“My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law.”—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

CUSTODY OF CHILDREN IN ARTIFICIAL INSEMINATION CASES

Recent advancements in medical science have brought the process of artificial insemination of humans into clinical usage. Since the middle of the 16th century the ability to artificially impregnate female humans has existed as a laboratory technique.\(^1\) However, instances of pregnancy resulting from this technique have

---

1. Koerner, Medicolegal Considerations in Artificial Insemination, 8 LA. L. REV. 484 (1948).
heretofore been so rare as not to require a consideration of the resultant legal problems. The increasing frequency of use of this process demands that these problems now be given consideration. The scope of this treatment will include a consideration of only one of the many legal problems likely to arise, that of the right of the respective "parents" of a child who is the product of artificial insemination to custody of the child in case of divorce or separation of the spouses. No opinion is here expressed as to whether procreation by the medium of artificial insemination can be justified on a moral, sociological or religious basis, but it is recognized that physicians are now using this technique to bring children to previously barren marriages and that many legal problems are likely to result.

There are two types of artificial impregnation techniques now receiving general clinical usage. One type, homologous insemination, would appear not to pose any particular legal problems, since the pregnancy in such case is achieved through use of the husband’s semen. This method is used in cases where the husband is fertile.

2. There are over 4000 children presently alive in the United States who were conceived through the use of artificial insemination. 116 A.M.A.J. 2747 (1941).

3. Hoch v. Hoch, Chicago Sun, February 10, 1945. A case before the Circuit Court of Cook County wherein the husband asked for a divorce on grounds of adultery of the wife. The court found that the wife had procured her pregnancy through artificial insemination. Judge Fineberg held that no definition of adultery included artificial insemination. But see contra: Orford v. Orford, 49 Ont. L. R. 15 (1921). The court stated by way of dicta that artificial insemination heterologically would be adultery; adultery being defined by that court as the voluntary surrender of the reproductive function of a married woman to one other than her husband.


5. "In 1877 the religious aspect of artificial insemination was ruled upon by a Papal Encyclical which condemned the practice as immoral and prohibited its consideration. Mantegazza, an outstanding student of sexual problems, ten years previously had exhaustively studied the New Testament and the Canonic Books from a strictly Catholic standpoint and had concluded that artificial insemination was directly in accord with the Bible, book of Genesis, and had recommended it warmly. He pointed out that, if to help the uterus to conceive by artificial means is a sin, it must also be a sin to help digestion with pepsin or aid a paralytic foot by the use of an electric current." Koerner, Medicolegal Considerations in Artificial Insemination, 8 LA L. REV. 484, 489 (1948).


7. See Koerner, note 1, supra. Russel v. Russel, 13 British Ruling Cases 246 (1924). This case is authority for the proposition that the law is not interested in the exact process preceding the institution of pregnancy, provided that the husband is the biological father of the child. But see R.E.L. v. E.L., (1949) P. 211. A wife whose husband had been unable to consummate the marriage was artificially impregnated with her husband’s semen on occasions spread over some twelve months. A few weeks after an insemination the wife, unaware that she was then pregnant, left the husband and did not return to him. The child was born in due course and was alive at the hearing at which the wife was asking for a decree of nullity of the marriage on the grounds of no consummation. The court granted the decree of nullity and declared the child a bastard, though it was the biological product of a man and woman married at the time of conception. The court stated, "The future holds better augury for the child, I think, if I grant the decree than if
but impotent, or where the wife is structurally or psychologically unable to have normal intercourse, but is capable of giving normal birth. The child conceived is the biological product of the husband and wife though there is no coitus.

Heterologous impregnation is the technique employed when the husband is sterile and it is necessary to use the semen of a donor to impregnate the wife. Since the child in such cases is not the biological product of the husband, it is from this mode of artificial impregnation that new legal problems are most likely to arise.

For a clearer understanding of the situation giving rise to the problems here discussed let us look briefly to the usual sequence of events in cases where a physician artificially impregnates a wife heterologously.

First there is the physical examination of the husband by virtue of which his sterile condition is ascertained. Upon the suggestion of the physician, the husband and wife agree that the wife shall be impregnated with the semen of a donor. Before the impregnation takes place it is customary for the physician to have both the husband and wife sign a consent form agreeing to the impregnation. After these formalities have been completed the physician performs the impregnating operation. Upon pregnancy being achieved, almost without exception the pre-natal care as well as attendance at birth is by a physician other than the one who performed the insemination. This second physician is not informed as to how the pregnancy was achieved. The reasons for resorting to the second physician and not informing him as to the method used to achieve pregnancy are (1) to keep secret so far as possible the fact that the child was conceived through an artificial impregnating technique, and (2) to eliminate any possibility of the physician attending at birth being guilty of falsifying the birth certificate he is required to execute upon stating that the husband is the father of the child. After the birth of the child the husband and wife treat it as their child and hold out to the child and to the public that the child is their offspring.

Let us now consider a hypothetical case wherein A, husband, is married to B. A, upon physical examination learns that he is sterile. In order that B may have a child, B and A agree that B shall be impregnated artificially. This is accomplished and the child is born to B. B and A live together until "their" child reaches the age of fourteen. B then commits adultery and becomes addicted to habitual drunkness. A sues for divorce and asks for the custody of "their" child. B admits the infamous conduct on her part and that A is entitled to a divorce. But B

he is brought up by an embittered mother who may be tied for life to a marriage that has never been a real marriage and which, only through the unnatural aid of science, has produced the fruit of a real marriage. If the child should be made illegitimate it is most regrettable, but the stigmas of birth are of less effect than they were. . . ."

9. See note 8, supra.
11. See note 19, infra.
asserts that since "their" child is in fact not A's, he being admittedly sterile, but is hers, the product of artificial insemination, A has absolutely no claim to the child. Therein is the issue.

The rule of law applicable in the usual divorce case to determine which spouse is to obtain custody of the children of the marriage is quite clear. It is unanimously agreed that, "The paramount consideration in determining to whom the custody of a child shall be awarded after a divorce is the welfare and best interests of the child. To that welfare the rights, claims, and personal desires of the parents, and even the wishes of the child, if opposed to that object, must yield."12

The application of this rule of law to the case supposed, supra, could leave little doubt, considering the wife's conduct and the age of the child, that the husband should be awarded custody of the child. The question with which we are confronted is as to the applicability of this rule of law to cases where, though the husband was married to the wife at the time of conception, during pregnancy, and at the time of the birth of the child, he is not in fact the biological father, though he has purported to be such.

At this time there is no reported case in the United States directly on this point. However, a case recently before a New York court may give some aid in solving the problem. In the case of Strnad v. Strnad,13 the wife with the husband's consent had been heterologously impregnated and a child had been born. In a proceeding between husband and wife after divorce to determine the husband's visitation rights as concerned the child the wife asserted that the husband had no rights in the child since it was not in fact his, but rather hers via the process of artificial impregnation. The court held that the husband did have rights of visitation which were not precluded by the fact that he was not in fact the child's biological father. In the opinion of the court it was stated, "The child has been potentially adopted or semi-adopted by the defendant (husband). In any event, in so far as this defendant is concerned and with particular reference to visitation, he is entitled to the same rights as those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstances would be entitled."

The New York court stated no reasons for its holding on this point, and it does not appear to be entirely clear exactly what bundle of rights are embraced within the terms "semi adopted" and "potentially adopted." However, whatever else the court may have said in the case, it is clear that it was held that the husband there had the privilege of visitation as concerned the child in spite of the fact that the child was not his biological offspring. Upon the authority of the Strnad case and upon reason it would appear entirely likely that in the closely analogous case of a custody proceeding, such as in the hypothetical case, supra, the court would hold

12. 27 C. J. S., Divorce, § 309; 17 Am. J. Divorce, § 683; 70 A.L.R. 518 (1930); Lusk v. Lusk, 28 Mo. 91 (1859); Perr v. Perr, 205 S.W. 2d 909 (Mo. App. 1947); Mo. Rev. Stat. § 1528 (1939).
that the husband would have the same rights as "those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstances would be entitled." It is submitted that such a holding would be both judicially sound and in accord with an enlightened social policy.

From the point of view of social policy it is difficult to see any reason why the objectives should be any different in a case where the child is the product of artificial insemination than in the normal situation. The primary concern in each case should be the welfare of the child. Assuming this is the premise upon which the court should proceed, and it is not likely to be controverted, even if it be admitted that the fact that the "father" is not the biological father of the child is a fact which should be considered in determining which parent will best serve the welfare of the child, it would appear that this should not be considered as a categorical block to the father's obtaining custody. It is not at all difficult to suppose a number of cases where the best interests of the child would require that the father be awarded its custody.

Concerning the judicial basis for applying the statement noted in the Sternad case to a case involving a custody proceeding, as in the case supposed, supra, it should be remembered that the husband has assumed the obligations incident to the normal parental relation; indeed, he has purported to be the true parent, but has not gone through any formalities of legal adoption, it being strongly desired to keep the mode of achieving pregnancy a secret in the usual case. In view of these facts it is submitted that in a case of this type the husband and purported father stands in loco parentis to the child. It has been consistently held that a person who assumes the liability to support, rear, and educate a child, or receives a child into his family under such circumstances as give rise to the presumption that he has assumed such liability, there being no legal adoption, stands in loco parentis to the child. One who assumes that relation is generally entitled to the rights and subject to the duties of an actual parent.

One of the rights enjoyed by a person standing in loco parentis to a child is the right to custody of the child. In 46 Corpus Juris, Parent and Child, Section 175, it is stated that, "A person standing in loco parentis is entitled to the custody

14. 25 Words and Phrases 572; Black's Law Dictionary. 15. Wicoff v. Moore, 257 S.W. 474 (Mo. 1924); Dix v. Marlen, 171 Mo. App. 266, 157 S.W. 133 (1913); Eickhoff v. Sedalia R. Co., 106 Mo. App. 541, 80 S.W. 966 (1904); In re Stevens' Estate, 116 S.W. 2d 527 (Mo. App. 1938); Cohen v. Lieberman, 157 Misc. 844, 284 N. Y. Supp. 970 (1936); Syczk v. Skrzyniewicz, 233 App. Div. 342, 252 N. Y. Supp. 780 (4th Dep't 1931); State v. Taylor, 125 Kan. 594, 264 Pac. 1069 (1928); Madden. Domestic Relations, p. 267, (1931) Schouler, Divorce Manual, §301 (1944), 46 C.J., Parent and Child, § 174: "A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to legal adoption, and the rights, duties, and liabilities of such persons are the same as those of the lawful parent."

Published by University of Missouri School of Law Scholarship Repository, 1950
of the child, as against third persons unless his conduct renders him unfit for such custody." This statement is borne out by the cases.

In the case of *State v. Taylor*, 16 an infant, the child of the husband by a former marriage, had been brought into the home of the spouses after his marriage to his last wife and was cared for by her. The wife sued for divorce and asked for custody of the child. The lower court decreed the divorce and granted the wife custody of the child. The Supreme Court of Kansas held that although the wife was only the stepmother of the infant, the decree awarding her custody was not void. It is to be noted that as in the case of the husband of a wife who has a child through the process of artificial insemination, the stepmother was of no blood relation to the infant; she stood only in loco parentis to the child, and the court's decree awarding her custody as against the natural parent was upheld. The court stated the proposition noted, *supra*, 17 that in a custody proceeding the welfare and best interests of the child is the controlling factor to be considered, and that if because of immoral conduct the natural parent was unfit to have custody of the child the custody should be given to the stepmother, who stood in loco parentis. Thus we observe that it was held that a person standing in loco parentis to a child was not necessarily barred from having custody of the child as against the natural parent. The test usually applied to a custody proceeding between two natural parents was used by the court in a proceeding between one standing in loco parentis to a child and the child's natural parent. It would seem to follow from this holding that in the hypothetical case, *supra*, the husband, as was indicated in the *Strnad* case, would have the same right of custody as though he were in fact the child's father. He stands in loco parentis to the child and the fact that the child is not his biological offspring is not a bar to his having custody. If then in any case it would be to the best interests of the child that the husband have its custody, it should be so decreed, in spite of the fact that the husband is not the child's natural parent.

In the case of *Waters v. Gray*, 18 a case involving a custody proceeding between the parents of a child and an aunt and uncle of the child, custody was awarded the aunt and uncle who had reared the child, as against the child's natural parents. In the opinion of the court it was stated that: "It has become axiomatic that the welfare of the child is the sole guiding star in cases such as this. No citation of authority is necessary on this score. All else sinks into insignificance. And while the parents (natural) have a right, by nature and by law, to the custody of children, which right should never be denied, except for the most cogent reasons, yet whenever such occasion arises, and such occasion arises, not alone by reason of the lewdness, immorality, or dissipation of the parents, or either of them, but whenever conditions are shown to be such that to continue the custody of the child with the parents, or either of them, would be contrary to the permanent well being of the child, then that natural right of the parent must give way, for this natural

---

17. See note 12, *supra*.
18. 193 S.W. 33 (Mo. App. 1917).

[https://scholarship.law.missouri.edu/mlr/vol15/iss2/3](https://scholarship.law.missouri.edu/mlr/vol15/iss2/3)
right of guardianship is less paramount than the life, health, or morals of the child." Here again it is to be noted that the usual test of what would be to the best interests of the child was held to be the controlling factor to be considered in a custody proceeding, though the proceeding was one between natural parents on one hand and persons standing only in loco parentis on the other.

Though there is basis in reason and authority for the proposition here asserted, for other reasons it is probable that the problem is one which demands legislative action. It has been pointed out by members of the medical profession that it is quite probable that if a child should learn he is a "test tube" baby, a definite and exceedingly undesirable psychological trauma would develop. For this reason it appears to be highly desirable as a matter of policy, that the wife in such a case as the Strnad case should be precluded by statute from showing in evidence that her child was conceived through the technique of artificial insemination. Having of her own will availed herself of this process in order to have a child, she, to obtain the child's custody, should not be allowed in a court of justice to disclose such facts as are apt to lead to the child's mental derangement, to the detriment of the child and society.

WILLIAM J. CASON

---

**EFFECT OF DEFICIENCY JUDGEMENTS AND STATUTORY RIGHTS OF REDEMPTION UPON TIME OF REALIZING TAXABLE GAIN OR LOSS IN MORTGAGE FORECLOSURES**

Since there is a possibility of some increase in the number of mortgage foreclosures in the not too distant future it seems profitable to review briefly, from a tax standpoint, two problems which may arise as a result of such foreclosures: What effect does a statutory right of redemption have on the time for taking income tax gains and losses? What effect does a deficiency judgment have on the time for taking income tax gains and losses?

19. 8 LA. L. REV. 484 (1948); 107 A.M.A.J. 2747 (1941).
20. The following is a statute proposed to the New York Senate in 1949. This proposal has not been adopted at this date.

"1. A child born to a married woman by means of artificial insemination with the consent of her husband shall be deemed the legitimate, natural child of both the husband and his wife for all purposes, and such husband and wife and such child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relationship including the rights of inheritance from each other.

2. The consent of the husband contemplated by subdivision one of this section is one which is in writing, duly executed and acknowledged by the husband, and duly filed in the office of the clerk of the county in which such husband wife reside. Each such consent so filed shall be sealed by the clerk's office and shall not be subject to inspection by any person or received in evidence in any action or proceeding, except pursuant to an order of a court of competent jurisdiction. The fee of the county clerk for filing and sealing such consent shall be one dollar." S. 801, 172d Sess. (1949).
STATUTORY RIGHT OF REDEMPTION

In the absence of a statutory redemption period the time for fixing the loss of the mortgagor on foreclosure is that of "the sale, which finally cuts off the interest of the mortgagor." Frequently, however, the sale does not cut off the interest of the mortgagor. A statutory right to redeem carries over for a period of a year or more after the sale, causing an equivalent delay in the time in which a loss may be taken. The expiration of the period of redemption then becomes the "identifiable event" fixing the gain or loss. This was first asserted in *J. C. Hawkins v. Commissioner*, but an apt analogy could be and was drawn to earlier cases which held that, upon sale of land for unpaid taxes, a loss could not be taken until the taxpayer's right to redeem had expired. In the *Hawkins* case emphasis was placed on what the mortgagor lost (the land) and when he lost it (at the expiration of the redemption period); consequently, the argument of the taxpayer that the debt was actually extinguished by the sale and that the date of the sale should control in dating the loss carried no weight. Nor was the court impressed by the contention that at a foreclosure sale the rights obtained are somewhat more certain or "higher" than at a tax sale, the prime factor in either case being that title did not become absolute in the purchaser at the time of the foreclosure sale. This distinction between tax and mortgage foreclosures was tried again in *Derby Realty Corporation v. Commissioner*, the taxpayer arguing that the chance of redemption is much smaller in the foreclosure cases than in the tax cases since the amount involved is larger. The taxpayer argued that since the probability of redemption was so small, therefore, a "practical test" should be used for ascertaining the time of loss. The court answered, "Where the legal test of the termination of petitioner's rights is so clear as it is here, and where the practical test of benefits is also so obvious, we think that the application of either test must reach the same result."

In the *Derby* case "the practical test of benefits" referred to the privilege of the mortgagor under Michigan law to stay in possession until the expiration of his right to redeem. A subsequent effort was made in *T. J. Bosquett v. Commissioner* to distinguish the *Derby* case on the ground that the mortgagor in the former case lost possession immediately upon the sale of the premises. The court reached the same result, holding that possession was not determinative. By im-

2. 34 B.T.A. 918 (1936); aff'd 91 F. 2nd 354 (C.C.A. 5th 1937).
4. 35 B.T.A. 335 (1937).
5. The "practical test" was suggested in Lucas v. American Code Co., 280 U.S. 445, 449 (1930), "The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test."
6. Italics added.
7. Supra, note 4 at 341.
8. 39 B.T.A. 763 (1939) (involved a tax sale case).
plication, therefore, expiration of the right to redeem remained the essential factor.

The inflexibility of the rule fixing the time of gain or loss at the expiration of the period of redemption\(^9\) may at times produce an unfair result. On the one hand, there may be taxpayers who desire and deserve to close out the transaction and take a loss at the time of the foreclosure sale. On the other hand, many may prefer to take the gain or loss at some date after the expiration of the period of redemption. Our inquiry is then whether there are any circumstances under which the time might be either prolonged or shortened?

As to prolongation of time, there is a dictum in \textit{W. Z. Morton v. Commissioner}\(^{10}\) which might prove helpful. The taxpayer's land was sold in 1932 under a mortgage foreclosure proceeding. The foreclosure sale was final, there being no statutory right to redeem. The taxpayer-mortgagor obtained a temporary staying order prohibiting the delivery of the deed to the purchaser at the sale. This order was vacated in the same year, but litigation involving the indebtedness was not settled until 1933. This was the year petitioner wanted his loss deducted. He contended, in effect, that until then the transaction was not final. To the analogy drawn by the taxpayer that a foreclosure sale did not fix the time of loss if the mortgagor retained the right to redeem, the court noted that the right to redeem was definite, while the taxpayer's right to avoid the sale was doubtful. However, the court left two possibilities open. Had the restraining order forbidding delivery of the deed to the purchaser continued into the next year the loss might have been sustained in that year;\(^{11}\) similarly, if the pending litigation had been directly attacking the validity of the sale and capable of nullifying it, there might have been an extension of time.\(^{12}\) The second possibility could very easily occur in a suit in equity to set aside a foreclosure sale which normally would be final, where "fraud, mistake, unfairness, or overreaching" is involved.\(^{13}\)

As to fixing the loss at some time prior to the expiration of the redemption period, the easiest and safest solution is a quitclaim deed by the mortgagor to the purchaser. This method was successfully used in \textit{Sherwin A. Hill, Administrator v. Commissioner}.\(^{14}\) The quitclaim deed "fixed definitely his time [taxpayer-mortgagor's] for taking the loss which had resulted from the foreclosure sale but which he could not take as a deductible loss until his right of redemption had expired."\(^{15}\) The court of appeals in a memorandum decision reversed the case on other grounds, but specifically stated that the loss would be sustained in 1934, the

---

9. The point was raised and then conceded by counsel in \textit{Nickoll v. Commissioner}, 103 F. 2d 619 (C.C.A. 7th 1939).
10. 38 B.T.A. 534 (1938).
11. \textit{Id.} at 539.
12. \textit{Id.} at 541.
15. \textit{Id.} at 380.
year of the foreclosure and quitclaim deed, though the right to redeem extended into 1935.16

Though a quitclaim deed or a transfer in some other form of the equitable or statutory rights of the mortgagor is probably the safest method for accelerating the time at which a loss may be taken,17 at least one mortgagor-taxpayer has successfully relied on abandonment of his right to redeem after the foreclosure sale and before the right to redeem had expired.18 At least two factors were important in establishing abandonment. First, the actual value of the property was some $20,000 less than the cost to redeem. Second, the owners of the equity, who were partners, met after the foreclosure sale and unanimously decided not to attempt to redeem. The number of parties involved, the unison of their action, and its semi-formal nature established the abandonment perhaps more clearly than is usually possible for an individual mortgagor.

The quitclaim deed or a clear showing of abandonment seem to be the only methods of accelerating or postponing the time for taking a gain or loss, otherwise the statutory right to redeem controls. Therefore, a résumé of typical foreclosure proceedings may be helpful.

First, there is the English method of strict foreclosure, which makes the title absolute, cutting off the mortgagor's equity of redemption at the time stated in the decree.19 No doubt should arise here as to the time of the gain or loss.

Secondly, there can be a foreclosure by Entry or by Writ of Entry. If by Entry, the mortgagee enters the premises without opposition from the mortgagor and stays in possession for a statutory period, usually three years. Foreclosure becomes final at the expiration of the period. If by Writ of Entry, the amount due under the mortgage is determined, possession is awarded, and if the amount is not paid within the statutory period the foreclosure becomes final. This type of foreclosure is used primarily in the New England states.20 In the absence of other factors the loss is taken at the end of the statutory period.21

Third, as in Missouri, there is a statutory authorization for an action at law resulting in foreclosure and sale.22 Under the Missouri statute, once the sale is made, there is no statutory right to redeem. In substance all the mortgagor does is file a petition setting forth the mortgage and praying judgment for the

16. 119 F. 2d 421 (C.C.A. 6th 1941). The reversal arose because the tax court erroneously took the view that the quit claim deed constituted an abandonment, and therefore an ordinary instead of a capital loss was sustained. Cf. Commonwealth, Inc., 36 B.T.A. 850 (1937).
17. John J. Seerley, 43 B.T.A. 50 (1940) (taxpayer's transfer of trust certificates representing his equity in the land fixed the year of loss).
18. Jacob Abelson, 44 B.T.A. 98 (1941).
19. WALSH, MORTGAGES § 65 (1934).
20. Id. § 66.
22. Mo. REV. STAT. § 3447 (1939). There is no doubt that under this statute this is an action at law and not in equity. State v. Evans, 176 Mo. 310, 75 S.W. 914 (1905); Brown v. Koffler, 133 Mo. App. 494, 113 S.W. 711 (1908).
amount of the debt and foreclosure of the equity of redemption. The date of the
sale should fix the year of loss.

Fourth, foreclosure may be had by a proceeding in equity. This is still used
in Missouri, particularly where the rights of the parties are such as to invite com-
plexions. As in the case of a foreclosure at law, the sale divests the mortgagor of
all right to redeem. The decree permits the mortgagor to exercise his equity of
redemption up to the time of the sale. Here, as in any type of foreclosure pro-
ceeding ending in a sale, the sale extinguishes the mortgagor’s “equity of redemp-
tion,” and any right that he may have left is strictly statutory, unless fraud or the
like is involved.

A fifth method is foreclosure by exercise of a power of sale contained in a
deed of trust. This is the sole instance in Missouri where a mortgagor has a
statutory right to redeem after a foreclosure sale. But before there can be
redemption under this statute, a deed of trust must be involved, the purchaser at
the sale must be the cestui que trust (mortgagee), written notice of intention to
redeem must be given at the sale or within ten days prior to the time set for the
sale, and security must be given within twenty days after the sale to cover
practically every expense arising out of the foreclosure sale except the payment
of the principal debt. On failure to give notice of intent to redeem all rights
of the debtor are foreclosed at the sale, which would evidently set the year in
which a loss may be taken. If notice be given, but a bond is not posted, all rights
are extinguished within 20 days after the sale and seemingly the year in which
the 20th day fell would be the year to take the loss.

Sixth is foreclosure by power of sale in a mortgage instead of a deed of
trust. On the sale, the debtor’s interest in the property is extinguished. Thus
again the sale sets the year in which a gain or loss may be taken.

Deficiency Decrees

If a deficiency judgment is obtained which is or becomes valueless, the
mortgagee may take a bad debt deduction in any year in which he ascertains the
judgment debt to be wholly or partially worthless. It is also now established

23. State v. Evans, 176 Mo. 310, 75 S.W. 914 (1903); Wolff v. Ward, 104
Mo. 127, 16 S.W. 161 (1891); McClurg v. Phillips, 49 Mo. 315 (1872).
26. Id. § 3451.
27. Dawson v. Hetzler, 230 Mo. App. 737, 74 S.W. 2d 488 (1934) states that
notice is mandatory. A sale at 1 p.m. and notice of intent to redeem at 9:15 p.m.
of the same day is too late.
S.W. 2d 386 (1937) (On failure to file a bond within 20 days, the court has no
jurisdiction to grant the right of redemption.).
30. Edward F. Dalton, 2 B.T.A. 615 (1925) (deficiency decree in 1916, as-
111, § 29.23 (k)-3 (as amended by T.D. 5376, June 3, 1944).
that a bid at a foreclosure sale for an amount sufficient to include not only unpaid principal but the interest on the mortgagor's indebtedness may constitute income to the mortgagee who is bidding. So also a failure on the part of the mortgagee to obtain a deficiency decree may result in income to the mortgagor.

R. O'Dell & Sons Co. v. Commissioner\(^{32}\) is illustrative of the latter point and also involves the question of when such income is realized. The mortgagee purchased the property at a judicial sale but failed to bring an action at law on the bond for the deficiency within the following three-month period as required by New Jersey law. Thus the mortgagor-taxpayer's $151,000 obligation was satisfied, or at least barred, in exchange for property that had a depreciated worth of $114,000, resulting in a $37,000 taxable gain to the mortgagor. Although the sale and confirmation occurred in 1939, action for a deficiency judgment was not barred until 1940; as a consequence the income was taxable in 1940 and not 1939 as contended by the taxpayer. This is entirely consistent with decisions involving the expiration of statutory rights to redeem discussed supra.

What if a deficiency judgment is compromised in one year and the foreclosure proceedings do not become final until the following year due to the mortgagor's right to redeem? The compromise price may be deductible as a loss by the mortgagor despite the fact that at first glance it appears that he is only paying a debt. Since this is possible the problem here is whether the compromise price is deductible as a loss to the mortgagor in the year of the compromise or in the year the foreclosure proceedings become final? The question may be indirectly answered in Harry H. Diamond v. Commissioner.\(^{33}\) There the taxpayer-mortgagor's property, a capital asset, was foreclosed in 1935, with a resultant deficiency decree; however, the taxpayer's right to redeem extended into 1936. The taxpayer in 1936 compromised the $20,000 deficiency judgment for $4,500 and claimed the latter amount as an ordinary loss, contending this was a loss separate and apart from his loss under the foreclosure proceedings.\(^{34}\) The court held that for the purpose of determining the type of loss the compromise on the deficiency judgment was related to the original cost of the property, "it was part of his realized capital loss which resulted from the foreclosure sale" and not an ordinary loss. The compromise occurred in 1936 after the mortgagor's right to redeem had expired; thus the loss was deductible in 1936. The question then is whether the compromise is not also sufficiently related to the foreclosure proceeding to require a deduction in 1936 when the fore-

---

32. 8 T.C. 1165 (1947), aff'd 169 F. 2d 247 (C.C.A. 3rd 1948). In New Jersey a separate action at law must be started in order to recover a deficiency judgment.
33. 43 B.T.A. 809 (1941).
34. In C. L. Gransden & Co. v. Commissioner, 39 B.T.A. 985 (1939), aff'd 117 F. 2d 80 (C.C.A. 6th 1941) where the same point arose the court of appeals at p. 82 specifically omitted consideration of it on review.
closure became final even if the compromise had occurred in 1935? The decision would seem to permit an affirmative answer. On the other hand, it might be argued that though the total capital loss sustained will not be known until 1936, part of it—the compromise—is known and is therefore deductible in the year it is made.

From the mortgagee's viewpoint the argument that the time of loss is fixed when the foreclosure becomes final is refuted by the earlier case of William C. Heinemann & Co. v Commissioner,35 but from the viewpoint of the mortgagor this argument is strengthened. In that case the mortgagee sought to take a loss on an uncollectible deficiency decree in the year when the mortgagor's statutory right of redemption expired. The claim was disallowed on the ground the loss was sustained the year before when the debt was known to be worthless. The court said, "The question here, however, is not what the mortgagor loses but what the creditor obtains,"36 and from the facts the taxpayer would be an "incorrigible optimist" to have expected payment of the deficiency judgment. Note that in the O'Dell case and the Diamond case where the problem involved the mortgagor's tax liability the question was not what the creditor obtained but what the mortgagor lost.

It might be added that the court has an equal antipathy for the "incorrigible pessimist," for the foreclosure of a first mortgage does not, in itself, warrant a second mortgage holder's taking a loss until at least after the statutory period of redemption has expired on the foreclosure proceeding.37

In conclusion it is to be noted that in addition to specific statutes of limitation controlling the time in which deficiency decrees may be obtained38 and thus perhaps dictating the year in which gain or loss is realized, either of two other rules of law may conceivably operate in the same fashion. First, if there is a statute of limitation on the debt itself, it may run out with foreclosure still possible on the mortgage. "Where the period of limitations on the debt differs from the limitation on foreclosure of the mortgage securing it, the limitation on the debt always applies in determining whether a deficiency judgment may be recovered in the foreclosure action."39 This presents a neat problem, for until foreclosure no one knows how much the deficiency will be. Presumably the deficiency, which cannot be ascertained until the foreclosure sale, but which technically was barred in a previous year, would still be deductible as a loss to the mortgagor or taxable as income to the mortgagee in the only year in which it is ascertainable, i.e., the year of foreclosure.40 Secondly, in some states a failure to obtain a deficiency decree on foreclosure may bar any subsequent action on the debt on the theory that only one action may be brought

35. 40 B.T.A. 1090 (1939).
36. Id. at 1093.
38. See Dime Savings Bank v. Pomeranz, 123 Conn. 581, 196 Atl. 634 (1938); In re Riverview Products, Inc., 34 F. Supp. 482 (W.D. N. Y. 1940), aff'd 34 F. Supp. 733 (W.D. N. Y. 1940); State ex rel. Union Trust Co. v. Pejsa, 15 Ohio Supp. 113 (1945) (two year limitation on enforcement of a deficiency judgment).
39. Walsh, MORTGAGES § 73 (1934).
40. This situation is now impossible in Missouri. Mo. Rev. Stat. § 1017 (1939) bars actions to foreclose where the debt is barred.
to enforce the debt.\textsuperscript{41} Here again, in the absence of other factors, the foreclosure sale would set the date for gain or loss.

Richard J. Watson

\textbf{Liability of Dam Owner for Flooding Caused by Sedimentation: Effect of Statute of Limitations}

Four cases\textsuperscript{2} recently decided by the Missouri courts call for a consideration of certain aspects of the problem of riparian rights. The essential questions in these cases are: what is the basis of liability of an owner of a dam on a natural watercourse when an upper riparian's property is flooded, due to the accumulation of silt and sediment in the reservoir? Under what conditions is an action for damages for losses so caused barred by the statute of limitations? The advisability of being acquainted with these problems, and the need for evaluation of the factors involved in their solution become apparent when one reads the statement of the Kansas City Court of Appeals in the \textit{Kennedy} case\textsuperscript{2}, upon granting the motion for transfer to the Missouri Supreme Court:

"The construction or maintenance of power and flood control dams in this State is of vital and general interest and importance to all the people of the State, as well as those who may construct or maintain such dams; and the question of liability of the owner or operator for damages for overflow of lands not acquired for reservoir purposes, under the facts and circumstances as disclosed by the record, is vital to the modern economic and industrial development of the State."\textsuperscript{73}

All four of these cases arose on substantially the same set of facts. The particulars which made the decision in the last case differ from the result in the three earlier cases will be discussed at a later point.

The defendant in these actions is the corporate owner of what is known as Bagnell Dam, a hydro-electric project authorized by the Federal Government, and constructed under federal license in 1931. It is located on the Osage River in central Missouri and forms an extensive reservoir known as the Lake of the Ozarks. In May, 1943, heavy rainfall was followed by overflow of certain tributaries to this lake approximately 100 miles upstream from the dam, resulting in the injuries of which plaintiffs in these actions complained. The normal height of the lake reservoir was 660 feet above sea level, and defendant had, by condemnation proceedings, acquired an easement of flowage rights up to the 673 foot level, but the injuries complained of by plaintiffs were above the 673 foot level.

Plaintiffs alleged that the injuries were caused by the construction, maintenance,

\textsuperscript{41} Walsh, Mortgages § 77, n. 64 (1934).
\textsuperscript{1} Grave v. Union Electric Co., 239 Mo. App. 1210, 200 S.W. 2d 364 (Mo. App. 1947); Kennedy v. Union Electric Co., 216 S.W. 2d 756 (Mo. 1948); Cunningham v. Union Electric Co., 221 S.W. 2d 758 (Mo. App. 1949); and Webb v. Union Electric Co., 223 S.W. 2d 13 (Mo. App. 1949).
\textsuperscript{2} Kennedy v. Union Electric Co., 203 S.W. 2d 489 (Mo. App. 1947).
\textsuperscript{3} Id. p. 491.
and operation of defendant’s dam which, they alleged, had resulted in deposits of silt and sediment in the bed of the stream, causing the backwater to rise higher in times of heavy rainfall than it otherwise would have risen.

The courts held in the first three cases that the actions were for tort in the nature of trespass, and did not involve negligence. A note on the tort problem of apportionment of damages in these actions appears in a recent issue of the Review. In the Webb case, the court held that the action was one involving a permanent nuisance. To perceive this distinction one must look at the details of the individual cases to some extent.

In the Grace case damage was to crops and fences and judgment for plaintiff was affirmed in the Kansas City Court of Appeals, damages awarded being $750.00.

In the Kennedy case damage was to a store building and a Delco light plant, judgment for plaintiff being affirmed in the Supreme Court of Missouri, and damages of $600.00 being awarded. It may be noted here that defendant contended that this was an action for damages for appropriation of property under eminent domain, but the court refused to rule on this point, stating that the case was not tried on this theory.

In the Cunningham case damage was to personalty located in the building involved in the Kennedy case, and judgment for plaintiff was affirmed in the Kansas City Court of Appeals with damages fixed at $912.86. Though the court does not discuss the point, it may be noted that the defendant here pleaded, among its defenses, the statute of limitations.

In the Webb case, however, judgment for plaintiff in the circuit court for $1500.00 was reversed on appeal to the Kansas City Court of Appeals, the court giving credence to defendant’s first point of error: that plaintiff’s action was barred by the statute of limitations. On petition for review by the supreme court the writ of certiorari was denied.

In distinguishing this case from the three preceding cases, one difference of fact and one of pleading appear: 1. In the Webb case, though defendant had an easement on plaintiff’s land up to 673 feet above sea level, plaintiff had notice in May, 1935, that water had reached his land above this point, evidently doing some damage to plaintiff’s crops. Plaintiff had talked to defendant’s attorney at that time in regard to the matter, but apparently no action was ever taken for any damage which occurred in that year. 2. In the Webb case, plaintiff alleged as his damages depreciation of the reasonable market value of his farm to the extent of $13,000, stating that portions of his topsoil had been washed away and silt had been deposited thereon. The court stated that Mo. Rev. Stat. 1014 (1939) barred the action unless brought within five years after accrual, and that Mo.

4. 15 Mo. L. Rev. 93 (1950).
5. “Sec. 1014. What within five years . . . ; third, an action for trespass on real estate; . . . , or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; . . .”
Rev. Stat. 1012 (1939) is applicable, which states that the cause of action shall not be deemed to have accrued until damage is sustained and capable of ascertainment. The latter statute rejects the rule applied at common law in actions of trespass, where the cause of action arose when the defendant acted, without reference to the plaintiff's injury, and adopts the rule applied at common law in actions of trespass on the case for nuisance, where substantial injury was an element of the cause of action. With the exception of the foregoing allegations as to the nature and extent of damages plaintiff's action was essentially the same in the Webb case as in the three prior cases under consideration. Yet in the Webb case the court held that this was an action involving a permanent nuisance, that plaintiff's cause of action arose in 1935 for all damage, present and future, actual and prospective, and in bringing suit in 1945 for the damage sustained in 1943 recovery was barred by the five-year statute of limitations.

Before inquiring further into the distinctions between actions of trespass and nuisance, and the effect of the statute of limitations on such actions it would be desirable first to look at the general law regarding riparian rights and the right of a property-owner to have his land free from flowage, since this is the broad basis of the action.

As a basic principle, it may first be stated that there is no actual ownership in running water itself, but merely property rights in relation to its use and consequent duties flowing therefrom. From this concept certain theories have arisen in regard to water rights. The theories which are in use today are commonly designated as:

1. The natural flow theory.
2. The reasonable use theory.
3. The prior appropriation theory.

The natural flow, or natural law, theory is chiefly a child of the civil law. It had been carried down from Roman law into the Napoleonic Code, but was delayed in reaching England. In Britain's pre-Industrial Revolution days, the rule in regard to water rights originally seemed to be "first come, first served." This doctrine had perhaps its widest employment under early English common law when there was little litigation over private use of water. Usage at that time was primarily domestic and there was enough water for all. Later the natural flow

6. "Sec. 1012. Period of limitation prescribed. . . Provided, that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."
theory, supposedly introduced to the United States chiefly through the influence of Story and Kent,\textsuperscript{11} was embodied in British law by an important decision\textsuperscript{12} in 1851. Under this theory the user may take water to supply natural wants and also to make extraordinary or artificial uses so long as they do not materially affect the natural quantity or quality of the water. A cause of action arises and the statute of limitations begins to run as soon as the flow is materially affected, without regard to whether the complaining riparian proprietor has suffered substantial injury. This is the common law rule in actions of trespass. It is essentially a doctrine of the status quo and of equal rights. The advantage of this theory is that it is definite and certain, but its defect lies in the fact that it is non-utilitarian and prohibitive of many beneficial uses.

The reasonable use theory, which seems to be a development from the former theory brought about by the greater needs for use of water occasioned by the Industrial Revolution allows much wider use, the only limitation being that one must not unreasonably interfere with the beneficial uses of others as shown by the facts and circumstances of each case. Under this theory no cause of action arises and, hence, the statute of limitations does not begin to run, until the complaining riparian proprietor has suffered substantial injury. This is the common law rule in actions of trespass on the case for nuisance. This doctrine, which has been adopted either expressly or impliedly in a large number of the United States today, has the advantage of being extremely utilitarian, but is subject to a great amount of indefiniteness. Some courts, either through mistake or intention, seem to apply both doctrines, and the results are at times confusing.

A third situation arises in some of the western states, which have either never adopted the common law or riparian rights, or have later abrogated it, and rely upon the doctrine of prior appropriation. This seems to be the case in Arizona, Colorado, Idaho, Nevada, New Mexico, Utah, and Wyoming, where the doctrine has been adopted either by statutory or constitutional provision.\textsuperscript{23} This theory apparently originated in California, as far as its use in this country is concerned. When California was ceded to the United States by Mexico, title to all land therein passed to the United States and private titles were not confirmed until 1866 or later. Partly because under Mexican law water was considered public property, and partly because of the custom and agreement among the miners settling in the area between 1848 and 1866, the prior occupant of property was considered as its owner, the doctrine being applied to water flowing in the streams which at this time were chiefly used for mining purposes. When the western states were admitted to the union, the past usages and value of the water for irrigation prompted some of them to embody either in statute or their constitutions a provision changing the common law rule in regard to these riparian rights and making it a rule of prior appropriation. Some states (California, Oregon, Washington) have limited the doctrine to public lands, and in others it has been given general application (Nevada, Arizona,

\textsuperscript{11} 3 Kent's Comm. *440.
\textsuperscript{12} Embrey v. Owen, 6 Ex. 353 (Ex. 1851).
\textsuperscript{13} Restatement, Torts, note 8, supra.
Colorado, Idaho, Utah, Wyoming). In Colorado, Idaho, and Wyoming the provision is constitutional while in the others it is statutory.\textsuperscript{14}

It has been stated that regardless of the theory which is followed in a particular jurisdiction the right not to be flooded by the act of another is inherent in the ownership of all land whether riparian or not.\textsuperscript{15} From this it would seem to follow that the cases under consideration primarily involve not riparian rights, but only riparian duties, and that as to liability for flooding there is little or no distinction in result regardless of the theory of use followed.\textsuperscript{16} It may be noted here that Missouri has never expressly abrogated the common law rule as to natural flow, but by implication does seem to have modified it until today reasonable use is the pre- eminent standard.

There seems to be practically unanimous agreement among the various jurisdictions, regardless of which theory of use is followed, that one who obstructs a natural stream, either with a partial obstruction, as in the vast number of railroad cases,\textsuperscript{17} or with a total obstruction,\textsuperscript{18} as in the cases under consideration, is liable for damages caused by overflow, either to upper or lower riparians,\textsuperscript{19} unless such right of flowage over the lands in question has been acquired by grant, license, prescription, prior appropriation, or the exercise of eminent domain,\textsuperscript{20} or unless the overflow is due to such an unprecedented flood as to constitute an act of God.\textsuperscript{21}

In the process of reaching a more or less consistent result, there seems to be a great difference of opinion in regard to several details. Some cases say that the person creating the obstruction is liable regardless of how carefully the obstruction may have been made,\textsuperscript{22} and despite the fact that construction of the structure which obstructs the stream has been authorized by the legislature.\textsuperscript{23} In some cases negligence\textsuperscript{24} seems to be the basis for liability, and in others absolute liability\textsuperscript{25} is imposed.

\begin{itemize}
\item \textsuperscript{14} Wiel, \textit{Fifty Years of Water Law}, 50 HARV. L. REV. 252 (1936).
\item \textsuperscript{15} Mills Power Co. v. Mohawk Hydro-Electric Co., 155 App. Div. 869, 140 N. Y. S. 655 (S. C. 3 Dep't 1913).
\item \textsuperscript{16} Cubbins v. Mississippi River Commission, 241 U.S. 351 (1916).
\item \textsuperscript{17} Culver v. Chicago, R. I. & P. Ry., 38 Mo. App. 130 (1889); Edwards v. Missouri, K. & T. Ry., 97 Mo. App. 103, 71 S.W. 366 (1902); see 7 A. L. R. 112 (1920).
\item \textsuperscript{18} Gulf States Steel Co. v. Law, 7 Div. 116, 141 So. 641 (1932); Harriman v. Financ, 133 N. Y. S. 1034 (S. C. 1912); McDaniel v. Greenville-Carolina Power Co., 95 S. C. 268, 78 S.E. 980 (1913); Callison v. Mt. Shasta Power Corp., 11 P.2d 60 (Cal. 1932).
\item \textsuperscript{19} Brutton v. Carolina Power & Light Co., 217 N. C. 1, 6 S.E. 2d 822 (1940); Trout Brook Co. v. Willow River Power Co., 221 Wis. 616, 267 N.W. 302 (1936).
\item \textsuperscript{20} Whipple v. Cumberland Mfg. Co., 2 Story 661, Fed. Cas. #17,516 (1843).
\item \textsuperscript{21} 2 FARNHAM, \textit{WATERS AND WATER RIGHTS}, § 577.
\item \textsuperscript{22} Webb v. Carter, 121 Mo. App. 147, 98 S.W. 776 (1906); Beaugham v. Taylor, 132 Mo. App. 92, 111 S.W. 609 (1908).
\item \textsuperscript{23} Town of Wausaukee v. Lauerman, 240 Wis. 320, 3 N.W. 2d 362 (1942).
\item \textsuperscript{24} Inland Power & Light Co. v. Griege, 98 F. 2d 811 (C. C. A. 9 1937); Brutton v. Carolina Power & Light Co., note 19, supra.
\item \textsuperscript{25} Town of Wausaukee v. Lauerman, note 23, supra.
\end{itemize}
Most decisions on the point take the position that overflow water, after it leaves the banks of the stream of which it was formerly a component part, retains its character as such until it is separated from the stream and has no connection therewith. 26

Missouri, and one other state, 27 take the view that such water becomes surface water as soon as it leaves the banks of the stream, 28 and Missouri decisions have also established that the common enemy rule, allowing one property-owner to prevent its passage onto his land to the possible detriment of another without liability therefor, applies. 29 Liability for causing the overflow remains the same, however, at least in Missouri, because the overflow waters were originally part of the stream, and the obstruction resulted in its becoming surface water and in causing the damage. 30

It is apparent, therefore, that though Missouri follows a decidedly minority rule in holding that overflow waters constitute surface water, liability for overflow by obstruction remains basically the same and consistent with the rule adopted by numerous other jurisdictions, holding the agency responsible for the obstruction liable. It would thus seem that the first three cases under consideration are consistent both with Missouri law and that of other states, in view of the conclusion reached.


28. Sigler v. Inter-River Drainage Dist., 311 Mo. 175, 279 S.W. 50 (1925); Anderson v. Inter-River Drainage & Levee Dist., 309 Mo. 189, 274 S.W. 448 (1925); Adair Drainage Dist. v. Quincy, O. & K. C. Ry., 280 Mo. 244, 217 S.W. 70 (1919); Inter-River Drainage Dist. v. Ham, 275 Mo. 384, 204 S.W. 723 (1918); Goll v. Chicago & A. Ry., 271 Mo. 655, 197 S.W. 244 (1917); Abbott v. K. C. etc. R.R., 83 Mo. 271, 53 Am. St. Rep. 581 (1884); McCormick v. K. C. etc. R. R., 57 Mo. 433 (1874); Harris v. St. Louis, S. F. Ry., 27 S.W. 2d 1072 (Mo. App. 1930); Brown v. St. Louis & S. F. Ry., 212 Mo. App. 541, 248 S.W. 12 (1923); Wells v. Payne, 235 S.W. 488 (Mo. App. 1921); Lee v. Inter-River Drainage Dist., 226 S.W. 280 (Mo. App. 1920); Schalk v. Inter-River Drainage Dist., 226 S.W. 277 (Mo. App. 1920); Goll v. Chicago & A. Ry., 198 S.W. 1183 (Mo. App. 1917); Edwards v. Mo., K. & T. Ry., 97 Mo. App. 103, 71 S.W. 366 (1902); Kenney v. K. C. etc. R.R., 74 Mo. App. 301 (1898).

29. See note 28 supra.

30. Standley v. Atchison, T. & S.F.R.R., 121 Mo. App. 537, 97 S.W. 244 (1906) at 247: "The law undoubtedly is that the defendant was not liable for any damages resulting merely from overflow of surface water onto plaintiff's land. Yet, if the defendant by obstructing the flow of water in the channel of the stream caused it to overflow and it thus became surface water, it would be liable for all damages occasioned thereby;" Keener v. Sharp, 111 S.W. 2d 118 (Mo. 1937).
The *Webb* case may be distinguished from the earlier cases however, not only because it involved the statute of limitations, but because it regarded the action as one involving a permanent nuisance rather than trespass, as in the three earlier cases. Therefore discussion of distinctions between the two types of actions seems appropriate here.

To recapitulate the essential facts in the *Webb* case, the dam in question was completed in 1931. In 1935 water flowed over plaintiff's land doing some damage to his crops, on which he brought no action. In 1943, another flood occurred, eroding plaintiff's land, depositing silt thereon, and apparently rendering it substantially unfit for further use and cultivation. In 1945, suit for damages based on permanent depreciation of the value of the land was instituted, the court holding such action barred by the five-year statute of limitations.

The sole factor in pleading which distinguishes the *Webb* case from the three preceding cases is that the damage alleged was the depreciation of the market value of plaintiff's land. The fact that in the *Webb* case the court referred to the action as one involving a nuisance, while reciting in the three earlier cases that the action was one of tort in the nature of trespass illustrates the modern tendency to break through the distinctions surrounding the old narrow forms of action. Probably the usual stipulation in modern codes of procedure that there shall be but one form of civil action is in large part responsible for this tendency.

Under the early common law there were rather sharp distinguishing factors between the actions of trespass and nuisance. Blackstone loosely defined a nuisance as "... anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." But at least two distinctions of importance between trespass and nuisance were made: 1. Nuisance required substantial (or at least more than nominal) injury to be actionable hence the statute of limitations did not begin to run until the complaining proprietor sustained substantial injury. In trespass the act of the offending person was immediately actionable without proof of substantial injury to the complaining proprietor, injury being implied if none in fact was present. 2. Trespass involved "direct" or "immediate" injury, while nuisance was more closely allied to trespass on the case, being concerned with "indirect" or "consequential" injury. Thus, where there was a direct physical invasion of plaintiff's land, such as by a deliberate act causing overflow of water, most courts, especially in the earlier days, would have called it trespass. It is true that Blackstone stated that "... if my neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance," but this example is one of negligent nonfeasance, an indirect injury, not one of active malfeasance, which is the normal trespass situation. Blackstone's example has sometimes been misapplied to overflow caused by malfeasance, where the injury was direct.

31. 3 BL. COMM. *215.
33. 3 BL. COMM. *210.
34. 3 BL. COMM. *218.
and, strictly, the action should have been trespass instead of trespass on the case for nuisance. 35 Some legal thought has tried to preserve the traditional lines of distinction, 36 but apparently this has become a rather difficult task. 37

The modern tendency has been to break down these older distinctions, so that today many cases which might formerly have been said to be trespass are referred to as nuisance. 38

This is far from being a unanimous trend, however, possibly due to the fact that the law involving nuisance has been conflicting and ambiguous almost from the beginning. Thus it has been said that an action for nuisance lies even though no actual damage occurs, if a legal right has been violated. 39 The confusion seems to rise mainly from cases which involve both user of defendant's land which is otherwise lawful, and an actual invasion of plaintiff's land thereby, as in the cases under consideration.

The Webb case is subject to further confusion because of the necessity of considering how such an action is affected by the defense of the statute of limitations. Two questions are involved: 1. When does the plaintiff's cause of action accrue so as to set the statute in motion? 2. Once plaintiff's cause of action has accrued, and when he brings suit, must he sue for the entire damage, past and future, actual and prospective, or may he recover only for such damage as has already occurred?

First, as to time of accrual of the cause of action. There seem to be four rather definite views of this problem. One line of cases takes the view that the limitation period begins to run at the time of completion of the obstruction. 40 This view seems to be based upon the theory that the obstruction is a permanent structure which is necessarily injurious, or that the damage is discoverable and ascertainable at the time of completion, or both. This would appear to be a reasonable view of the matter when injury occurs immediately or shortly after the completion of the obstruction, but seems difficult to justify when the injury sued upon occurs many years following such completion. This strict view cannot, of course, be applied under the statute in Missouri.

A second group of cases holds that the cause of action accrues at the time of

35. Frick v. Kansas City, 117 Mo. App. 488, 93 S.W. 351 (1906); Paddock v. Somes, 102 Mo. 226, 14 S.W. 746 (1890).
38. See note 35, supra.
the first injury. This doctrine normally is invoked where the damage is temporary and allows recovery of all damages occasioned within the statutory period following such first injury. It is conceivable that such a formula as this might work hardship on a plaintiff where the first injury occasioned by overflow due to defendant's obstruction is of insignificant degree, so that only nominal damages could be recovered, and a later substantial injury beyond the period of limitation occurs, leaving the plaintiff without remedy. This might be said to be the result in the Webb case.

Some courts have become aware of this possibility and have adopted the view that the cause of action accrues only at the first substantial injury. That this is not only a more liberal, but a more just, settlement of the respective parties' rights would appear to be too obvious to question. It is quite probable that this doctrine is an outgrowth of the next-mentioned class of decisions.

This line of cases takes the view that the limitation period runs from each injury, or overflow. This rule is applied chiefly when temporary injury is sustained, such injury being occasional, not continuous—recurring, not habitual—and at such intervals that it could not readily be anticipated or foreseen, or where the obstruction is abatable, for one reason or another, or sometimes by mere applica-


tion of the arbitrary maxim that a nuisance is a continuing wrong, so that each nuisance is a fresh cause of action. With the exception of the latter reason for invoking the rule, the principles behind its application seem valid, workable, and not creative of hardship on either party.

Still other cases hold that the limitation period runs from the time the injury becomes permanent.\(^{44}\) The idea expressed in these cases seems to be that where the damage is temporary, successive actions may be had for each injury, but where permanent, the entire damage must be sued for in one action, and future actions are henceforth barred.

Under the applicable statute\(^{45}\) in Missouri, of course, the cause of action accrues at the time of actual harm, so the question remaining is whether the statute then runs against the entire cause, or only on the past damage.

From a logical point of view, it is difficult to ascertain any fallacy in the latter line of reasoning, which holds that successive actions may be had for temporary injury, but that where the injury is permanent, there must be a single action for the entire damage. The Missouri courts, however, supported by some other authority, have decided that the factor of permanence is to be decided not upon the basis of the category of the injury, but upon the character of the source of the injury.

The court held, therefore, in the Webb case, that, the dam being permanent, a permanent nuisance was involved, that consequently plaintiff's cause of action arose upon his first injury in 1935, that he should have sued then for his entire damages, prospective as well as actual, and that his action instituted in 1945 was barred by the five-year statute of limitations.

The soundness of this decision is arguable on several grounds. First, the general rule seems to be that the determination whether the action involves a permanent nuisance may be decided upon either the nature of the injury or the nature of the source of such injury. Reason would indicate that except where the obstruction is necessarily injurious from the time of its completion, a rule based upon the permanence of the source of the injury is arbitrary and illogical. As under the Missouri statute\(^{46}\) the cause of action does not accrue until damage "is sustained and is capable of ascertainment," then the cause of action for the permanent damage should not have accrued, logically, until 1943.

Second, it is contrary to the intent of the Missouri statute\(^{47}\) to hold that plain-


\(^{45}\) Mo. Rev. Stat. § 1012 (1939), note 6, supra.

\(^{46}\) Ibid.

\(^{47}\) Ibid.
tiff's cause of action for the entire damage arose in 1935, as the statute, indicating time of accrual of the cause of action, further provides "... and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained." It is difficult to see the concurrence of legislative intent with the result reached in the Webb case.

Third, such a decision is unjust and works a hardship on parties plaintiff. However true it may be, theoretically, that damages which have not yet occurred and may never occur may be fully recovered in such an action, the practical effect of a suit such as that in the Webb case, where future and prospective damages are asked, is to limit recovery to a small or nominal amount and to make such action res judicata so as to bar a subsequent recovery when actual damage of significant value is sustained in the future.

For the above reasons it is submitted that the Webb case might well have reached a contrary result.

ROY W. MCGHEE, JR.

THE NATURE OF THE LIABILITY OF PARTNERS IN MISSOURI

At common law the liability of partners in contract is joint, rather than joint and several as in tort. The Uniform Partnership Act adopts substantially the common law rule.

In 1825, the General Assembly enacted a general statute as follows: "All contracts which, by the common law, are joint only, shall be construed to be joint and several." Similar statutes, in general terms attempting to make all joint obligations joint and several, have been enacted elsewhere. In some of the states, these general statutes have been held not to apply to partnership debts; in other states, they have been interpreted as applying to partnership obligations as well as others. Missouri has taken the latter position. "At common law, when part only of the members of a partnership were sued on a partnership contract, the partner might plead the non-joinder of the other partners in abatement. But our statute makes all such contracts joint and several, and a person having a demand against a partnership, under our statute may sue any partner or all the partners at his election."

In view of these statutes, the Commissioners on Uniform Laws suggest with respect to Section 15, which adopts the common law rule of joint liability, that where a state has already declared the liability to be joint and several, "the principle of uniformity would not be affected by that state so altering this paragraph as to make the liability joint and several, as this change would affect only the

1. MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP 272 (2d ed. 1920).
2. Section 15, 7 U. L. A. 85.
4. See Commissioner's Note to UNIFORM PARTNERSHIP ACT, Section 15, 7 U. L. A. 86.
5. Gates v. Watson, 54 Mo. 585 (1874). See also Willis v. Barron, 143 Mo. 450, 45 S.W. 289 (1898).
procedural law and this act is one to make uniform the substantive law of partnership.”

In 1949, the General Assembly enacted the Uniform Partnership Act. But in doing so it failed to alter Section 15 as to make it conform to the statute which, as interpreted by the Missouri Supreme Court, had already declared partnership liability in contract to be joint and several. Instead, it simply enacted the common law rule by declaring: “All partners are liable (a) jointly and severally for everything chargeable to the partnership under sections 13 and 14 (wrongful acts and breaches of trust), (b) jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.”

A partner’s contract obligation, then, would seem to be joint, not joint and several. But it possesses at least one attribute of a joint and several obligation. A statute, first enacted in 1816, provides: “In all cases of joint obligations and joint assumptions of co-partners or others, suits may be brought and prosecuted against any one or more of those who are so liable.” This section appears to be unaffected by the enactment of the Uniform Partnership Act.

W. H. P.