must be absolutely withdrawn from liability for debts, to the injury of creditors and to the benefit of the householder's heirs, but without any beneficial results to the widow and minor children.[31] Second, although by the provisions of the statute of 1895 the interest of the widow and children is limited to a right to occupy, the court assumes the position[32] that the land does not descend to the heirs until the period of exemption has elapsed. Where is the fee in the meantime? Have we here a statutory determinable fee?

Upon these considerations it is submitted that the result of *Armor* v. *Lewis* is not necessary to the purposes of the Homestead Act of 1895, that it is in conflict with principles which have long been a part

29. *Jones* v. *Waters* (1853) 17 Mo. 589; *Waddell* v. *Waddell* (1889) 99 Mo. 338, 12 S. W. 349; *Chew* v. *Keller* (1889) 100 Mo. 362, 13 S. W. 395; *Rodney* v. *Landon* (1891) 104 Mo. 251, 15 S. W. 962; *Byrne* v. *France* (1895) 131 Mo. 639, 33 S. W. 178.

30. (1894) 127 Mo. 189, 29 S. W. 1004.

31. *In re Powell's Estate* (1900) 157 Mo. 151, 155, where the following statement is to be found: "Whether after the majority of the heirs and the death or remarriage of the widow the land may be sold to pay debts is a question which may arise in the future."

32. *Broyles* v. *Cox* (1899) 153 Mo. 242, 251.

of Missouri law, and that the dissenting opinion of Bond, J., is to be preferred to that of the majority.[33] G. C. W. JR.

PENAL AND REMEDIAL FEATURES OF MISSOURI "DEATH STATUTE."—In the statutory revision of 1855 the so-called "Death Statute" of Missouri was passed.[1] There are two main divisions of this act, and they have survived with some changes to the present day. Section 2, *inter alia*, covered recovery for injuries by public conveyances resulting from "negligence, unskillfulness or criminal intent," on the part of officers, agents, servants, etc., and the section provided that the defendant "shall forfeit and pay for every such person or passenger so dying the sum of five thousand dollars." Section 3 was general in its application, allowing a recovery "whenever the death of a person shall be caused by a wrongful act, neglect or default of another," which "would (if death had not ensued) have entitled the party injured to maintain an action."[2] Section 4 provided that in actions brought under section 3 "the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and, also, having regard to the mitigating or aggravating circumstances attending such wrongfult act, neglect, or default." In 1905 section 2 was amended by the adding and changing of a number of words and phrases.[3] Since this amendment the section, instead of providing that the defendant "shall forfeit and pay," provides that he shall "forfeit and pay as a penalty," and instead of providing for the payment of the set sum of $5,000, there is substituted the provision that the defendant shall pay "the sum of not less than two thousand dollars and not exceeding ten thousand dollars in the discretion of the jury."[4] The old section 3 was in 1907[5] changed so that the amount recoverable shall not exceed $10,000 instead of $5,000.[6]

There has been little necessity for determining whether sections 3 and 4, are penal or remedial. The act merely sets a limit not to be exceeded, and the damages to the party entitled to sue are to be determined within those limits by the jury. It is well settled that

33. In 1907 the statute of 1895 was amended by inserting a provision absolutely prohibiting a sale of the homestead for debts of the husband (except as such debts had been legally charged on his estate during his life). This at least shows that under the statute of 1895 the question was still thought to be a doubtful one, even after the cases of *Broyles* v. *Cox* and *In re Powell's Estate*. See Laws of 1907, p. 301; Revised Statutes 1909, § 6708.

1. Revised Statutes 1855, Chap. 51.
2. But an injury covered by § 2 is excluded from the operation of § 3. *Casey* v. *Transit Co.* (1907) 205 Mo. 721, 103 S. W. 1146.
3. Laws 1905, p. 135.
4. Now Revised Statutes 1909, § 5425.
5. Laws of 1907, p. 252.
6. The original sections 3 and 4 as amended are to be found now in Revised Statutes 1909, §§ 5426 and 5427.

the earning power of deceased and the number of children that the death has compelled the plaintiff to support are elements for consideration.[7]

So too there was no very serious difficulty encountered in applying section 2, in its original form, although different views of its character were expressed by the courts. The early case of *Coover* v. *Moore*[8] held that the section was not penal, but was compensatory, damages being liquidated by the statute. But *Philpott* v. *Railroad*[9] was a case where parents were suing for damages to their minor son nineteen years old, and there the court said, "The statute is remedial and is designed to be compensatory in part. The case at bar demonstrates that it can not be wholly compensatory for the amount of the recovery being fixed, as it is, is altogether out of proportion to the value of the services of the son for the remainder of the period of his minority. . . . The law as well as being compensatory is of a penal and police nature and can without objections subserve both purposes at one and the same time." This view prevailed.[10] Some difficulty arose when plaintiff sued for less than the $5,000 specified. The Kansas City Court of Appeals held that this was permissible.[11] The St. Louis Court of Appeals held that this was not permissible, as the statutory sum had a penal element in it necessitating suit for the exact penalty.[12] The Supreme Court settled the matter by adopting the decision and the opinion of the St. Louis Court of Appeals.[13]

Since the change of 1905, fixing the damages between $2,000 and $10,000, the courts of Missouri have varied much in their characterization of the statute. The St. Louis Court of Appeals held that the statute was purely penal, but that a requested instruction that if the jury found for the plaintiff they could not assess her damages at more than the sum of $2,000 was properly refused, though there were no aggravating circumstances.[14] The Kansas City Court of Appeals held that the remedy was entirely a penalty and not compensatory, and yet the court held that the jury was properly instructed to consider "the age, physical condition and earning capacity" of deceased at the time of his death.[15] A year later this same court, without discussing the point, held that the statute was both compensatory and penal, and allowed evidence of the capacity of the deceased wife

7. *Tetherow* v. *Railroad* (1888) 98 Mo. 74, 11 S. W. 310; *Soeder* v. *Railroad* (1890) 100 Mo. 673, 13 S. W. 714; *O'Mellia* v. *Railroad* (1892) 115 Mo. 205, 213 S. W. 503; *Fisher* v. *Lead Co.* (1900) 156 Mo. 479, 492, 56 S. W. 1107, 1111; *Morgan* v. *Mining Co.* (1911) 100 Mo. App. 99, 141 S. W. 735.
8. (1862) 31 Mo. 574.
9. (1884) 85 Mo. 164.
10. *King* v. *Railroad* (1889) 98 Mo. 235, 11 S. W. 563; *Gilheson* v. *Railroad* (1909) 222 Mo. 173, 203, 121 S. W. 138, 147.
11. *Marsh* v. *Railroad* (1904) 104 Mo. App. 577, 78 S. W. 284.
12. *Casey* v. *Transit Co.* (1905) 110 Mo. 235, 91 S. W. 419.
13. *Casey* v. *Transit Co.* (1907) 205 Mo. 721, 103 S. W. 1146.
14. *Potter* v. *Railroad* (1909) 136 Mo. App. 125, 117 S. W. 593.
15. *Pratt* v. *Railroad* (1909) 139 Mo. App. 502, 122 S. W. 1125.

to do housework, relying on cases to this effect decided before the amendment of 1905.[16] On the other hand the Springfield Court of Appeals in the next year held that the statute was entirely penal, and that the nature of defendant's acts might be shown in order to make the penalty assessed commensurately punitive, but that it was reversible error to admit evidence of the deceased's earning capacity, and of his being the head of a family.[17]

The amended statute first came before the Supreme Court for consideration in the case of *Young* v. *Railroad*[18] where its constitutionality was called in question because of the discretion allowed to the jury in fixing the amount to be awarded. The court held that the statute was "all penal in its character," but that it was constitutional for the legislature to allow the jury to "adjust the amount of penalty to the circumstances of the particular case." *Boyd* v. *Railroad*[19] held that the statute was penal and compensatory throughout, and the pecuniary loss of the plaintiff was an element to be considered as well as the circumstances of defendant's negligence. The *Boyd Case* came up again,[20] and this time the court held that the statute is penal to the extent of the $2,000 which is recoverable, and that it is remedial and compensatory to the extent to which recovery above $2,000 is allowed; [21] and expressly overruled the *Young Case* and the first decision in the *Boyd Case* in so far as they are inconsistent with this holding. It was held that the earning capacity, age and condition of health of the deceased and the circumstances of defendant's acts were admissible under the remedial part of the action. The court argued that the statute before the change of 1905 was largely penal though it was also compensatory; that the substance rather than the form of the statute is the test, and that, though the change of 1905 added the words "as a penalty," yet, as the amount of the recovery is in the discretion of the jury, and as no test is prescribed for the exercise of such discretion, the legislative intent seemed to be to allow admission of all the facts in the case, thus making the recovery partially remedial.

The recent case of *Johnson* v. *Railway*[22] then came before the Kansas City Court of Appeals. In that case the plaintiff sued for

16. *Hartzler* v. *Railroad* (1910) 140 Mo. App. 665, 126 S. W. 760.
17. *Ervin* v. *Railroad* (1911) 158 Mo. App. 1, 139 S. W. 498.
18. (1910) 227 Mo. 307, 127 S. W. 19.
19. (1911) 236 Mo. 54, 139 S. W. 561.
20. *Boyd* v. *Railroad* (1913) 249 Mo. 110, 155 S. W. 13.
21. This result is foreshadowed by a *dictum* in *Murphy* v. *Railroad* (1910) 228 Mo. 56, 86, 128 S. W. 481, 487. Lamm, J., speaking for the court said, "But when the whole statute is read and harmonized it might appear (by construction) that the minimum amount is left alone as nakedly and baldly penal, and that the discretion of the jury to go above that amount might be gauged on the theory of compensation, as pecuniary loss, or, if not that, as having regard to the aggravating or mitigating circumstances of the individual case." But the court expressly reserved the point.
22. (1913) 160 S. W. 5.

$2,000 only. The court refused to support the contention of defendant that to come within the statute it was necessary to sue for $10,000, the maximum amount prescribed by the statute. It was held that under the second decision in the *Boyd Case*,[23] the plaintiff had either one of two remedies—to sue for the penalty of $2,000, or to sue for compensation plus the penalty, when he could recover between $2,000 and $10,000. The case has been transferred to the Supreme Court as involving the proper construction to be put on the last decision in the *Boyd Case*, and thereby raising the question of the constitutionality of the statute.

This case of *Johnson* v. *Railway* seems to be a proper application of the principle of the second decision in the *Boyd Case*, and will probably be so recognized by the Supreme Court. It is not clear what constitutional question is involved, and the Court of Appeals does not indicate what it had in mind. Perhaps a desire on the part of the court for the opinion of the Supreme Court on the matter of construction of the statute largely accounts for the transfer.

More difficulty appears with the *Boyd Case* itself, however. It is to be noted that the instruction approved in the second decision of that case allowed the jury to consider pecuniary loss to the plaintiff and the facts constituting defendant's negligence, in determining the amount of recovery between $2,000 and $10,000. How this is consistent with the view there expressed is not quite apparent. If the statute is entirely remedial above $2,000, it appears that the exclusion of the facts constituting negligence should follow. Again, it seems that consistency with the view of the twofold character of the statute should compel instructions separating the elements of recovery. That is, $2,000 should be recovered in all events, and if a pecuniary loss of $3,000 is shown, this should be added.[24] It is not likely that the Supreme Court desires or would sanction either of these conclusions. On the other hand the decision in the first *Boyd Case*, that the statute is penal and compensatory throughout, avoids this embarassment, and also conforms to the language of the amendment of 1905 that the plaintiff shall recover between $2,000 and $10,000 "at the discretion of the jury" which the defendant shall "forfeit and pay as a penalty." But, under the first decision in the *Boyd Case*, holding that the action is penal as well as compensatory throughout, the decision in *Johnson* v. *Railway* would probably not be upheld, as the result would then be to allow the plaintiff to fix the amount of the penalty which the defendant should pay.[25] A. J.

23. *Supra.*

24. See in this connection *Maier* v. *Met. St. Ry. Co.* (1914) 162 S. W. 1041.

25. See *Young* v. *Railroad* (1909) 227 Mo. 307, 319, 127 S. W. 19; *Johnson* v. *Railroad* (1913) 160 S. W. 5, 8; *Cigar Makers* v. *Goldberg* (1905) 72 N. J. L. 214, 61 Atl. 457.

FIXTURES.—It was an ancient maxim of the law that whatever became annexed to the land became a part of the land. The language of antiquity was *quicquid plantatur solo, solo cedit.* Presumably at an early period in the common law it was a hard and fast rule that whatever was so incorporated with the realty as to become of an immovable character became part and parcel of the realty, and belonged to the owner of the land. The hardship of the rule led the law courts at an early date to make an exception in favor of chattels placed upon the land by a tenant. Indeed the whole subject of fixtures may be classified under two general divisions: (1) fixtures placed upon the land by a tenant; and (2) fixtures placed upon the land by the owner. In the first division the character of the party who annexes the chattel raises a presumption, or at least an "allowable inference" that the annexation was not intended to be permanent, although to all appearances it may be firmly fixed to the land. It is fairly well settled that a tenant may remove all improvements made by him upon the land, unless so merged in the realty as not to be removable without material injury to the realty, or unless an intent that they should not be removed is shown.[1] The presumption is that they were intended to be temporary only. The old rule has also broken down in many cases where the owner of land has himself made the annexation, so that the ancient maxim of *quicquid plantatur solo, solo cedit* can no longer be said to be a rule. This note will be confined to the examination of the second class of cases.

At the outset it is to be noted that there is some confusion in the definitions of the term fixtures. The difficulty is to determine whether they shall be defined as real property, or as personal property, or as a middle class of property, which may be realty or personalty. A fixture has been defined by the Missouri court[2] as follows: "A fixture is something in its nature a chattel, but which has been so planted in or attached to the soil as to be in contemplation of the law a part of it, so that it cannot be removed without the consent of the owner, and partakes of all legal incidents of the freehold." On the other hand fixtures are by others defined as "personal chattels annexed to or used in association with land and removable by the person who so annexed or uses them."[3] However, it would seem that in fact fixtures are such things as have been so fixed on land that they may be either realty or personalty, and that they are well defined as "things associated with, or more or less incidental to the occupation of lands and houses or either thereof, and with regard to which the question most frequently arising is that of their removability by the person claiming to remove them."[4] It is its liability

1. Tiffany, Real Property, § 240.
2. *Goodin* v. *Edwardsville Hall Ass'n* (1878) 5 Mo. App. 289.
3. Reeves on Real Property, § 10.
4. Brown's Law of Fixtures (4th ed.) 1 to 3.

to raise a question between adverse claimants as to whether it is realty or personalty that marks as a fixture an article used in connection with real property.[5]

The tests for determining whether or not a thing used in connection with land, known as a fixture, is realty or personalty have also been differently laid down.[6] A case in the United States much cited on this subject is *Teaff* v. *Hewitt*,[7] which gives three tests for determining the removability: (1) actual annexation; (2) adaptability to the use of the freehold; (3) the intention with which the chattel was annexed. The court in this case came to the conclusion that there is no one test for determining removability. The court does not state the relative importance of these three tests, and does not say that they must all be present in a particular case. There is, however, a growing tendency to consider intention as the test, and to regard the degree of annexation and the adaptability as *criteria* of intention, when intention is not expressed.[8]

The question of removability may arise between various parties claiming an interest in fixtures as chattels on the one hand and as realty on the other. The questions which arises as to removability between the unpaid vendor of a chattel, who takes a mortgage back for the purchase price or sells by conditional sale, and the mortgagee or purchaser of the land to which the chattel has been attached, are interesting. There are three distinct rules upon this point. The New York rule, which is followed by a number of states, is to the effect that in the absence of fraud the holder of the chattel mortgage is entitled to possession as against the mortgagee or vendee of the land, even though the chattel is apparently affixed permanently to the land at the time of the real estate mortgage or sale.[9] The Massachusetts rule, which has some following, is to the effect that the mortgagee or vendee of the land will always have the prior right.[10] The rule followed by the federal courts, and the rule accepted in the majority of the United States and in England may be termed the equitable rule.[11] Under it the mortgagee or vendee of the land takes precedence

5. Reeves on Real Property, § 10.
6. 6 American Law Review 412; 7 Columbia Law Review 1.
7. (1853) 1 Ohio State 511; 3 Cent. Law Jour. 541. And see 19 Cyc. 1048, and cases cited.
8. *Thomas* v. *Davis* (1882) 76 Mo. 72; *Banner Iron Works* v. *Aetna Iron Works* (1909) 143 Mo. App. 1, 122 S. W. 762.
9. *Ford* v. *Cobb* (1859) 20 N. Y. 344; *Tifft* v. *Horton*, 53 N. Y. 377; *Warren* v. *Liddell* (1896) 110 Ala. 232, 20 So. 89; *Eaves* v. *Estis* (1872) 10 Kans. 314; *Burrill* v. *Lumber Co.* (1887) 65 Mich. 571, 32 N. W. 824; *San Antonio Brewing Ass'n* v. *Ice Co.* (1891) 81 Tex. 99, 16 S. W. 797. The rule in New York was later changed by statute. Laws of 1904, Chap. 698, amending The Lien Law (Laws of 1897, Chap. 418), §§ 112 to 118; *Kirk* v. *Crystal* (N. Y., 1907) 118 App. Div. 32, 34, 103 N. Y. Supp. 17.
10. *Clary* v. *Owen* (Mass., 1819) 15 Gray 522; *Hawkins* v. *Hersey* (1894) 86 Me. 394, 30 Atl. 14; *Watertown Steam Engine Co.* v. *Davis* (Del., 1875) 5 Houst. 192; *Albert* v. *Uhrich* (1897) 180 Pa. St. 283, 36 Atl. 745.
11. *Fosdick* v. *Schall* (1878) 99 U. S. 235, 251; *Campbell* v. *Roddy* (1888) 44 N. J. Eq. 244, 14 Atl. 279; *Tibbets* v. *Horne* (1889) 65 N. H. 242, 23 N. E. 145; *Page* v. *Edwards* (1892) 64 Vt. 124, 23 Atl. 917; *Hobson* v. *Gorringe* (1897) 1 Ch. 183.

if he relied upon the fixture as security, the fixture having been put on the land before the time of the real estate mortgage or sale, and reasonably appearing to be part of the land. In such a case the landowner and the chattel mortgagee or vendor under a conditional sale are estopped to deny that the fixture is a part of the realty. On the other hand, according to the equitable rule, if there is no such estoppel the conditional vendee or mortgagee of the chattel prevails.

The rule in Missouri is not clear because the point has not been squarely raised. In the case of *Climer* v. *Wallace*[12] two adjoining landowners put up a partition fence. By mistake it was located entirely upon the land of one of them. The one upon whose land the fence was, sold the land to a third person with no notice of the fence being a partition fence. The court in that case held that the fence passed as a part of the realty. There was nothing to show, however, that the fence was intended by either party to remain personalty. In *Pile* v. *Holloway*[13] the plaintiff erected a henhouse on his father's land with the understanding that the title should remain in the plaintiff. The land was sold to the defendant with the understanding that the henhouse did not pass with it but belonged to the son. The defendant sold the land without any reservation of the henhouse. The plaintiff brought trover against the defendant for the conversion of the henhouse. The court very properly held that the henhouse had remained personalty up to the time it was sold by the defendant, and that the selling of the land without reservation of the henhouse amounted to a conversion. In the case of *Defiance Machine Works* v. *Trister*[14] the mortgage on the land was made to include fixtures that should be afterwards placed upon the land. The chattel was afterwards placed upon the land under an agreement of conditional sale. The mortgagee of the land had no notice that it was so placed and claimed it as a part of his mortgage security. The agreement of conditional sale was not recorded as required by statute. But the court held that the vendor under the conditional sale was entitled to the prior right. The statute[15] provided that an agreement for a conditional sale of a chattel which was annexed to the realty should be void as against creditors unless recorded in the proper manner. The court held that this meant *subsequent* creditors and was not intended to apply to creditors prior to the time of the conditional sale. It seems plain from the reasoning of the case that if the mortgage had been made of the land after the chattel had been placed upon the land the mortgagee of the land would have prevailed. The conditional sale would not by the statute have

12. (1885) 88 Mo. 556.
13. (1907) 129 Mo. App. 593, 107 S. W. 1043.
14. (1886) 21 Mo. App. 69.
15. Revised Statutes 1879, §§ 2505 and 2507; now Revised Statutes 1909. § 2889.

been effective against such mortgagee, as it would if recorded, and the mortgagee might reasonably have relied upon the fixture as part of his mortgage security.

In a recent case in the Kansas City Court of Appeals of *American Clay Machinery Co.* v. *Sedalia Brick & Tile Co.*[16] a machine used in clay manufacturing was set upon a concrete foundation and attached to the sides of the building with rods, and the removal of the machine would have necessitated the removal of part of the wall. The machine was sold under a conditional sale. The owner of the land subsequently mortgaged the land and building with the machine, but specifically stated that the machine was subject to a prior encumbrance. The court held that the vendor under the conditional sale was entitled to the machine. From the reasoning of the opinion, however, it is clear that, if the mortgagee had had no notice of the prior encumbrance, from the actual annexation and the adaptability of the machine he would have had a right to rely upon it as a part of his mortgage security, and that the owner of the land and the vendor under the conditional sale would have been estopped to deny that it was a part of the realty. There has been no case where a subsequent mortgagee of the land without notice has claimed the fixture, but from the foregoing cases it follows that when the question does arise Missouri courts will adopt the so-called equitable rule in this class of cases. M. W.

Res Gestae.—The phrase *res gestae* may be found throughout classical literature, and as used therein it indicated an event or transaction.[1] But Professor Thayer has first observed its use in a legal meaning in 1794 in 25 Howells State Trials 440, and, while the phrase occurred soon thereafter in several cases, Professor Thayer points out that it was not used in a treatise until 1806.[2] The phrase was soon adopted in America,[3] and has been so generally received that scarcely a report can be opened which does not contain a case dealing with the subject. In accounting for the adoption of the doctrine and phrase, Professor Thayer suggests that its use was first due to its "convenient obscurity," that "the lawyers and judges . . . caught at the phrase as one that gave them relief at a pinch."[4] Similarly Professor Wigmore characterizes it as "ambiguous and unmanageable in all its various uses," as "harmful because by its ambiguity it invites confusion," and as "an empty phrase so encouraging to looseness of thinking and uncertainty of decision."[5]

16. (1913) 160 S. W. 903.

1. Professor James B. Thayer in 15 American Law Review 5.
2. *Ibid.* 7.
3. *Ibid.* 8. See also *Bartlett* v. *Delprat* (1808) 4 Mass. 702.
4. 15 American Law Review 9 and 10.
5. Wigmore on Evidence, § 1695.

Two different kinds of statements, which may be put in evidence, are often confused under the title of *res gestae*, though in fact the justifications for their introduction are quite distinct. One of these kinds of statements is testimonial in character, and, therefore, within the general hearsay rule, but constitutes an *exception* to that rule because it is a spontaneous declaration, whose spontaneous character makes it possible to dispense with the ordinary guarantees, such as oath, etc.[6] The other of these kinds of statements is not put in evidence for its testimonial effect, but as a "verbal act," which is one of the several acts making up a particular transaction in controversy, and without which that transaction would be incompletely presented. Not being testimonial in effect it does not come within the hearsay rule at all.[7] The statements in this class are properly *res gestae*. Things which are *res gestae* have been variously described as "the circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act;" [8] or "facts . . . which are so connected with the very transaction or facts under investigation, as to constitute a part of it." [9] A Missouri case [10] says that declarations to be admissible as part of the *res gestae* must have been made contemporaneously, concerning some fact pertinent to the issue, and as to which the declarant could have been examined as a witness, and must be in the nature of a verbal act tending to uphold the nature and quality of the facts they are intended to explain. In *State* v. *Gabriel*,[11] a larceny case, it was said that the *res gestae* are not restricted to the limited time when the fingers reach out and grasp the articles in question; the *quo animo* and all actions and words whereby that is demonstrated form part of the *res gestae* and thus become admissible in evidence to explain the nature of the act. In *State* v. *Davidson*,[12] a prosecution for assault and battery committed by an officer in unlawfully arresting the complainant, evidence of what took place in the recorder's office, where the officer took the plaintiff, was admitted as part of the *res gestae*. And in *State* v. *Crawford* [13] the evidence of a previous trouble provoked that same evening in the same saloon was admitted as *res gestae*, though the issue was as to the assault and battery at the hands of the officer. In *State* v. *Testerman* [14] a prosecution for homicide, evidence that the

6. Wigmore on Evidence, § 1745.
7. Wigmore on Evidence, § 1759. It is often stated that the right to put in evidence statements which are *res gestae* constitutes an exception to the hearsay rule. This results from confusing spontaneous exclamations, and statements which are properly *res gestae*. McKelvey on Evidence 278; Hughes on Evidence 56.
8. *Nutting* v. *Page* (Mass., 1855) 4 Gray 581.
9. *Haynes* v. *Commonwealth* (Va., 1877) 28 Gratt. 942.
10. *Corbett* v. *St. L., Iron Mt. S. S. R. Co.* (1887) 26 Mo. App. 621.
11. (1886) 88 Mo. 631.
12. (1891) 44 Mo. App. 513.
13. (1893) 115 Mo. 620.
14. (1878) 68 Mo. 408.

defendant had cut the decedent's brother during the fight was admitted as part of the *res gestae*, in a prosecution of the defendant for killing the bar keeper. The above cases together with numberless others [15] indicate to what extent the term has been extended. As was well said in *Jacks* v. *Mutual Reserve Fund Life Association*,[16] "the modern tendency is to extend rather than narrow the rule as to admissions of declarations as part of the *res gestae*."

As Professor Wigmore shows, since the declarations or verbal acts are admitted to give legal significance to the whole, it is logically necessary that such verbal acts be contemperaneous with the transaction in question. The strict rule was well set out in a Connecticut case, *Enos* v. *Tuttle*,[17] where the court said, "They [the verbal acts or declarations] must have been made at the time of the act done which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the acts they were intended to explain, and so to harmonize with them as to constitute one transaction." Later cases, however, have not followed the strict rule, and absolute coincidence is not required,[18] the evolved rule apparently being that "declarations may be contemporaneous in the legal sense when they precede or follow the act;" [19] that "immediateness is tested not by closeness of time but by causal relation." [20] In a Virginia case, *Hill* v. *Commonwealth*,[21] the court said that to make the declaration part of the *res gestae* it is necessary that it be made recently after receiving the injury, and before the declarant had time to make up a story for his own advantage. The Missouri cases seem for the most part to take the position that if there is causal relation, or if there are connecting circumstances between the act and the declaration, such declaration will be admissible as part of the *res gestae*.[22]

15. *Radolph* v. *R. R.* (1885) 18 Mo. App. 609; *Northrup* v. *Ins. Co.* (1871) 47 Mo. 435; *State* v. *Sanders* (1882) 76 Mo. 35; *State* v. *Taylor* (1893) 118 Mo. 153, 22 S. W. 806; *State* v. *Ramsey* (1884) 82 Mo. 133; *Tetherow* v. *R. R.* (1888) 98 Mo. 74, 11 S. W. 310; *State* v. *Fitzgerald* (1895) 130 Mo. 407, 32 S. W. 1113; *State* v. *Moore* (1893) 117 Mo. 395, 22 S. W. 1086; *State* v. *Cavin* (1906) 199 Mo. 154, 97 S. W. 573; *State* v. *Vaugh* (1906) 200 Mo. 1, 98 S. W. 2; *Weinstein* v. *Reid* (1889) 25 Mo. App. 41; *Clark* v. *Loan Co.* (1891) 46 Mo. App. 248. Only Missouri cases have been cited. The reports of other states are as prolific of such cases as the Missouri reports.

16. (1902) 113 Fed. 49.

17. (1820) 3 Conn. 247, 250.

18. *State* v. *Lacey* (Mont., 1900) 61 Pac. 994; *Ward* v. *White* (1889) 86 Va. 212, 9 S. E. 1021; *Mitchem* v. *State* (1852) 11 Ga. 615; *Hill* v. *Commonwealth* (Va., 1845) 2 Gratt. 605.

19. *Mitchem* v. *State*, *supra*.

20. Wharton's Evidence (3d ed.) § 262.

21. *Hill* v. *Commonwealth*, *supra*.

22. *Harriman* v. *Stowe* (1874) 57 Mo. 93; *State* v. *Elvins* (1890) 101 Mo. 243, 13 S. W. 937; *State* v. *Kennade* (1894) 121 Mo. 405, 26 S. W. 347; *Stockman* v. *Terre Haute, etc., R. Co.* (1884) 15 Mo. App. 503. But see *State* v. *Christian* (1877) 66 Mo. 138 where declarations, made one-half hour after the act, and after declarant had gone some distance, were held not admissible as part of the *res gestae*. Also *State* v. *Rider* (1888) 95 Mo. 947, in which declarations made a few minutes after the act, the declarant having gone 200 feet, were held not admissible as part of the *res gestae*.

The recent Missouri case of *State* v. *Rogers* [23] illustrates the liberality of the rule in Missouri. In this case the defendant became involved in an altercation with several men and finally shot one with his revolver. He then walked to the house of one Blankenship, 200 yards away, put up his revolver and took down a shotgun, and on B's asking him what he was going to do, the defendant replied, "go back and kill every damned one of them." This declaration was admitted, over defendant's objection, as part of the *res gestae*, the court saying that the declaration was made "so soon after the act, and before anything had occurred which could be reasonably calculated to interrupt or change the condition of the defendant's mind that it was part of the *res gestae*." In view of the previous discussion it would seem that this case is perhaps justified by the present extended doctrine of *res gestae*, but it must be said that from the strict, or theoretical view, the decision is not upheld by the reasoning, and there are several Missouri cases, in point, which are *contra*,[24] thus showing the confusion prevalent, not only in the decisions of the different states, but also in the decisions of the state of Missouri. C. B. R. JR.

MISDELIVERY BY A COMMON CARRIER OF GOODS.—The duty of a common carrier of goods is to carry to a particular place, and that necessarily implies an undertaking to deliver safely to the consignee. The duty to deliver to the consignee is an absolute one. By the weight of authority the carrier is an insurer and delivery by him is at his peril.[1] This liability as an insurer is a common law liability, but has a further basis in the nature of the contract of the consignor with the carrier. The contract of the carrier is to deliver to the particular person named as consignee. It is not unreasonable, then, to require of the carrier a strict performance of his contract, and at the same time this affords the owner a valuable protection against loss of his goods.

The carrier has been repeatedly held liable in an action of trover for conversion of goods delivered to a person other than the consignee, even though the misdelivery was due to an innocent mistake, or fraud or imposition practiced upon the carrier.[2] The undertaking of the carrier is to deliver to the consignee, and when he

23. (1913) 161 S. W. 770.
24. *State* v. *Brown* (1877) 64 Mo. 567; *State* v. *Noeninger* (1891) 108 Mo. 166; *State* v. *Smith* (1894) 125 Mo. 2.

1. *Smith Express Co.* v. *Crook* (1870) 44 Ala. 468; *Claffin* v. *Boston & Lowell R. Co.* (Mass., 1863) 7 Allen 341; *Sanquer* v. *London & S. W. Ry. Co.* (1855) 16 C. B. 163; *Mobile, J. & K. C. Ry. Co.* v. *Bay Shore Lumber Co.* (1910) 165 Ala. 610, 51 So. 956; *Hall* v. *Boston & Worcester R. R. Co.* (Mass., 1867) 14 Allen 439; *Adams* v. *Blankenstein* (1852) 2 Cal. 413; Hutchinson on Carriers (3d ed.) Chap. 9.
2. *Cavallaro* v. *Texas & Pacific Railway Co.* (1895) 110 Cal. 348, 42 Pac. 918; *Viner* v. *The Steamship Company* (1872) 50 N. Y. 23; *Wilson Sewing Machine Co.* v. *Louisville, etc. R. Co.* (1879) 71 Mo. 203; *Devereux* v. *Barclay* (1819) 2 B. & Ald. 702; *Stephenson* v. *Hart* (1828) 4 Bing. 476.

fails to deliver to him he has failed in the performance of his undertaking. The law has imposed on him the liability of an insurer. No matter what care the carrier has used in trying to carry out his undertaking, he is liable for a failure to strictly perform.

It may be, however, that delivery of goods by the carrier is obtained, not by fraud practiced primarily on the carrier, but on the consignor. For instance, suppose that A, representing himself to be B, writes for goods to be sent to him. They are sent, addressed to B, and delivered by the carrier to A, who impersonates B. In a number of jurisdictions the carrier is held liable for such delivery, it being insisted that the carrier, without regard to the care he used, is not justified in delivering to anyone except to the person who the consignor thought wrote the letter.[3] The cases representing the opposite view insist that the undertaking of the carrier is to deliver to the consignee as directed by the consignor, and that the intention of the consignor is to have the goods delivered to the one who wrote the letter.[4]

If this last group of cases properly interprets the consignor's intention, then the conclusion that the carrier is not liable for delivery to the swindler is clearly correct, for the swindler would even have title. But if in fact the consignor's intention was to pass title to, and to consign to the man who was impersonated, then no title passed to the swindler, and not being the consignee, a delivery to him by the carrier would be tortious. The division of authority it will be noticed is based on a difference of opinion as to what should be considered the intention of the consignor or, in other words, a difference of opinion as to who is consignee. It is a question upon which the authorities are not uniform, and strong opinions can be found on both sides.

The question of misdelivery by a common carrier was before the St. Louis Court of Appeals in the recent case of *May Department Stores Co.* v. *Louisville & N. R. Co.*[5] Plaintiff shipped a box of goods to its own store in St. Louis. The box arrived at defendant's freight depot and a card was sent by defendant to an express company authorized to receive shipments for the consignee, notifying it of the arrival of the shipment. This card was delivered by the express company

3. *Pacific Express Co.* v. *Shearer* (1896) 160 Ill. 215, 43 N. E. 816; *Winslow* v. *Vermont & M. R. R. Co.* (1870) 42 Vt. 700; *Oskamp* v. *Express Co.* (1899) 61 Ohio St. 341, 56 N. E. 13; *Louisville & N. R. R. Co.* v. *Fort Wayne Electric Co.* (1900) 108 Ky. 113, 55 S. W. 918; *Southern Express Co.* v. *Van Meter* (1880) 17 Fla. 783; *Equitable Powder Mfg. Co.* v. *St. Louis & S. F. R. Co.* (1911) 99 Ark. 497, 138 S. W. 964.

4. *The Drew* (1883) 15 Fed. 826; *Wilson* v. *The Adams Express Co.* (1887) 27 Mo. App. 360; *Pacific Express Co.* v. *Hertzberg* (1897) 17 Tex. App. 100, 42 S. W. 795; *Samuel* v. *Cheney* (1883) 135 Mass. 278; *McKean* v. *McIvor* (1870) L. R. 6 Ex. 36. *Bush* v. *St. L. K. C. & N. Ry. Co.* (1876) 3 Mo. App. 62 is valuable for discussion of cases of foreign jurisdictions on this point, but in this case the carrier had become a warehouseman.

5. (1913) 160 S. W. 526.

to one of its teamsters, who in collusion with a third person gave the card to the latter. The third person presented the card and received the goods. It was held that the common carrier was not liable because the jury found he had used reasonable care in delivering the goods. The court says this is not the case where the card has been lost, and presented by a finder, who gets the goods. It is hard, however, to see any real difference between the principal case and the case supposed. The consignee had an agent with authority to receive the goods, and a delivery to that agent would have been a discharge of the carrier's duty. But the person who received the goods was not the consignee's representative, nor had the consignee done anything to estop itself to deny that he was its representative. It is upon the carrier to show that the one to whom he delivered was authorized, or that he had apparent authority to receive the goods. There was no such proof on the part of the carrier in *May Department Store Co.* v. *Louisville & N. R. Co.* The case, it seems, is not to be decided on the basis of agency but upon the same basis as other cases of fraud on the carrier. The carrier delivered, perhaps, in good faith, to the third person on the strength of his possession of the card notice. He is an insurer of safe carriage and delivery to the consignee. "No circumstance of fraud, imposition or mistake will excuse the common carrier from responsibility for delivery to the wrong person. The law [as we have seen] exacts of him absolute certainty that the person to whom delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistake in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for delivery to a person for whom the goods were not intended or consigned."[6] The principal case is clearly a case of delivery because of imposition upon the carrier. There was no fraud on the consignor. He sent the goods properly consigned to the branch store. The carrier delivered to a person other than the consignee, thinking that person was the agent of the consignee. He delivered the goods to this person at his peril. He should have required proof of his authority further than mere possession of the notice. It would seem, then, that the principal case is in conflict with the well-established rule in this country and in England.[7]

W. B.

RECOVERY BETWEEN TENANTS IN COMMON FOR IMPROVEMENTS OR REPAIRS MADE UPON THE COMMON PROPERTY.—The authorities seem to indicate that a tenant in common cannot recover in a quasi con-

6. Hutchinson on Carriers (2d ed.) § 344.
7. Compare *Sinsheimer* v. *N. Y. C. & H. R. R. R.* (1897) 46 N. Y. Supp. 887.

tractual action against his cotenants for improvements he has made upon the common property, when made without the express or implied authority of the cotenants.[1] Such a rule is not unreasonable to the tenant in common who has improved. If he thinks that it is advantageous for him to improve the property, he may procure partition and then do as he pleases with his share. If he does not have the land partitioned and improves the land, he may well be considered as having intended to make the improvements without compensation, or, at least, may be looked upon as a gratuitous intermeddler insofar as he has improved his cotenant's share.

The same reasoning may be used against recovery by one tenant in common for repairs upon the common property. When the premises fall into disrepair, and the cotenants will not join in repairing, one tenant may have the property partitioned, and he may then repair his portion as he sees fit. And yet, if one who repairs property in which he has a common interest with others, without their consent, is officious, his officiousness is certainly less in degree than that of one who improves the property under like circumstances. There is a division of authority as to recovery for repairs in an action at law.[2]

For improvements or repairs made under an express agreement with the cotenant there can, of course, be a recovery on the contract. An express contract, however, is not indispensable to a recovery. Such circumstances may exist as will amount to an implied authorization to one tenant to make improvements or repairs, and require his cotenants to share in the expense.[3] The conduct of the parties, the use made of the property, or the common purpose which all are striving to accomplish may go to show an understanding among the tenants in common that all shall be liable. In order to hold a cotenant liable at law more must be shown, however, than that the improvements or repairs were made and he did not protest or move to prevent their being made.[4]

Several states, including Missouri, have statutes which provide that one who *bona fide* puts improvements on the land of another can recover compensation for such improvements when sued in ejectment.[5]

1. *Coakley* v. *Mohar* (N. Y., 1885) 36 Hun 157; *Spitts* v. *Wells* (1853) 18 Mo. 469; *Ballou* v. *Ballou* (1897) 94 Va. 350, 26 S. E. 840. See *dicta* in *Rico Reduction Co.* v. *Musgrave* (1890) 14 Colo. 79, 23 Pac. 458; *Calvert* v. *Aldrich* (1868) 99 Mass. 74; *Cosgriff* v. *Foss* (1897) 152 N. Y. 104, 46 N. E. 307; *Drennan* v. *Walker* (1860) 21 Ark. 539, 557; *Ward* v. *Ward* (1895) 40 W. Va. 611, 21 S. E. 746.

2. Allowing recovery: *Fowler* v. *Fowler* (1882) 50 Conn. 256. And see *Beaty* v. *Bordwell* (1879) 91 Pa. St. 438, allowing recovery where repairs were absolutely necessary; and *Cooper* v. *Brown* (1909) 143 Iowa 482, 122 N. W. 144, which requires a demand and refusal before allowing recovery.

Refusing recovery: *Calvert* v. *Aldrich* (1868) 99 Mass. 74. And see *Kidder* v. *Rixford* (1844) 16 Vt. 169; *Mumford* v. *Brown* (N. Y., 1826) 6 Cowen 475.

3. *Biard* v. *Jackson* (1881) 98 Ill. 78.

4. *Crest* v. *Jacks* (Pa., 1834) 3 Watts 238; *Cooper* v. *Brown*, *supra*.

5. Arkansas Statutes 1904, § 2754; Missouri Revised Statutes 1909, § 2401.

These statutes do not expressly apply to tenants in common, but such a statute has been held to apply to such a case.[6] Missouri courts have not yet passed on this question, but their general attitude would seem to indicate that they would hold that the statute applies to tenants in common. Macfarlane, J., has said, "While this proceeding is purely statutory, the remedial portions of the statute have ever been liberally construed in order to an equitable and fair adjustment of the rights of the parties." [7]

While, as we have seen, there can be no recovery at law for improvements, and the authorities are divided as to a recovery for repairs, a tenant in common is, under certain circumstances, liable in equity to account for rents and profits,[8] and before that court his right to compensation for improvements and repairs is recognized. In the first place, the tenant who improves, if liable for rents and profits, is only charged with the rental value of the property in the condition it was in before he improved it.[9] Any other rule would work an injustice to the tenant who improves the common property. He would not only be refused compensation for the improvements, but he would be charged rent for the use of them. Most jurisdictions also consider improvements and repairs in reduction of the amount allowed in an accounting for rents and profits.[10]

The question of compensating a tenant in common, who improves or repairs the common property without the consent of his cotenant, most often arises in cases where the land is sought to be partitioned. The court of equity tries to avoid the question of compensation by dividing the land equally, but giving to the tenant who improved the land that portion upon which the improvements were made. Such a method of division, obviously, does justice to all concerned. The method is used in all states [11] except Massachusetts.[12]

6. *Shepherd* v. *Jernigan* (1888) 51 Ark. 275, 10 S. W. 765.
7. *Cox* v. *McDivit* (1894) 125 Mo. 358, 361, 28 S. W. 597.
8. 38 Cyc. 63.
9. *Carver* v. *Fennimore* (1888) 116 Ind. 236, 19 N. E. 103; *Hannah* v. *Carver* (1889) 121 Ind. 278, 23 N. E. 93; *Johnson* v. *Pilot* (1885) 24 S. C. 254; *Nelson's Heirs* v. *Clay's Heirs* (Ky., 1832) 7 J. J. Marsh. 138.
10. Improvements: *Pickering* v. *Pickering* (1885) 63 N. H. 468; *White* v. *Stewart* (1882) 76 Va. 546; *Cooter* v. *Dearborn* (1886) 115 Ill. 509, 4 N. E. 388.
Repairs: *Goodenow* v. *Ewer* (1860) 16 Cal. 461; *Hannan* v. *Osborn* (N. Y., 1834) 4 Paige 336, 343. And see *Dick's Appeal* (1868) 57 Pa. St. 467, 472; *Alexander* v. *Ellison* (1880) 79 Ky. 148; *Ward* v. *Ward* (1895) 40 W. Va. 611, 21 S. E. 746.
11. *Drennen* v. *Walker* (1860) 21 Ark. 539; *Noble* v. *Tipton* (1905) 219 Ill. 182, 76 N. E. 151; *Scale* v. *Soto* (1868) 55 Cal. 102; *Carver* v. *Coffman* (1889) 109 Ind. 547, 10 N. E. 567; *Stephenson* v. *Cotter* (1889) 5 N. Y. Supp. 749; *Brookfield* v. *Williams* (1840) 2 N. J. Eq. 341; *Leavitt* v. *Locke* (1894) 68 N. H. 17, 40 Atl. 395; *Ballou* v. *Ballou* (1897) 94 Va. 350, 26 S. E. 840; *Osborn* v. *Osborn* (1884) 62 Tex. 495; *Nelson* v. *Clay* (Ky., 1832) 7 J. J. Marsh. 138.
12. *Aldrich* v. *Husband* (1881) 131 Mass 480; *Husband* v. *Aldrich* (1883) 135 Mass. 317. The refusal of the courts of the latter state to give this relief is, perhaps, historical. That state began without a court of equity (1 Pomeroy, Equity Jurisprudence, § 311), and the machinery of the common law system was cumbersome for working out the equitable rights of the parties as was done in the equity courts of other states.

Where a partition of the land cannot be made without injustice to some of the cotenants, equity will have the lands sold and distribute the proceeds. To work out justice in the distribution of the proceeds of the sale, equity should deduct the increase in the sale price, due to improvements and repairs, and divide the residue according to the interests of the cotenants in the property. All that any one tenant is entitled to is a share of the proceeds of the sale representing his share of the land in its unimproved state, and the one who improves or repairs it is entitled to the increase in the sale price due to his labor and materials used in improving and repairing the realty. This is the method followed in most states in cases where a sale is found necessary.[13] The only objection to such a method of compensating the tenant who improves the common property is that it is difficult to find the amount to which the sale price has been increased by the improvements or repairs of the tenant.

The Supreme Court of Missouri has recognized still another method of compensating a tenant in common who improves the common property without the authority of his cotenants. In the recent case of *Armor* v. *Frey*[14] the court held defendant entitled to a certain share of the land, and that he should be compensated for improvements. This compensation, it would seem, may be in the form of a personal obligation on the part of the other cotenants, or of a lien on the allotment to each tenant.[15] This is a material extension of the relief in equity, and it is not surprising to find several states refusing to follow such a course,[16] or restricting its application to very exceptional circumstances.[17] The practice is justified by those courts which adopt it on the ground that those who ask equity must do equity, and that all parties in a partition suit are in the position of claimants, but this justification is not, perhaps, entirely satisfactory. Such practice seems to be subject to the same objections as those raised to a quasi contractual action. The act of one cotenant in improving is officious, and it is doubtful if a court should impose a personal obligation on the other cotenants to make compensation.

13. *Cooter* v. *Dearborn* (1886) 115 Ill. 509, 4 N. E. 388; *Sarback* v. *Newell* (1882) 28 Kan. 642; *Clapp* v. *Nichols* (1898) 52 N. Y. Supp. 128; *Ward* v. *Ward* (1895) 40 W. Va. 611, 21 S. E. 746; *Watson* v. *Goss* (Eng., 1881) 57 L. J. Ch. 480; *Burford* v. *Aldrich* (1901) 165 Mo. 419, 63 S. W. 109, 65 S. W. 720; *Alexander* v. *Ellison* (1880) 79 Ky. 148.

14. (1913) 253 Mo. 447, 477, 161 S. W. 829, 838. See also *Armor* v. *Jester* (1913) 253 Mo. 480, 161 S. W. 839; *Armor* v. *Kearney* (1913) 253 Mo. 485, 161 S. W. 840; *Armor* v. *Cooper* (1913) 253 Mo. 483, 161 S. W. 841.

15. *Atha* v. *Jewell* (1881) 33 N. J. Eq. 417; *Ogle* v. *Adams* (1877) 12 W. Va. 213; *Sarbach* v. *Newell* (1883) 30 Kan. 102, 1 Pac. 30; *Noble* v. *Tipton* (1905) 219 Ill. 182, 76 N. E. 151.

16. *Jones* v. *Johnson* (1873) 28 Ark. 211; *Liscomb* v. *Root* (Mass., 1829) 8 Pick. 376; *Thorton* v. *York Bank* (1858) 45 Me. 158; *Houston* v. *McCluney* (1874) 8 W. Va. 135.

17. *Scott* v. *Guernsey* (1871) 48 N. Y. 106; *Cosgriff* v. *Foss* (1897) 152 N. Y. 104, 46 N. E. 307; *Porter* v. *Osmun* (1904) 135 Mich. 361, 98 N. W. 859; *Gerstadengen* v. *Hartzell* (1900) 9 N. D. 268, 83 N. W. 230; *Elrad* v. *Keller* (1883) 89 Ind. 382.

It is submitted that the cotenant making the improvements should be compensated by having the improved portion allotted to him if possible; or by selling the property and apportioning to him the surplus after his cotenants have received the value of their shares of the property before its improvement; or even by an unequal division of the common property, so that his cotenants would receive shares of the improved property equal in value to their original shares of the unimproved property, and so that the tenant making the improvements should receive a share of the improved property equal in value to his original share of the unimproved property plus the value of the improvements.[18] We have seen that where a cotenant repairs he is felt to have a stronger case at law against his cotenants than where he makes improvements,[19] and similarly in a case of partition there is more reason to recognize a personal obligation on the part of cotenants for repairs made by one of their number than for improvements. K. B.

18. See suggestions with regard to this latter method in *Sanders* v. *Robertson* (1876) 57 Ala. 465; 16 Amer. & Eng. Encyc. of Law 116; Note to *Ward* v. *Ward* in 52 Amer. State Rep. 924, 940.
19. The second paragraph of this note.