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"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

CIVIL DISABILITY—WHEN DOES IT BEGIN?

In the practice of the law an interesting problem has recently presented itself. The case arose in this fashion: A man was injured in an accident involving a city bus line and brought suit against the bus line. In preparing for suit, the attorneys for the bus line learned that the injured man had been convicted of sodomy and was out on bail pending appeal at the time he received the injury. Subsequently, the parties arrived at a settlement, a stipulation was filed and at this point the crux of the situation was reached. The attorneys for the defendant wanted to get some protection for their client so that there would be no danger of another suit being filed for the same cause of action. They applied to the court for the appointment

of a trustee to act on behalf of the convicted man which was, of course, refused because under Section 9229, *Missouri Revised Statutes* (1939), there was no authority for such an appointment.

Several alternatives presented themselves. They could either take a release, a covenant not to sue or an indemnity from some third party. The latter would have been feasible except that there were no financially responsible persons willing to indemnify the defendant on behalf of the plaintiff. The other two are basically contractual and the question is whether one sentenced to a term of years in the penitentiary and while out on bail pending appeal has the ability to contract.

The application of two Missouri statutes causes the difficulty. Section 9225 reads: "A *sentence* of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead." Section 9229, as amended in 1945, reads: "Whenever any person shall be *imprisoned* in the penitentiary, a trustee, to take charge of and manage his estate, may be appointed by the circuit court of the county in which such convict last resided; or if he have no known place of residence, then by the circuit court of the county in which the conviction was had, on the application of the wife of the convict, or any of her relatives, or any relative of the convict, or any creditor of such convict."[1]

In addition to the power to contract, a number of other questions can be considered: 1. Does such a convict have the ability to sue or be sued? 2. Assuming that he does not, would a judgment rendered either for or against him be void and, hence, subject to collateral attack, or merely voidable and subject only to direct attack? 3. If he does not sue, does the sentence toll the running of the statute of limitations against him?

The basic question, the answer to which would solve all the subsidiary problems, is: When does the civil disability of a convict start? Is it at the moment of sentence according to the wording of Section 9225, or is it at the time of actual incarceration in the penitentiary in spite of the apparent wording of Section 9225? If the first and literal construction is adopted, the rights of a person convicted of a felony are suspended under Section 9225 on *sentence,* but no trustee can be appointed under Section 9229 until he is *imprisoned.* Neither the basic question nor the particular one stated at the beginning of this comment seems to have been directly answered in this jurisdiction; however, an analysis of analagous situations and some of the subsidiary questions as answered both in this and other jurisdictions may help to arrive at a prediction of what the Missouri court would do if this specific case were presented to it.

At common law one convicted of treason or any other felony was conceived to be civilly dead.[2] However, absent a statute civil death is generally denied in

1. Italics in both sections added by the author. These statutes are now Mo. REV. STAT. §§ 222.010 and 460.010 (1949), respectively.

2. Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888); 34 VA. L. REV. 463 (1948).

this country.[3] Approximately one third of the states have passed civil death statutes.[4]

The early cases indicated that civil disability of a convict attached upon passing of sentence. In *Miller v. Finkel*,[5] the New York court said by way of dictum under a New York statute, providing that "A sentence of imprisonment in the state prison for any term less than for life suspends all the civil rights of the person so sentenced," that the disqualification commences, as does the running of the time of imprisonment, from the moment of passing sentence.[6]

The Missouri case of *Presbury v. Hull*[7] turned on the fact that *Missouri Revised Statutes*, 1855, p. 642, Section 22 (suspending civil rights) did not apply to convictions in federal courts but the court said by way of dictum: "It is of no consequence that Wolff's offense might have been punished by a state court (if it be so), for it is not the fact of criminality which, in any case, suspends his rights, but the conviction and sentence to the penitentiary."[8]

Despite these early indications, it is now likely that suspension of civil rights begins not upon passing of sentence but upon actual incarceration.[9] The Missouri case of *Cole v. American Ry. Express Co.*[10] particularly held that one sentenced to a term in the penitentiary but out on parole had the power to sue. Here Cole brought action for loss of hogs in shipment against the defendant express company. Three months prior to this civil suit he had received a conditional commutation of his sentence. Defendant pleaded that plaintiff being under sentence to the penitentiary for a term less than life had access to the courts only through a trustee. The court after referring to the statute suspending civil rights and then citing the section providing for appointment of a trustee said: ". . . It is our opinion that the section last mentioned did not preclude the plaintiff herein from maintaining this suit, in his own proper person, for the reason that he was at the time of trial thereof under parole, issued by the Governor of Missouri. . . . In the case at bar respondent, Cole, at the time of the trial in circuit court was not actually imprisoned, and it therefore devolved upon him to protect his rights involved herein."[11]

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3. Holmes v. King, 216 Ala. 412, 113 So. 274 (1927); 50 HARV. L. REV. 968, 970 (1937); 34 VA. L. REV. 463, 464 (1949); 48 YALE L. J. 912 (1939).

4. MO. REV. STAT. 1939, §§ 9225 *et seq.*; see notes 34 VA. L. REV. 463, 465 (1948); 48 YALE L. J. 912, 916 (1939), concluding that the judicial tendency to limit the operation of these statutes is highly desirable. It is significant that Mo. REV. STAT. § 9228 (1939), providing for administration of estates of convicts imprisoned for life, was repealed by Mo. Laws 1945, p. 1333, § 1.

5. 1 Park Cr. R. 374 (N.Y. Sup. Ct. 1853).

6. *Id* at 377.

7. 34 Mo. 29 (1863).

8. *Id.* at 34.

9. Martin v. Long, 92 W. Va. 624, 115 S.E. 791 (1923). 18 C.J.S., *Convicts*, § 6, p. 105: "However, under particular statutes rendering a convict civilly dead, he may be entirely, or to a limited extent, unable to contract, although the disability does not take effect pending an appeal from the conviction, or until his imprisonment actually begins."

10. 228 Mo. App. 78, 68 S.W.2d 736 (1934).

11. 228 Mo. App. 78, 68 S.W.2d 736, 740 (1934).

In *Gray v. Gray*,[12] the convict was being sued for divorce while he was in prison. The court held that he could be sued even though actually incarcerated but that it was desirable for an attorney to be appointed to look after his interest, particularly if property interests are involved. This latter indication seems to have been more rigidly construed to the benefit of the convict in the later decisions. For instance in *McLaughlin v. McLaughlin*,[13] the plaintiff was convicted of murder in 1897 and sentenced to ten years in the penitentairy. He remained in the penitentiary from 1898 to 1904 when he was granted a pardon. In 1902 while plaintiff was in the penitentiary, defendant brought suit for divorce and alimony as well as the care and custody of the children. In the decree, land was divested from plaintiff. The court held that the judgment divesting title from plaintiff was void on its face since plaintiff was in the penitentiary.

In *Murphy v. Baron*,[14] Murphy was convicted of a felony and sentenced to a term in the state penitentiary. He received another sentence in 1903 and was confined until 1905. In 1904 while Murphy was so confined, Baron recovered a judgment for possession of the land. The court held that the action by which Baron recovered was void.

In *Wamsley v. Snow*,[15] Snow was sentenced to life in the penitentiary for murder. He was confined pending appeal. During this time, special execution and sale were levied against him. This execution and sale were held void, the court saying: "The purpose of the statute is to protect the property rights of a convict while he is incarcerated in the penitentiary. The fact that, while defendant was in the penitentiary, an appeal was pending from the conviction and sentence did not change the situation. He would have been as helpless to defend his rights in a civil case as if no appeal had been taken. . . . Incarcerated he could not defend in person. . . . While defendant was confined in the penitentiary, he was entitled to the protection of the provisions of the statute."

On the other hand in *Jandro v. Jandro*,[16] a convict had married while in prison. Suit for annulment was allowed against him while still imprisoned on the ground that a convict may not enter into a marriage contract.

As concerns the right of a convict to be sued it seems to make a difference whether property interests are involved are not. If they are, and he is incarcerated, it seems that he cannot be sued. If only a status is to be determined, he may be. But in all these cases whether the right to sue or to be sued is in issue the court seems to emphasize the element of actual incarceration as the determinative factor.

Cases involving conveyances of land help to throw some light on the judicial tendency with respect to these civil disability statutes. It seems that Missouri and Rhode Island are the only states in which it is definitely held that a convict may

12. 104 Mo. App. 520 (1904).
13. 228 Mo. 635, 129 S.W. 21 (1910).
14. 275 Mo. 282, 205 S.W. 49 (1918).
15. 331 Mo. 261, 53 S.W.2d 258 (1932).
16. 246 S.W. 609 (Mo. App. 1923).

not convey.[17] In *Williams v. Shackelford*,[18] Williams had been convicted of a felony and sentenced to the penitentiary for a term of years. While in the penitentiary, he executed a mortgage deed under which the plaintiffs claimed title. The court quoted the civil disability statutes and said that the effect of these provisions is to "deprive him of the power of alienating or encumbering his property during the term of his sentence of imprisonment. . . . in the case of a convict felon for a term of years, it is suspended during the term of his imprisoment, unless transmitted *ad interim* to a trustee. . . . Williams had no power to execute the deed . . . while a convict in the penitentiary serving his term for a felony."

However, in *Ward v. Morton*[19] cited in the *Cole* case, *supra*, plaintiff was sentenced to prison for felony. No appeal was taken nor was a guardian or trustee appointed for him. At the time of sentence he was paroled for four years, was never incarcerated in the penitentiary but allowed to remain at large. Defendant offered a deed executed by plaintiff and his wife during the time of his parole. Plaintiff cited *Williams v. Shackelford, McLaughlin v. McLaughlin*, and *Murphy v. Baron, supra*. The court said: "In all cases cited by plaintiff the person whose property was affected was actually confined in the penitentiary at the time the judgment was rendered or the conveyance was executed. The underlying reason upon which each of the adjudications were predicated was that, while in custody, a convict is prevented from attending to his affairs and the statute has therefore provided a method by which his property may be protected and preserved . . . even though application for the appointment of a trustee to represent his estate had been made, the court would have been powerless to act for the reason that Section 2297 provides that a trustee may be appointed only 'upon producing a copy of the sentence, duly certified, *and satisfactory evidence that such convict is actually imprisoned under such sentence*' . . . under the circumstances plaintiff was not entitled to the benefit of the statute providing for the management and administration of the estates of convicts by a trustee appointed for that purpose. The duty devolved upon plaintiff to protect the title to his property." The court then cited *Harmon v. Bowers*[20] with approval.

In *Harmon v. Bowers*,[21] Harmon on April 12, 1904, was sentenced to the penitentiary and appealed to the Kansas Supreme Court. From that date until January 19, 1905, he was at liberty under bond, on which date he was taken to the penitentiary where he remained until January 12, 1906 when he was pardoned and discharged. After his conviction and sentence but before he was taken to the penitentiary, Harmon and his wife made the deed in question. Section 2301, *Kansas General Statutes* (1901), read: "A sentence of confinement and hard labor for a term less than life suspends all civil rights of the person so sentenced during the

17. Note, 48 YALE L. J. 912, 914, n. 14 (1939). *Cf.* Kenyon v. Saunders, 18 R.I. 590, 30 Atl. 470 (1894), where a statute expressly forbade conveyance.
18. 97 Mo. 322, 11 S.W. 222 (1888).
19. 294 Mo. 408, 242 S.W. 966 (1922).
20. 78 Kan. 135, 96 Pac. 51 (1908).
21. *Ibid.*

term thereof . . . ." Sections 5776 and 5777 provided for appointment of a trustee upon satisfactory evidence that the convict was actually imprisoned. The court said: "From these provisions it appears that civil rights are not suspended until the convict is imprisoned. If we should hold that civil rights are suspended the moment sentence is pronounced, the defendant's punishment would be increased by taking away his civil rights for an indefinite period in excess of the term of imprisonment, which does not begin until the stay allowed upon appeal has expired and he is imprisoned, or, possibly, when he is in custody to be conveyed to the penitentiary."

In *Martin v. Long*,[22] the defendant had been convicted of a felony, had appealed and was out on bond. While at liberty and pending appeal, he entered into a contract with the plaintiff. Plaintiff performed his part of the contract and sued defendant on the contract. Defendant set up his disability to contract. A committee had been appointed to act for defendant pursuant to Section 11, c. 163, *West Virginia Code* (Barnes, 1918), which read: "When a person is sentenced to confinement in the penitentiary for more than one year, the estate of such convict, if he have any, both real and personal, shall, on the motion of any party interested, be committed by the county court of the county, in which his estate, or some part thereof may be, to a person selected by such county court, who, after giving bond before the said county court in such penalty as said court may prescribe, shall have charge of said real estate until such convict is discharged from such confinement."

The upper court held the committee improperly appointed. They cited *Harmon v. Bowers, supra,* but said it was not very helpful since based on different facts and different statutes. The West Virginia case turned upon whether the committee had been properly appointed or more broadly whether defendant was sui juris in respect to his property rights while he was out on bail pending appeal. According to the wording of the statute, authorization to appoint a committee to have charge of a convict's property was given by virtue of the convict's sentence. However, the court came to the conclusion that in spite of the apparent meaning of this statute a committee could not be appointed until the convict was actually imprisoned. The basis for the decision seems to be that pending appeal and while defendant was out on bail the state "had no control over defendant's person. . . . No one but his surety on his bail bond could take him into custody because of that judgment. He could do so because he was on his bond, but his right to do so did not at all arise from the judgment, but because of the bond. . . . The judgment or sentence being stayed, the state had no rights thereunder that could be enforced during the stay, either as to his person or his estate."[23]

One out on bail is not under such a disability as to toll running of the statute of limitations. This was held in the leading case of *Hyde v. Nelson*[24] cited as

22. 92 W. Va. 624, 115 S.E. 791 (1923).
23. *Id.* at 793.
24. 287 Mo. 130, 229 S.W. 201 (1921). See also Wales v. Whitney, 114 U.S. 564, 5 Sup. Ct. 1050 (1885); Stallings v. Splain, 253 U.S. 339, 40 Sup. Ct. 537 (1920); Sibray v. United States, 185 Fed. 401 (C.C.A. 1911); Palmer v. State, 170

authority in *Rose v. Washington Times Co.*[25] Both of these cases involved actions for libel in which the cause of action accrued while the plaintiff was out on bail. In the *Hyde* case, the court quoted the limitations disability statute, Section 1323, *Missouri Revised Statutes* (1919), and said: "There can be no doubt that the word 'imprisonment' is used in this section in its plain, ordinary meaning. 'Imprisonment' is—'The act of putting or confining a man in prison; the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion.' "[26]

It would seem relatively safe to predict that the Missouri court would say if the question were presented to it that a convict out on bail pending appeal can sue, following the *Cole, Martin* and *Ward* cases; that he can be sued even though incarcerated if property interests are not involved, but if both of these factors are present, such a judgment against him is void; that mere sentence without actual incarceration does not toll running of the statute of limitations; that he can convey land; that he can contract under the reasoning of the *Martin* and *Ward* cases which approved *Harmon v. Bowers;* in short, that civil disability does not arise under Section 9225 until actual imprisonment.

Although such a prediction seems reasonable based upon these prior decisions, it is respectfully suggested that the legislature take all the guess work out of the matter, follow the judicial tendency and make it clear by a rewording of Section 9225[27] that at least all private civil rights such as those mentioned above in this article be not suspended until actual imprisonment. It may be deemed socially desirable to draw a distinction between these rights and those such as the right to vote or hold public office which perhaps should be suspended in the interest of the public with the passing of sentence.

JOHN W. INGLISH*

POSSESSION AS NOTICE UNDER MISSOURI RECORDING ACT

The question of whether or not possession of realty under an unrecorded deed or other instrument imparts notice of the possessor's interest in the realty to a subsequent purchaser of the realty from the last record title holder has caused more litigation in Missouri than in most other states. This is attributable in part to the wording of the Missouri recording act and the interpretation placed upon it by the courts of this state. Another factor which probably has had some causal effect in bringing about some of the litigation of this question is the language sometimes

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Ala. 102, 54 So. 271 (1910); Spring v. Dahlman, 34 Neb. 692, 52 N.W. 567 (1892); 29 C.J. 22.

25. 23 F.2d 993 (App. D. C. 1928).

26. Hyde v. Nelson, 287 Mo. 130, 229 S.W. 200, 201 (1921), quoting 21 CYC. 1742.

27. Now MO. REV. STAT. § 222.010 (1949). See *supra* n. 1.

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used by the courts of this state; this language standing alone does not indicate the difference between the Missouri law on the matter as set forth by the leading cases and the law of other states. Whether or not such a distinction should be present, the fact remains that the Missouri act is differently worded from those of most other states and on the basis of this the courts have in the leading cases interpreted it differently.

There are three common types of recording acts throughout the United States. These statutes may be grouped as follows: (1) those giving priority to the bona fide purchaser or mortgagee of realty who first records his deed, or the race type statute;[1] (2) those giving priority to a subsequent bona fide purchaser unless he has *notice* of a prior unrecorded instrument;[2] and (3) those protecting a subsequent bona fide purchaser unless he has *actual notice* of a prior unrecorded instrument.[3] Under both of the first two types of statutes it is generally held as a matter of law that possession alone by a prior purchaser is sufficient notice of the possessor's interest to a subsequent purchaser, and it is immaterial whether the subsequent purchaser in fact knew of the possession.[4] But the third type statute, such as those of Missouri and Massachusetts, requires that the subsequent purchaser have no *actual notice* of the prior unrecorded instrument for such purchaser to take free of the prior instrument. The question whether possession under an unrecorded in-

1. WIS. STATS. §235.49 (1947). Wisconsin originally had the actual notice type statute, WIS. REV. STAT. c. 86, § 32 (1858). NEB. REV. STATS. § 76-238 (1943): "All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; *Provided,* that such deeds, mortgages and other instruments shall be valid between the parties." Most frequently the controversies arising under this statute are between mortgagees. In the typical case, *M* executes a mortgage to *E*1 who does not record; *M* then executes a mortgage to *E*2, who has no notice, actual or constructive, of the first mortgage. *E*1 then records. Under the race type act *E*1 has priority. Under the notice type act *E*2 has priority. Missouri has rejected the race type interpretation. White v. Hughes, 88 S.W. 2d 268 (Mo. App. 1935). But see Smith v. Johnson, 107 Mo. 494, 497, 18 S.W. 21, 22 (1891) for dictum that where a grantor delivers two deeds on the same day to two innocent parties, the first to record has priority.

2. ALA. CODE, Tit. 47 § 120 (1940)—"All conveyances of real property, deeds, mortgages, deeds of trust, or instruments in the nature of mortgages, to secure any debts, are inoperative and void, as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees, or judgment creditors."

3. MO. REV. STATS. § 442.400 (1949), MO. REV. STATS. ANN. § 3428—"No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." MASS. GEN. LAWS c. 183, § 4 (1932).

4. Enslen v. Thornton, 182 Ala. 314, 62 So. 525 (1913); Blum v. Poppenhagen, 142 Neb. 5, 12, 5 N.W. 2d 99, 103 (1942); Ehrlich v. Hollingshead, 87 N.Y.S. 2d 682 (4th Dep't. 1949); Phelan v. Brady, 119 N.Y. 587, 23 N.E. 1109 (1890); Brinkman v. Jones, 44 Wis. 498 (1878).

strument is sufficient notice to a subsequent purchaser without the latter in fact knowing of the possession has seldom arisen in Massachusetts. In *Curtis v. Mundy*,[5] the Massachusetts court held that it was sufficient that the subsequent purchaser have knowledge of facts which would put the average person upon inquiry. But in *Pomroy v. Stevens*,[6] the Massachusetts court held that possession was not sufficient notice even if the subsequent purchaser in fact knew of it, saying: "It is not sufficient to prove facts which would reasonably put him on inquiry. He is not bound to inquire." Whether or not in Massachusets possession pursuant to an unrecorded interest is sufficient notice to a subsequent purchaser, it is clear from these cases that it is not if the subsequent purchaser has no knowledge of the possession.

In Missouri the problem has arisen much more frequently, and the majority of the cases where the question has been directly in issue hold that knowledge of possession under a prior unrecorded instrument is evidence to go to the jury of notice of the outstanding interest to the subsequent purchaser, but is not notice as a matter of law. But a thorough reading of all the cases on the question and a close study of the facts involved are necessary to determine the difference between the Missouri law and that of other states.

The first case in Missouri which gave a full and accurate discussion of the Missouri recording act was *Vaughn v. Tracy*.[7] In that case the plaintiff was in possession of a mill and a one-acre tract of land upon which the mill stood, under an unrecorded grant. Subsequently the defendant purchased an eighty-acre tract of which the one-acre tract in the possession of the plaintiff was a part. The plaintiff entered evidence which tended to show that the defendant in fact knew of the plaintiff's possession, but there was no findings of fact on this issue in the record of the trial court. In discussing what is meant by actual notice as used in the Missouri recording act, the supreme court said: "We think the legislature here referred to *actual notice* as contradistinguished from *implied notice*, both of which were well known terms in our law when the act was passed; . . . possession is not, as the Circuit Court seemed to suppose, as a mere matter of law, *actual notice* within the meaning of our recording acts. . . . Actual notice, under our statute, is a fact, and of course may be proved as any fact, . . . The notice required by the statute is not certain knowledge, but such information as men generally act upon in the transactions of life." The court throughout this decision indicated that possession under an unrecorded instrument is evidence of actual notice to the subsequent purchaser without further evidence that the subsequent purchaser in fact knew of the possession. On rehearing of the appeal the court held[8] that possession was not notice of the possessor's interest as a matter of law, but was evidence of notice of the possessor's title which should be submitted to the jury, but whether or not this would be sufficient to satisfy the jury that the purchaser had actual notice "would

5. 44 Mass. (3 Met.) 405 (1841).
6. 52 Mass. (11 Met.) 244 (1846).
7. 22 Mo. 415 (1856), *rehearing* 25 Mo. 318 (1857). In accord: Speck v. Riggin, 40 Mo. 405 (1867).
8. 25 Mo. 318 (1857).

be a matter for their consideration." In this latter decision the court indicated that there also must be evidence that the subsequent purchaser in fact knew of the possession under the unrecorded instrument. In neither of these decisions was the court definite as to whether evidence of knowledge in fact of the possession is necessary, but later cases follow the rule that there must be evidence that the subsequent purchaser in fact knew of the possession. This decision was followed in *Maupin v. Emmons*.[9] In that case the court said that a second sale of property by the grantor after he has already parted with title is necessarily a fraud, and if it appears in evidence that the subsequent purchaser knows that the holder of the unrecorded instrument is in possession of the property as owner, or if he is informed that the holder of such a deed has bought the property, "the jury has a right to infer full knowledge or voluntary ignorance; and if he buy with such knowledge or *such means of knowledge*,[10] he becomes a party to the fraud, and will not be permitted to take advantage of it."

The leading case in Missouri on the subject is *Drey v. Doyle*.[11] In that case the lower court instructed the jury: "By the term 'actual notice' as used in the instructions, the jury are not to understand that plaintiff and said Nelson must have actually seen the written renewal of said lease, or been informed of its existence. Knowledge by them of facts, if they had such knowledge as would put an ordinarily prudent person on inquiry as to the nature of defendant's title, and lead him to discover the truth respecting the same, is equivalent to actual notice . . . ." The Missouri Supreme Court upheld this instruction saying that if the subsequent purchaser is conscious of having the means of knowledge of an adverse claim and does not use this means of obtaining information, he ought to be charged with such information as a fair and reasonable inquiry would have disclosed.

Therefore, it seems that although the *Vaughn* case is still cited as authority in Missouri, knowledge of possession is something more than mere evidence of actual notice of the possessor's interest. As a practical matter the jury determines whether the knowledge of possession is sufficient to put the purchaser on inquiry. If it is, then it will satisfy the requirement of actual notice under our statute if the purchaser could have learned of the possessor's interest by a reasonable inquiry. But it should be noted that this extends only to such facts as a reasonable inquiry would have revealed and does not apply where the subsequent purchaser can show that he could not have learned of the outstanding interest by a reasonable inquiry.[12]

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9. 47 Mo. 304 (1871).
10. Emphsais added.
11. 99 Mo. 459, 12 S.W. 287 (1889).
12. Hallaver v. Lackey, 353 Mo. 1244, 1252, 188 S.W. 2d 30, 34 (1945); Farrington v. Hays, 353 Mo. 194, 182 S.W. 2d 186 (1944), *cert. denied* 323 U.S. 797 (1945), *rehearing denied* 342 U.S. 885 (1945); Langford v. Welton, 48 S.W. 2d 860 (Mo. 1932); Woodbury v. Connecticut Mutual Life Insurance Co., 350 Mo. 527, 166 S.W. 2d 552 (1942). In the Woodbury case the defendant's grantor had used misappropriated trust funds with which to purchase the land in his own name. When the defendant purchased, there was a tenant in possession who knew of the misappropriation. The court held that the possession of the tenant was evidence

The rule that knowledge of possession is evidence of actual notice of all that could be learned by a reasonable inquiry, is limited to the interests of the possessor in land under his actual or constructive possesion. That is, possession of a part of a tract of land is not necessarily evidence of the possessor's interest in more than the portion he possesses, even though inquiry might have revealed interests in the remaining portion of the tract. Thus in the *Vaughn* case, the court affirmed the admission into evidence by the lower court of occupancy of one acre of an eighty acre tract as notice of the possessor's interest in the one acre, but not as to the remainder of the eighty acres. But in *Martin v. Jones*,[13] the court held that occupancy and cultivation of from twelve to fifteen acres was sufficient evidence to infer notice to the purchaser of the possessor's title to a twenty acre tract.

It was further held in *Masterson v. West End R.R.*,[14] that knowledge of past possession is not evidence of notice where the possession ends prior to the purchase. In that case the Railroad had graded some of the land but had ceased operations some two years before the purchase. The court also stated in that case that there is no implication in our statute or in case decisions that a purchaser must visit the premises to determine whether someone is in possession. But in *Leavitt v. Laforce*,[15] the court held that one cannot purposely avoid going on to the premises. In that case the purchaser had traveled several miles—from Iowa to Missouri—to look over the land with the intention of taking a mortgage on it, but had viewed it from the road, and appeared purposely to avoid going close enough to determine whether anyone was in possession. There was also evidence of fraud in the case.

Also to be considered here is whether a subsequent purchaser without notice taking from the record owner by quitclaim deed or a deed without general warranties takes free from outstanding interests not of record. It has been held in Missouri that such purchaser takes subject to all outstanding claims or interests not required to be recorded and that such purchaser is a purchaser with notice because the absence of general warranties in his deed is sufficient to put him on inquiry.[16] Therefore it was held in *Ridgeway v. Holliday*,[17] that one who procured title by adverse possession, then moved off the land, had good title as against a subsequent purchaser who took by a deed with special warranties from the record owner even though the latter was in possession and the purchaser never knew of the adverse possession. But this rule applies only to interests not subject to the recording act and does not include claims under instruments which could be recorded.[18] It is

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to the defendant of the tenant's rights as a tenant but was not evidence of the defects in the grantor's title arising out of the misappropriation of the trust funds and known to the tenant.

13. 72 Mo. 23 at 26 (1880).

14. 5 Mo. App. 64 (1878), *affd.* 72 Mo. (1880).

15. 71 Mo. 353 (1879).

16. King v. Fasching, 234 S.W. 2d 549 (Mo. 1950); McAboy v. Pacher, 353 Mo. 1219, 187 S.W. 2d 207 (1945); Starr v. Bartz, 219 Mo. 47, 117 S.W. 1125 (1909); Ridgeway v. Holliday, 59 Mo. 444 (1875); 2 GILL, REAL PROPERTY LAW IN MISSOURI 890-895 (1949).

17. *Supra*, note 16.

18. Starr v. Bartz, *supra*, note 16.

not clear whether this rule would apply in Missouri where the conveyance by the record owner is by warranty deed. But there is indication that it would apply since the cases uniformly hold that title acquired by adverse possession is for all purposes as good as if acquired by deed from the record owner.[19] In support of this also are the holdings that the recording act does not apply to title acquired by adverse possession.[20]

Although knowledge of possession will generally be evidence of actual notice to the purchaser, where the person in possession holds an interest which is of record and there are no circumstances which indicate that he is in possession other than under the recorded instrument, such possession is not evidence of actual notice to the purchaser of any unrecorded title or interest which the possessor holds. In *Moeller v. Holthaus*,[21] the possessor held a lease for a nominal rental from the defendant's grantor. The possessor also held an unrecorded vendor's lien on the property. The court of appeals held that the defendant had a right to rely upon the recorded instrument as being the possessor's right to possession and in such case the defendant was not bound to inquire into the possessor's interest.

In spite of these decisions holding that possession is only evidence of actual notice to the subsequent purchaser, the courts of Missouri have not always been too careful of the language used in their decisions. Frequently the statement appears in a decision that possession is notice to a subsequent purchaser of the possessor's interest with no indication in the case as to whether the subsequent purchaser must know of the possession.[22] And frequently it is not clear from the facts whether it was found in the lower court that the purchaser knew of the possession.[23] But in *Jones v. Nichols*,[24] and *Desteiguer v. Martin*,[25] it is clear that the court considered possession of itself to be notice without knowledge of the possession on the part of the purchaser. In the *Desteiguer* case the court indicated that notice could be inferred from possession alone. In that case the lower court instructed the jury that if the plaintiff knew the defendant was in possession, it was sufficient to put the plaintiff on inquiry and the judgment should be for the defendant unless it was

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19. *Ibid;* Ridgeway v. Holliday, *supra,* note 16; Nelson v. Brodhack, 44 Mo. 596 (1869).

20. McAboy v. Packer, *supra,* note 16, *supra,* note 18.

21. 12 Mo. App. 526 (1882). In accord: Sikes v. Turner, 212 Mo. App. 419, 247 S.W. 803 (1923).

22. Johnson v. Moore, 346 Mo. 854, 143 S.W. 2d 254 (1940); Chilton v. Cady, 298 Mo. 101, 250 S.W. 403 (1923); Swift v. Buford, 280 Mo. 432, 217 S.W. 980 (1920); Titus v. North Kansas City Development Co., 264 Mo. 229, 174 S.W. 432 (1915); Gulley v. Waggoner, 255 Mo. 613, 164 S.W. 557 (1914); Squires v. Kimball, 208 Mo. 119, 106 S.W. 503 (1907); Stuart v. Ramsey, 196 Mo. 404, 415, 95 S.W. 382, 385 (1906); Myers v. Schuchmann, 182 Mo. 159, 81 S. W. 618 (1904); Wiggenhorn v. Daniels, 149 Mo. 160, 165, 50 S.W. 807, 808 (1899); Davis v. Briscoe, 81 Mo. 27 (1883).

23. Chilton v. Cady, *supra,* note 22; Titus v. North Kansas City Development Co., 264 Mo. 229, 174 S.W. 807 (1914); Shaffer v. Detie, 191 Mo. 377, 90 S.W. 131 (1905); Myers v. Schuchmann, *supra,* note 22.

24. 280 Mo. 653, 216 S.W. 962 (1919).

25. 162 Mo. 417, 63 S.W. 107 (1901).

found that the plaintiff did actually inquire and was unable to ascertain the defendant's interest. In approving this instruction the court held that the plaintiff had no grounds for complaint since the instruction was more favorable to him than should be because in it "plaintiff was not charged with the inference of notice to be drawn from defendant's possession of the land as might properly have been done; . . . ." In the *Jones* case the court held that "open, exclusive, separate and distinct possession . . . is and was *notice to the world*"[26] of all the rights of the possessor. The result of these cases is not contrary to the holdings of the *Drey* case and the *Vaughn* case when it is noted that in all of these cases the purchaser knew of the possession from which notice could have been inferred by the jury. But such language as used renders the cases of no value as precedent for subsequent litigation where the facts are different from the facts of those cases.

But where the issue has been directly before the court as to whether possession is notice without knowledge of the possession on the part of the subsequent purchaser, the rule set forth in the *Drey* case has generally been followed and it is held that possession of itself is not notice to the purchaser of the possessor's interest, but is merely evidence from which notice may be inferred by the jury.[27] In *Whitman v. Taylor*,[28] the court held that the defendant's position that since he was in possession the plaintiff had notice of his interest, was untenable since there was no averment that the plaintiff knew of the possession at the time of the purchase. In the *Vaughn* case,[29] the court said: "It is true, the circumstances may be such as to show conclusively that the purchaser did not, in fact, know that any one was in possession, . . . and in such case, the jury, of course could not find the fact of actual notice."

Although the doctrine in the *Drey* case is the generally accepted law of this state, attorneys continue to cite *Beatie v. Butler*[30] without regard to the fact that it has been so often criticized and questioned that for all practical purposes it has been overruled on this point. In the *Beatie* case, Judge Scott said: "What is actual notice, we conceive, is a question of fact for the jury. . . . The jury will only find the facts when such evidence has been submitted to them as produce the conviction that the purchaser was really aware of the existence of the instrument which he seeks to defeat at the time of his purchase."[31] Judge Ryland dissented from this discussion concerning possession as notice. This decision by Judge Scott was not followed in the *Vaughn* case one year later and was questioned in *Maupin v. Emmons*.[32] The case was often questioned by the courts when cited by counsel as

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26. Emphasis added.
27. McBride Realty Co. v. Grave, 223 Mo. App. 588, 15 S.W. 2d 957 (1929); Masterson v. West End R.R., 5 Mo. App. 64 (1878); *affd.* 72 Mo. 342 (1880); Whitman v. Taylor, 60 Mo. 127 (1875); Shumate v. Reavis, 49 Mo. 333 (1872); Harrison v. Cachelin, 23 Mo. 117 (1856).
28. *Supra*, n. 27.
29. *Supra*, n. 7, 22 Mo. at 422.
30. 21 Mo. 313, 64 Am. Dec. 234 (1855).
31. In accord: Frothington v. Stacker, 11 Mo. 77 (1847).
32. *Supra*, note 9.

authority on this point. But in *Kansas City Granite and Monument Co. v. Jordan*,[33] the *Beatie* case was cited by counsel and favorably considered by the court. In the *Kansas City Monument Co.* case, the defendant was claiming under an unrecorded deed. But while this alleged deed was in existence, defendant testified under oath in an action to which both the plaintiff and defendant were parties that defendant's possession was by virtue of a tenancy under the plaintiff's grantor. Therefore it is doubtful that an inquiry by the plaintiff would have elicited the defendant's alleged interest. There was also evidence, both from witnesses and in the deed held by the defendant, that the deed had been altered and was invalid. Therefore, it is doubtful that the application of the doctrine of the *Beatie* case was necessary for a proper determination of the issues in the case.

A purchaser of realty who purchases such without actual notice of an unrecorded interest in the realty takes perfect title to the realty. Therefore such purchaser can convey good title to another purchaser even though the latter has actual notice of the unrecorded interest.[34] This is true even though the last conveyance is by quit-claim deed, but such acquired interest is good only as against those prior equities to which the recording act applies and which could be recorded thereunder.[35] Also a purchaser with actual notice of an unrecorded interest can convey good title to a purchaser without actual notice of the interest.[36]

Another problem which may frequently arise here is that of agency. The same rules of agency apply here as in other transactions and an agent's knowledge will be imputed to his principal. Knowledge on the part of the agent which would be evidence of actual notice to him were he the purchaser, will be imputed to his principal.[37] In regard to this problem, the same attorney or broker often acts as agent of both the vendor and the purchaser. That agent will frequently have knowledge of the possession by a third party. The attorney or broker acting as agent of both the vendor and the purchaser should remember that he must reveal to the purchaser any circumstances of which he has knowledge which would affect the title to the realty.

The problem discussed herein arises less frequently in Missouri today than formerly. The commercial practices are such that a case will seldom arise today in which the purchaser of realty will not know of the possession of the realty by a third party. Land plays much less part in commercial transactions today than in past years, and the modern modes of transportation and communication make examination of the premises much easier for the absentee purchaser of realty—either personally or through an agent. Also the land speculation of early days where land was often bought and sold without examination of the premises is of little preva-

33. 16 Mo. 1118, 295 S.W. 763 (1927).
34. Drey v. Doyle, note 11, *supra;* Lemay v. Poupenez, 35 Mo. 71 (1864).
35. Hendricks v. Calloway, 211 Mo. 536, 111 S.W. 60 (1908).
36. Drey v. Doyle, *supra,* note 11; Bartlett v. Glasscock, 4 Mo. 62 (1835).
37. Hickman v. Green, 123 Mo. 165 (1894), questioned on another point in Morrison v. Juden, 145 Mo. 282 at 303 (1898); Meier v. Blume, 80 Mo. 179 (1883).

lence in Missouri today. But if a purchaser does buy without knowledge of an unrecorded interest or knowledge of possession under an unrecorded instrument, the Missouri cases contain adequate authority for a successful litigation of the question by such purchaser.

The purchaser of realty should not feel that the law of Missouri as set out in the foregoing discussion, as a practical matter, gives him a license to safely purchase realty without an examination of the premises to determine whether a third party is in possession. If a third party is in possession under an unrecorded instrument, and the matter gets into litigation, there is always the possibility that the possessor will be able to put in sufficient evidence to show that his possession was of such an open and notorious character that the jury will infer actual notice to the purchaser of the possessor's interest with little or no evidence that the purchaser in fact knew of the possession. There is the further possibilty that an agent through whom the subsequent purchaser may deal will have knowledge in fact of the possession by a third party under an unrecorded instrument, and this knowledge may be imputed to the purchaser. Under any circumstances the matter is almost certain to get into litigation. For the same reasons a purchaser of realty should never rely entirely upon a recorded lease where a tenant is in possession of the realty. An attorney giving a title opinion should always provide against the possibility that the realty is in the possession of a third party by inserting a provision in his opinion that the title is subject to the rights of any parties in possession. This provision will in no way affect the title which the purchaser gets, but will protect the attorney from liability and the client from litigation in the event there is a third party in possession under an unrecorded interest.

The foregoing discussion has been written without consideration of the National Housing Act.[38] What effect national control of housing in those areas subject to such control has upon the Missouri law on the problem herein discussed can be left only to speculation. But it is probable that the rights of a tenant under the federal act cannot be altered by the Missouri law in the case of a party purchasing property without actual notice that a tenant is in possession.

BRUCE A. RING

AN INCONSISTENCY IN JUDICIAL APPLICATION OF *Laissez Faire*

Political and economic theory must always face at some point the problem of the proper role of government both as it pertains to persons and to things. Granted that on the one hand a policy of pure *laissez-faire* has never characterized any government and that on the other no government can continue to exist without the acquiescence of the governed; the problem still remains as to the most desirable relationship between governmental power and the citizen. This is a problem in values but the social scientist may be able to shed some light upon the possibilities involved as well as the contradictions which frequently exist between explicit action and implicit assumption.

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38. Housing and Rent Act, 50 U.S.C.A. §1881 *et. seq.* (Supp. Pamph. 1951).

One area of even more confusion than most is that separating governmental intervention in economic activities and governmental intervention in civil liberties. It is urged on the one hand that any governmental action of a regulatory character automatically involves a diminution of individual freedom whether the regulation is directed at property or persons, while on the other it is often stated that the only manner in which men can hope to attain greater individual freedom is through the collective power of government.

Those who most vociferously object to the regulation of business enterprise frequently base their arguments upon the premise that any regulation of property rights constitutes an automatic invasion of personal freedom which is contrary to the democratic philosophy. It is not the purpose of this paper to either support or attack such a premise but merely to attempt to show that as the argument has sometimes been advanced by the members of the Supreme Court it has reflected some puzzling inconsistencies.

It is customary to think of the conservative justices sitting on the Supreme Court bench during the early 1930's as being reluctant to sanction governmental interference with business activities. In the main this popular conception is firmly based on the evidence, for VanDevanter, McReynolds, Sutherland and Butler objected frequently and at length to attempts on the part of the state and federal governments to regulate prices, competitive conditions, and employer-employee relations or contracts.

Analysis of the opinions which the above justices either wrote or to which they signified their approval has disclosed that in economic philosophy they indicated a remarkably close relationship to the *laissez-faire* economists.

It is not necessary to indicate agreement with a *laissez-faire* policy in order to recognize the logical consistency of such men as Jean B. Say, David Ricardo or J. R. McCulloch as long as their assumptions are granted, nor is there any need to quarrel with the ultimate goals of these men. Equating individual freedom with economic freedom was certainly entirely consistent with the conditions of free competition and known self-interest which they assumed. The Supreme Court justices VanDevanter, McReynolds, Sutherland and Butler, however, were by no means as consistent in the application of such a policy as were the economists whose philosophy they implicitly imitated.

An understanding of the distaste with which these justices viewed governmental interference with the operation of the economy can be gained from the *dicta* with which their opinions were so liberally salted. For example, *New State Ice Co. v. Liebman*[1] raised the question of whether a state could, through the use of the "certificate of public convenience" regulate entry into the ice business. The Oklahoma statute which had implemented such regulation was found by Sutherland to be unconstitutional, for "Plainly a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business,

1. 285 U.S. 262 (1932).

such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' "[2]

A number of other statutes were found equally objectionable by the conservative justices; among them the New York Milk Control Act, the Minnesota Mortgage Moratorium Act and the New York Wages and Hours Act. Justice McReynolds objected in strong language to the regulation of the price of milk which was accomplished by the New York Milk Control Act, and which the Court majority found to be permissible under the Constitution.[3] McReynolds' reasoning was also based upon the assumption that an interference with market prices constituted a diminution of individual liberty which was contrary to the Constitution. He said: "Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to standards long accepted—complete destruction may follow; but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefit to others. . . .

"The statement by the court below that—'Doubtless the statute before us would be condemned by an earlier generation as a temarious interference with the rights of property and contract . . . ; with the natural law of supply and demand' is obviously correct."[4]

Justice Butler objected to another New York statute on the grounds that individual liberties were invaded. This objection reflected the views of the majority of the Court with respect to the wage and hour law of that state. In this case, *Morehead v. New York* ex rel *Tipaldo*,[5] Justice Butler following the *dicta* of earlier cases,[6] declared: "The right to make contracts about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee fixing the wages to be paid. In making contracts of employment, generally speaking, the parties have equal rights to obtain from each other the best terms they can by private bargaining."[7]

The same group of justices objected to the federal government's efforts to guarantee collective bargaining,[8] to set aside the gold clauses in private and public

2. *Id.* at 278, citing Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924) and Liggett Co. v. Baldridge, 278 U.S. 105, 113 (1928).
3. Nebbia v. New York, 291 U.S. 502 (1934).
4. *Id.* at 557.
5. 298 U.S. 587 (1936).
6. Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923).
7. 298 U.S. at 610.
8. National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937); National Labor Relations Board v. Fruehauf Co., 301 U.S. 49 (1937); National Labor Relations Board v. Clothing Co., 301 U.S. 58 at p. 76 (1937).

contracts,[9] to modify the use of injunctions in industrial disputes,[10] and the states' power to modify a mortgage contract.[11] In each case the objection was stated in terms of the resulting diminution of individual freedom which presumably such regulation entailed.

In view of this record it would be logical to expect that VanDevanter, McReynolds, Sutherland and Butler would view governmental interference with civil liberties with equal repugnance. That is, if the government's attempts to interfere with the "normal" operation of the economy were rejected on the grounds that they unconstitutionally diminished the individual's freedom, consistency would seem to indicate that a direct regulation of the individual's freedom of expression would be similarly viewed. Such, however, was not always the case.

Near v. Minnesota[12] brought before the Court a state act which provided for the use of the injunction against businesses which made it a practice of publishing material of a scandalous or defamatory nature. The facts in the case were not contested. Indeed, excerpts from Near's publication included in the margin by Justice Butler indicate that he was engaged in the publication of an anti-semitic hate sheet. The problem before the Court, however, was larger than a mere evaluation of Near's publication, *The Saturday Press*. Speaking for the majority, which found the statute in violation of the First Amendment, Chief Justice Hughes summarized the situation as follows:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."[13]

Justice Butler, in spite of his usual concern that the individual's freedom be protected from governmental intervention, took the position that in this case the interference of the State of Minnesota was entirely justified. In his dissenting opinion, in which he was joined by Justices VanDevanter, Sutherland and McReynolds, he said:

> "The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodi-

9. Norman v. B. & O. R.R., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935).
10. Lauf v. Shinner and Co., 303 U.S. 323 (1938); Senn v. Tile Layers Union, 301 U.S. 468 (1937).
11. Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934).
12. 283 U.S. 697 (1931).
13. *Id.* at 713.

cals that in due course of judicial procedure has been adjudged to be a public nuisance.[14]

Attention must be called to the fact that the Minnesota statute was directed at preventing continuing publication on the basis of the past record of the publisher and that while *The Saturday Press* could by no stretch of the imagination be considered a publication with an acceptable record, the injunction was aimed not at the past sins of the periodical but at its future course. The publisher was to be enjoined from continuing in the business. This Butler condoned although he had repeatedly raised objections to state interference with the individual's right to "enter a common calling."

In this case, however, Butler did not emphasize the importance of the individual's "right" to carry on his business without outside interference; on the contrary he viewed the statute as one designed to preserve the "good order of [the] community." The shift in emphasis was significant. The very nature of the business in which Near was engaged had led the majority of the Court to find that the state had overstepped its powers by making that business subject to an injunctive order to cease operation. The very nature of the business however was the basis of Butler's finding that the statute should have been upheld as a constitutional exercise of the state's power. "The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion."[15]

It is also important to note that the Minnesota statute provided that a publisher hailed before a court to show cause as to why his publication should not be enjoined was required to show, not only that the material he published was true, but that it was published "with good motives." The breadth of such power is immediately apparent when the matter of proving "motive" is considered. As Chief Justice Hughes remarked, any attack upon a public official could be considered a scandal and the publication which had made the attack presumably enjoined from further publication under the terms of the statute.[16]

The justices who would have upheld this statute placed themselves in the position where they would condone governmental interference with the business of publishing material for the public to a greater extent than they would condone such interferences with the other types of business activity. This would appear to be an inconsistency in the reasoning of this group of Supreme Court Justices. In terms of the application of a *laissez-faire* policy it was. In terms of another attitude of these justices it was entirely consistent.

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14. *Id.* at 723.
15. *Id.* at 737-38.
16. *Id.* at 711.

A *laissez-faire* economic policy during the early 1930's was essentially conservative and most consistent with maintaining the *status quo*. The attitude of Butler which his opinion in the *Near* case reflected, was also conservative and essentially aimed at maintaining the *status quo*. He said: "The Act was passed in the exertion of the State's power of police, and this court is by well established rule required to assume, until the contrary is clearly made to appear, that there exists in Minnesota a state of affairs that justifies this measure for the preservation of the peace and good order of the State."[17]

The point is not whether or not the Minnesota statute should or should not have been upheld by the Suprmee Court but merely that the very members of the Court who were most opposed to governmental intervention in the economic activities of persons both real and corporate were not opposed to the type of intervention which the statute contemplated.

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17. *Id.* at 731.

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