

Missouri Law Review

Volume 24
Issue 2 April 1959

Article 4

1959

Editorial Board/Comments

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Recommended Citation

Editorial Board/Comments, 24 MO. L. REV. (1959)

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MISSOURI LAW REVIEW

Published in January, April, June, and November by the
School of Law, University of Missouri, Columbia, Missouri.

Volume 24

APRIL 1959

Number 2

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Subscription Price \$2.50 per volume

\$1.00 per current number

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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 269 (1920).

Comments

ARREST IN MISSOURI BY THE USE OF RADAR SPEEDMETERS

Shortly after the turn of the decade, an interesting and perhaps ominous creature made its debut into law enforcement in our nation. The device is not unknown to those engaged in work with the military, aviation and shipping; however it is

certainly an innovation in a court of law. Law enforcement agencies have found it a boon in detecting speed violators, and have engaged in using it to a wide extent.¹ The objections which come with the introduction into law enforcement of any new and untried scientific device are many, and this device has certainly found no exception to that general rule.

The name of the device is "Radio Ranging and Detection," or more popularly, radar. Since the radar unit has been introduced into law enforcement, it has met with a constant battle for recognition in the courts on what seems to be a case of desirability of law enforcement in the strict sense on the one hand versus adherence to strict rules of evidence and the desirability of the human element of judgment in law enforcement on the other hand. Opposition to the use of the device has been stringent in the contested cases, and perhaps as stringent in feeling in those cases in which the criminal defendant found it unprofitable to contest the case and paid a fine under the state of mind which accompanied the abolished plea of *nolo contendere*.

Although this Comment is being written for publication in Missouri it is incumbent that cases from other jurisdictions be cited, as at the time of writing no Missouri case has been decided at the reported (appellate) level. However, it seems fair to assume that when the problem is presented in the Missouri courts, the general trend of the decisions of other jurisdictions will be followed and certainly must be called upon for authority for both the prosecution and the defense.

From the reported cases, it appears that the device used in all jurisdictions is the same in principle, and possibly of the same manufacture. Therefore, the questions involved should not materially differ in Missouri as far as the accuracy of the device is involved, although the rules of evidence and arrest will be peculiar to the law of this state.

Perhaps the explanation for the dearth of authority on this subject in Missouri is found in the fact that a state speed law has not existed until very recently.² Although many municipalities in this state have long employed this device to enforce ordinances relating to speed, the use of the device upon the state highways is relatively new. It may well be that the bringing of the original proceeding in a state court rather than a municipal court will result in appellate cases on this subject which otherwise would not have been carried to them.

In the main, it may be stated that there appear to be four basic issues involved in the conviction of a defendant for speed violation detected by use of radar:

1. The accuracy of the device as a class of scientific instruments.
2. The accuracy of the particular device or unit used to detect the violation of this particular defendant. This may be called "functioning" of the radar unit at the time of the arrest.

1. Over 500 police departments in 43 states are using it. Comment, 23 TENN. L. REV. 784 (1955).

2. § 304.010, RSMo 1957 Supp.

3. The identification of the defendant as the speed violator in question.
4. Hearsay evidence, as it may relate to testing and setting the unit up, to identification, and to the arrest of the defendant.

The reported cases to date will be discussed in the order in which they may bear upon these four questions. Undoubtedly, there will be some "seeping through" as the issues are by their nature very closely interrelated to the entire picture.

ACCURACY

In accordance with the rules of evidence governing untested scientific devices, the earlier cases which were permitted to stand all contain testimony of the electronic and mechanical principles of the radar instrument itself. In most of these cases, the expert testimony was given by the same individual, Dr. John M. Kopper. This man's ability to qualify as an expert in the field is undisputable, in view of his experience with devices of this type, and his general experience and ability in the electronics area.³ In brief, his explanation may be somewhat paraphrased as follows:

The transmitter component of the instrument casts a beam in the path of the oncoming vehicle. The beam consists of microwaves at the frequency of 2455 megacycles per second. The vehicle becomes the beam's target. The beam strikes or illuminates the target, and in turn, is reflected or echoed back to the receiver part of the mechanism. The frequency of the waves so returning is different from the frequency of the waves originally transmitted. The faster the target approaches the radar device, within the zone of influence, the higher this difference between the two frequencies. Upon reaching the receiver, the returning waves mix with a portion of the energy radiated from the transmitter. This mixture creates a phenomenon called "beats." This phenomenon is analogous to that of beats in music, where, upon simultaneously striking two adjacent keys on a piano, the combined tones develop greater definition and intensity, resulting in an alternate rising and falling or throbbing of sound identified as such "beats."

It is to be inferred from Dr. Kopper's explanation that just as "beats" occur with combined sound waves of different frequencies, so can they also occur with intermingled radio or light waves of different frequencies. The number of such radio beats per second is equal to the difference between the frequency of the waves transmitted and that of the waves received; the said number of beats being directly proportional to the velocity of the target vehicle. Accordingly, the radar device has as its primary function, the measurement of the mentioned difference of the said frequencies, or the computation of the number of beats per second. Ultimately, the measurement is made in the form of an electrical quantity in terms of electrical current; the current being directly related to the number of beats. A

3. "Dr. Kopper has been on the staff of The Johns Hopkins University since 1937, and currently is serving in two capacities: (1) Research Scientist in the Radiation Laboratory; (2) Research Contract Director of various research projects." Kopper, *Symposium: Radar Speedmeters—The Scientific Reliability of Radar Speedmeters*, 33 N.C.L. Rev. 343 biog. note (1955).

scale can be made for such measurement and affixed to the radar apparatus, so as to translate the number of beats per second into miles per hour. In fine, the radar speedmeter is a "beat" or "pulse" frequency meter with its readings given in miles per hour instead of in beats per second.⁴

Perhaps to the novice in electronics, it is easier to think of this mechanical operation in terms of the so-called Doppler effect. We have all noticed the difference in frequency of sound as we approach an oncoming auto with its horn sounding. As it approaches, the frequency of the sound seems to increase, as is noticed by the pitch of the horn becoming higher; as it passes, we notice an immediate drop in the pitch of the sound. The faster the car approaches, the more noticeable the effect. The radio waves of the radar react in the same way, with the receiver serving the function of the ear, measuring the intensity of the change of frequency, and calibrating this change into miles per hour on a dial which is observed by the operator.⁵

It is understandable that the first attack in court of the use of radar would include, if not be based *in toto*, on the contention that the device is inaccurate and incapable of measuring the speed of the defendant's car. In the first reported case, *State v. Moffitt*⁶ such a contention was made. An expert appeared for the state and testified to the operation of the radar unit. The court instructed the jury that this device, as explained, was of the type that they might find accurate in the measurement of moving vehicles, if found to be properly functioning at the time of the arrest.

Next, and shortly thereafter, a series of New York cases were reported, and seem to be the cornerstone in this field of the law. The first of these is *People v. Offermann*.⁷ Although there are many interesting aspects of this case, only that dealing with the accuracy problem will be discussed at this point. The trial judge stated that he had personal knowledge of the accuracy of the device, as he and others in his car had tested it on location. Additionally, the radio technician of the police department was permitted to testify as an expert on the accuracy of the device. On appeal, it was held that the personal knowledge of the lower court so acquired did not come within the scope of judicial knowledge, and further, that the radio technician of the police department was not qualified as an expert in the field of electronics. The conviction was reversed.

In *People v. Torpey*⁸ no expert testimony was offered as to the functioning of the device. The court sustained a conviction of the defendant on the testimony of the officers that in their opinions the defendant was speeding, independent

4. This statement of operation is taken almost bodily from *People v. Nasella*, 3 Misc. 2d 418, 422-23, 155 N.Y.S.2d 463, 469-70 (Magis. Ct. 1958).

5. For the most detailed and complete description of the mechanics of the device that has been found, and that is cited in the cases, see Kopper, *Symposium: Radar Speedmeters—The Scientific Reliability of Radar Speedmeters*, 33 N.C.L. Rev. 343 (1955).

6. 48 Del. 210, 100 A.2d 778 (Super. Ct. 1953).

7. 204 Misc. 769, 125 N.Y.S.2d 179 (Sup. Ct. 1953).

8. 204 Misc. 1023, 128 N.Y.S.2d 864 (County Ct. 1953).

of the radar evidence. The court stated that the radar evidence would not be sufficient in itself to sustain a conviction, but was admissible to be weighed with the officers' estimates. The court points out that until such time as the courts recognize radar equipment as a method of accurately measuring the speed of automobiles, in those cases in which the law authorities rely *solely* upon the speed indicator of the radar equipment, it will be necessary to establish by expert testimony the accuracy of radar for the purpose of measuring speed.

The theory that an expert witness would be necessary if the state relied solely upon the radar unit for speed violation was supported in *People v. Katz*,⁹ a case arising in a different New York jurisdiction a few months after the decision in the *Torpey* case. There it was held that radar evidence when explained by an expert (Dr. Kopper) is sufficient, without more, for establishing a speed violation.

In *People v. Sarver*¹⁰ a hint at judicial notice of the accuracy of the device was made, but the court was working with a case in which Dr. Kopper had testified as an expert. In this case, Dr. Kopper testified that the device was within one to two miles per hour accurate. The court held the evidence admissible in this case, but could not base its holding upon the radar evidence as the arresting officer had sworn out the complaint against the defendant on the hearsay information supplied to him by the radar officer, which forced the court again to rely upon the estimated speed testimony of the officers involved.¹¹

Another case in the same court as the *Offermann* case again met with difficulty. In *City of Buffalo v. Beck*¹² the trial court took judicial notice of the accuracy of the radar unit, stating that the Doppler effect was recognized as being used. The court on appeal said:

The taking of judicial notice complained of by the appellant was not proper and the court below erred in so doing. The court failed to consider well-recognized rules which permit a trier of the facts to take judicial notice of what otherwise would require proof. The essence of judicial notice is that the trier of the facts, whether he be judge or juror, will assume as true for the purpose of the case before him, certain facts without requiring proof thereof. The fundamental justification for this legal phenomenon is that the trier of the facts possesses in common with the public, knowledge of facts of common occurrence and notoriety.¹³

* * * *

I must hold that the theory of the operation of this electrically operated device and the accuracy of its measurement of speed is not a proper subject for judicial notice at this time. Electronics is a recent development in the science embracing the mysteries of electricity. Certainly it cannot be said that such knowledge is 'notorious' as above described or that it is 'the general

9. 205 Misc. 522, 129 N.Y.S.2d 8 (Ct. Spec. Sess. 1954).

10. 205 Misc. 523, 129 N.Y.S.2d 9 (Ct. Spec. Sess. 1954).

11. For a somewhat different interpretation of *People v. Sarver*, see Baer, *Radar Goes to Court*, 33 N.C.L. Rev. 355, 376 (1955).

12. 205 Misc. 757, 130 N.Y.S.2d 354 (Sup. Ct. 1954).

13. *Id.* at 758-59, 130 N.Y.S.2d at 356.

knowledge of the 'country' nor is the operation of this device 'a practical application of scientific facts which are generally known or ought to be known.'¹⁴

The court then reversed as the record did not disclose whether the trial court relied upon the radar evidence or upon the testimony of the police officers of independent evidence of speed.¹⁵

State v. Dantonio, a New Jersey case, is perhaps the most frequently cited case in this field. There are two reported decisions on this case, one at the appellate level¹⁶ and one in the Supreme Court of New Jersey.¹⁷ The case is extremely interesting as the defendant bus driver was operating a vehicle which was equipped with a "tachograph," an instrument which records the speed of the bus permanently on a graph for later inspection by the company. Dr. Kopper testified for the prosecution and the defense countered with expert testimony on the accuracy of the tachograph. The graph from the tachograph indicated that the bus had not exceeded 61 miles per hour on the trip in question, yet the defendant was charged with travelling 66 miles per hour. Later, the same bus using the same tachograph was run through the same radar unit, and both recorded identical speeds. Both courts upheld the conviction on the basic theory that the accuracy of the devices was a question for the trier of the facts, and it had been resolved against the tachograph in favor of the radar unit. Other elements in the case made affirmance easy, for there was some discrepancy in the testimony of the expert on the tachograph plus the defendant's own admission of the length of time it took him to travel a certain distance on this particular trip which indicated that he must have been speeding at some point, for his overall average including stops was very near the 60 mile per hour speed limit.

Additionally the court held that expert testimony would no longer be necessary on the part of the prosecution in a radar speed case, although it was here present. This is the first holding by a high court that expert testimony as to the operation and construction of the radar unit will not be necessary in the future.

In *People v. Sachs*¹⁸ a lower New York court holds that expert testimony will not be necessary in the future, after hearing testimony by Dr. Kopper on the design of the instrument. However, the court is careful to lay out certain rules as to the "functioning" of the unit which must be proven in each case and will not be judicially recognized.

Until this time all the cases at the reported level were in the eastern states. Perhaps it will be well to discuss the two additional cases from that area, although somewhat out of order in point of time.

14. *Id.* at 760, 130 N.Y.S.2d at 357.

15. Compare this with *People v. Torpey*, *supra* note 8, where the court held the radar evidence admissible as additional evidence of speed, under similar circumstances.

16. 31 N.J. Super. 105, 105 A.2d 918 (1954).

17. *State v. Dantonio*, 18 N.J. 570, 115 A.2d 35 (1955).

18. 1 Misc. 2d 148, 147 N.Y.S.2d 801 (Magis. Ct. 1955).

*People v. Nasella*¹⁹ found Dr. Kopper on the witness stand for the prosecution again. The court held this would not be necessary in the future, saying that the time is here to dispense with the necessity of expert testimony and that even though this places speed contest cases on the basis of man v. machine, the scientific facts of the accuracy cannot be disputed. The court however lays great emphasis on the necessity of a properly functioning unit.

In *People v. Magri*²⁰ no expert appeared. The court held that this was proper, taking judicial notice of the accuracy of the radar unit as a class of scientific instruments. Thus the long battle was won.

There appear to be two decisions on this subject from the Supreme Court of Nebraska. The first, *Dietze v. State*²¹ involved a Greyhound bus which was saddled with a governor on the engine, designed to permit a maximum of 1900 revolutions per minute, calculated to permit a maximum speed of 60 miles per hour. The defendant was given a summons for travelling 70 miles per hour. At the trial, on the accuracy point no objection was made to the introduction of the radar evidence without expert proof and testimony. It was held that this issue could not be raised for the first time on appeal. The appellate court did hold, however, that since some of the obvious functional characteristics of the device were offered in evidence by the prosecution, and in view of the cases in other jurisdictions, it would not reverse on the accuracy point. It appears that this court is willing to waive expert testimony as to accuracy of the class of instruments, or at least it may be said that its decision has this result. The case was reversed on the grounds of prejudice of the trial judge.

The second Nebraska case, *Peterson v. State*,²² again finds the defendant not complaining of lack of expert testimony as to the accuracy of the class of instruments, but rather merely as to the accuracy of the unit in question. The court holds that the unit in question was properly functioning and goes on to the defendant's contention that radar evidence *alone* is insufficient for conviction. The court fails to meet this issue squarely and finds that the officers making the arrest did in fact testify at the trial as to their estimates of the defendant's speed, which was above the speed limit:

On recross-examination he [the officer] testified that his estimate was based on his observation of the vehicle and that his opinion was not influenced by the reading made by the speed meter.²³

Therefore, it appears that the Supreme Court of Nebraska will admit radar evidence, without expert testimony as to the operation of the class of instruments, so long as there is *some* testimony as to its functioning. Further, it appears unclear

19. 3 Misc. 2d 418, 155 N.Y.S.2d 463 (Magis. Ct. 1956).

20. 3 N.Y.2d 562, 147 N.E.2d 728, 170 N.Y.S.2d 335 (1958).

21. 162 Neb. 80, 75 N.W.2d 95 (1956).

22. 163 Neb. 669, 80 N.W.2d 688 (1957).

23. *Id.* at 674, 80 N.W.2d at 692.

whether Nebraska will permit a conviction to stand if it is based on radar evidence alone, without testimony from the arresting officers that the defendant was speeding in their opinion, independent of the evidence presented by reading the radar speed-meter.

One case from the Supreme Court of Tennessee has been reported. In *Hardaway v. Tennessee*²⁴ we again find Dr. Kopper in his usual role as expert for the prosecution. Although this case presents some interesting points on "functioning" it differs little on the accuracy question. The court held that in view of the expert testimony the radar evidence alone would suffice for conviction, and that no estimate of speed independent of the radar evidence was necessary.

Virginia has seen fit to enact a statute which relieves the prosecution of the burden of proving the theory of the device by expert testimony in each case.²⁵ This statute was held constitutional on an attack of due process in *Dooley v. Commonwealth*²⁶ the court saying that the statute merely provides a presumption of accuracy, shifting the burden of going forward with the evidence to the defendant.²⁷ There are many other desirable features of this statute which will be discussed below.²⁸

From the foregoing it is seen that New York has actually upheld a case wherein no expert was offered on the accuracy of the class of instruments, that New Jersey has authorized dispensing with expert testimony in the future, and that Nebraska may be said to have done the same. However, even to concede the accuracy of the

24. 302 S.W.2d 351 (Tenn. 1957).

25. VA. CODE ANN. § 46-215.2 (Supp. 1958), which provides:

(a) The speed of any motor vehicle may be checked by the use of radiomicro waves or other electrical device. The results of such checks shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue.

(b) The driver of any motor vehicle may be arrested without a warrant under this section provided the officer is in uniform or displays his badge of authority; provided that such officer has observed the recording of the speed of such motor vehicle by the radiomicro waves or other electrical device, or has received a radio message from the officer who observed the speed of the motor vehicle recorded by the radiomicro waves or other electrical device; provided in case of an arrest based on such a message that such radio message has been dispatched immediately after the speed of the motor vehicle was recorded and furnished a license number of the vehicle and the recorded speed to the arresting officer.

(c) No operator of a motor vehicle may be arrested under this section unless signs have been placed at the State line on a primary highway system, and outside cities and towns having over 3,500 population, on the primary highways to indicate the legal rate of speed and that the speed of motor vehicles may be measured by radiomicro waves or other electrical devices. . . .

26. 198 Va. 32, 92 S.E.2d 348 (1956).

27. *Royals v. Commonwealth*, 198 Va. 876, 96 S.E.2d 812 (1957), discussed *infra*, holds that the Virginia statute does not dispense with the necessity of proving that the machine has been properly set up and recently tested for accuracy.

28. See also *People v. Beamer*, 130 Cal. App. 2d 874, 279 P.2d 205 (App. Dep't. 1955) holding that use of the radar device is not prohibited by the California "speed trap" statute. For a case somewhat out of line with the other authority on this subject, strongly in favor of prosecution, see *State v. Ryan*, 48 Wash. 2d 304, 293 P.2d 399 (1956).

instrument in general is a far cry from conceding the correctness of the functioning of a particular instrument on a particular occasion.

FUNCTIONING

The word "functioning" is employed in this Comment to describe the operational aspects of the device as it effects the accuracy of the particular unit at the time used. This necessarily involves the manner in which the device is used, and the manner in which it is set up and tested prior to such use. Assuming that the accuracy of the class of instruments has been established, the problem of establishing the accuracy of this particular unit still remains. Although it may have been tested for accuracy at the place of manufacture, it cannot be assumed that it will still be accurate a year later, or even a day later, after having been moved from place to place and after having been subjected to abuse of normal usage.

It is in the area of functioning that real problems arise, and that the defendant will either be subjected to abuse by the use of the apparatus, or will have his rights adequately protected. It seems that this cannot be overemphasized, for here we have man v. machine, a type of justice which may be forthcoming but a type of justice that must insure to the maximum degree that at least the machine is working right. The weight of the radar evidence in a jury case is very impressive when accompanied with testimony of the experts and the arresting officers. The officers can be expected to be very positive in their statements of accuracy of the unit as it is logical to assume that they do in fact believe that the speed recorded by it is correct. However, it may well be that as a result of using the unit for an extended period of time the officers have come so to rely upon its accuracy that they become lax in insuring the accuracy of the unit with which they work. It is here that the courts must seek, and have sought, to protect the defendant from abuse. In this type of prosecution the court must scrutinize the operation of the machine carefully to *insure* that it was properly functioning at the time of the particular arrest. That it is *usually* or *generally* accurate is not proof enough. That it was accurate *yesterday* or at a *different location* is not enough. The prosecution must be held to prove that it was accurate when the defendant was summoned. This problem is particularly pointed up when the defendant is accused of exceeding a speed limit by only a few miles per hour, in view of Dr. Kopper's testimony that the device "is within one to two miles per hour accurate" *when properly functioning*.

The usual method of operating the radar unit is as follows: Two officers in two vehicles are used. The radar equipment is placed in one vehicle, usually in a somewhat permanent manner. The vehicle containing the radar equipment, called the radar car, is placed alongside the street or highway in a normal parking position or is located in a driveway or convenient side street. The second car and officers are located a short distance away from the radar car farther down the roadway. Generally the two units are placed in such a manner that they are inconspicuous to the motorist. The two vehicles are in communication with each other by police radio, and in the better operations are in view of each other. As the violator passes through the radar unit's zone of influence the radar operator observes the

speed indicated by the speedometer and radios the information ahead to the officer in the pick up car. The officer in the pick up car then stops the motorist and issues a summons.

The radar car must of course be located in such a manner that the operator can see the oncoming traffic so as to enable him to determine which vehicle is recording the speed on the meter. He will know approximately where the target vehicle enters the zone of influence and where it leaves the zone, this information aiding him in his identification of the vehicle if in violation. The target vehicle causes the dial on the radar unit to reflect the speed of the vehicle in miles per hour, the dial appearing much as the familiar speedometer in common use in automobiles. Many of the radar units are also equipped with what is called a graph instrument. The graph paper is fixed on one spool, and runs or winds onto a blank spool during the period of operation. As the target vehicle comes through the zone of influence, the speed thereof is recorded on the graph in ink, the inking arm of the apparatus moving across the graph from a position of zero to a position on the calibrated graph paper equivalent to the speed reflected on the dial of the instrument. The desirability of this feature is readily seen, as it eliminates the element of human error of the operator in misreading the dial, as the dial returns to zero with the passing of the target vehicle giving no permanent recordation of the defendant's speed.

Dr. Kopper points out that in his opinion the average policeman can learn to use the radar speedometer after about one and one-half to two hours of instruction. He need not know the details of design and construction of the unit any more than he needs to know those of the speedometer in his patrol car. Assuming that the operator is sufficiently trained in using the instrument, Dr. Kopper then makes the following recommendations in the use of the device:

1. Check for accuracy at each location where the unit is used, both before and after use:

It is important to check the meter for accuracy each time it is set up for use; if the meter is to be used at two sites in one morning then it should be checked at each site to avoid the contention that the meter was thrown out of adjustment during transit. The meter should be checked before the beginning of the period of observation of a highway and at the end of the period. In scientific work it is usual to assume that if a given instrument reads correctly at the beginning and ending of a set of measurements, its readings during the interval were also correct. The check can be made by having a car with calibrated speedometer run through the zone of the meter twice, once at the speed limit for the zone and once at a speed ten or fifteen miles per hour greater. As the test car goes by the meter the driver can notify the operator of the meter what his speed is. If the difference between the speedometer reading and the radar meter is more than two miles per hour, steps should be taken to see why this is the case and to remedy the matter.²⁹

29. Kopper, *Symposium: Radar Speedmeters—The Scientific Reliability of Radar Speedmeters*, 33 N.C.L. REV. 343, 353 (1955).

The Supreme Court of Virginia, in *Royals v. Commonwealth*³⁰ held that failure to test the radar unit in the above described manner was fatal to the case for the prosecution and reversed the conviction of the lower court. In a companion case³¹ the same court held that failure to test after the use of the device was also fatal, although it had been tested at the beginning of the tour. It is interesting to note that the Virginia court was working under a statute³² stating that the instrument is prima facie correct. Commenting, the court says:

It [the statute] does not eliminate the necessity for the Commonwealth to prove that the machine used for measuring speed had been properly set up and recently tested for accuracy.³³

In *People v. Magri* evidence was offered that a test had been made in conformity with the above, but it was excluded on the grounds that the officers who were operating the device at the time of the recording of defendant's speed were not the officers who had run the test, and therefor their testimony of the test information was hearsay. The court upheld the conviction, however, on the testimony of the officers that in their opinion the defendant was exceeding the speed limit, independent of the radar information, saying:

Were the only evidence here that of the untested radar equipment, we would hold, as in the case of an untested automobile speedometer, that such evidence is insufficient to sustain a conviction for speeding.³⁴

Two other cases seem worthy of specific comment in this area. The first is the sole Tennessee case reported.³⁵ The report recites that evidence of testing was presented. However, the operation in that case consisted of a single officer, driving the radar equipped car, doing both the timing and arresting of the violator. From the report it appears that the officers would pull his radar equipped car to the side of the road, time vehicles as they drove through the zone of influence, and then pursue and arrest violators as indicated by the radar equipment. Although the court seems to be satisfied with the evidence as offered as to testing, it appears that this mode of operation would not be conducive to the rigid method of testing every time the unit is moved that has been required by other jurisdictions.

The second unusual case is the sole reported case from the state of Washington.³⁶ In this case the defendant contended (on appeal) that sufficient testing had not been made prior to the use of the equipment. The court took the view that this roadside testing was unnecessary, for the radar equipment is, according to this court, more accurate than a speedometer, and any discrepancy between the radar and the speedometer would only indicate that the speedometer in the test car was inaccurate.³⁷ A

30. 198 Va. 876, 96 S.E.2d 812 (1957).

31. *Royals v. Commonwealth*, 198 Va. 883, 96 S.E.2d 816 (1957).

32. VA. CODE ANN. § 46-215.2 (Supp. 1958), quoted *supra* note 25.

33. 198 Va. at 881, 96 S.E.2d at 816.

34. 3 N.Y.2d at 566-67, 147 N.E.2d at 731, 170 N.Y.S.2d at 338.

35. *Hardaway v. Tennessee*, 302 S.W.2d 351 (Tenn. 1957).

36. *State v. Ryan*, 48 Wash. 2d 304, 293 P.2d 399 (1956).

37. It is perhaps noteworthy that the *Ryan* case is not cited in later cases in other jurisdictions.

dissent is also reported, which states that the roadside test is indispensable and that the radar evidence should have been excluded. The dissenting judge would have affirmed the conviction on the ground that the officers testified to a speed violation independent of the radar evidence. This would have brought the case within the doctrine of the *Magri* case.

This raises a problem which seems to be unsettled in many states, involving the necessity of producing evidence on the accuracy of the speedometer in the test car. Preliminary research on this question has disclosed no Missouri case in point, and what may well be termed a dearth of authority in most other states.³⁸ However, it may be stated the English view on the matter is that the speedometer is accepted as being prima facie correct³⁹ and this view is followed in at least one American case involving the testing of radar equipment with the speedometer in question.⁴⁰ A contrary view does exist, to the effect that testimony of the testing of the automobile speedometer within a reasonable time prior to the date in question is necessary to render evidence of the reading admissible. In *People v. Heyser*⁴¹ it is said:

In our opinion, evidence of the reading of an untested speedometer without more would be insufficient to sustain a conviction for speeding.⁴²

The court upheld a conviction in the *Heyser* case of driving 60 miles per hour in a 40 mile per hour zone, on the officers' estimate of violation of the 40 mile per hour limit, when the officer had followed the defendant in light traffic for two miles.⁴³

Dr. Kopper also states that the unit must be placed in such a manner that vehicles in the opposite lane of traffic will not be detected by the unit, as "the meter reads the speeds of both oncoming and receding vehicles with equal accuracy."⁴⁴ This seems to be a matter requiring the utmost care on the part of the officer operating the device, particularly when the unit is being operated in an area of dense traffic.

Another feature of the device is that it will record the highest speed within the zone of influence at one time. Thus, if two moving objects are within the zone, the

38. Annot., 21 A.L.R.2d 1200, 1202 (1952), which states:

Whether the dearth of American authority on the point is any indication that the American courts are committed to a negative view as to the presumption of accuracy, it is impossible to say. It should be observed, however, that in many of the American cases there has been a failure to object to the introduction of such evidence on the ground that the measuring instrument has not been tested for accuracy. In other cases, proof of accuracy has been accepted, and so no presumption was needed.

39. *Nicholas v. Penny*, [1950] 2 K.B. 466.

40. *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957).

41. 2 N.Y.2d 390, 141 N.E.2d 553, 161 N.Y.S.2d 36 (1957).

42. *Id.* at 393, 141 N.E.2d at 555, 161 N.Y.S.2d at 38.

43. See also *People v. Magri*, 3 N.Y.2d 562, 147 N.E.2d 728, 170 N.Y.S.2d 335 (1958). It is rumored that some police agencies use their radar equipment to test the speedometers in their patrol cars. If this is so, it is possible to conceive a situation where each is used to test the other.

44. Kopper, *Symposium: Radar Speedometers—The Scientific Reliability of Radar Speedometers*, 33 N.C.L. Rev. 343, 352 (1955).

fastest moving of the two will be recorded. This again raises special problems where heavy traffic is involved in the matter of identification of the proper party to receive the summons. This will be discussed below at greater length. However, it is seen that a swinging sign, flying bird, wind blown paper or even a leaf could cause the dial of the unit to reflect a greater speed than that of the vehicle under observation. Dr. Kopper points out however, that these events will usually reflect only for a "short duration and can be properly interpreted"⁴⁵ by a competent operator.

Also it is pointed out that certain other types of electronic devices, such as diathermy machines used by hospitals, may cause the radar to reflect an inaccurate reading. But this again can be interpreted by a competent operator as it will result in "jumps" of the dial.⁴⁶ However, it would seem that an opportunity for error would be present, in the remote situation where the diathermy machine or other device is turned on while the target vehicle is in the zone of influence.

Changing weather conditions, temperature changes, and the like, could also affect the accuracy of the unit, but if the unit is not used for an extended period of time this would seem to be minimal. It would seem desirable that the officer operating the unit note on the graph sheet the time and weather conditions at the beginning and ending of the period of operation in the event a condition change should be used as a defense to the accuracy of the unit.

Aging parts and general wear, along with the battery of the radar car going down, as well as distance from the roadway at which the unit is placed, all resolve themselves in the motorist's favor. This is due to the fact that less "beats" would be transmitted and reflected back, thus resulting in something less than the true reading of the speed of the target vehicle.⁴⁷

In *People v. Sachs* the court first states that judicial notice will be taken of the accuracy of the class of instruments in future cases, then states:

It is from that point of acceptance that the court should require operative and mechanical proof to the effect that—

1. The radar car was properly set up in its detecting location.
2. The radar instruments used were working.
3. The apprehending car was set in its own location.
4. That both cars were visible to each other at a reasonable distance.
5. That a motorcycle or other vehicle equipped with a calibrated speedometer had been used at the beginning and the end of the tour to test the accuracy of the radar set; the manner in which tests were made.
6. The graph sheet shows the results of these tests.
7. That the speedometer on the motorcycle or other vehicle had been tested in the manner hereinbefore described [with a master speedometer] and found to be accurate.
8. The radar car officer observed the speeding vehicle as well as any other vehicle, and his description of the speeding vehicle.

45. *Id.* at 352.

46. *Id.* at 351.

47. *Id.* at 352.

9. The defendant was apprehended, and what the apprehending officer did to insure that the proper defendant was served with the summons. It would seem that the defendant under this method of proof is fully protected in his rights.⁴⁸

Thus it is seen that many considerations present themselves in determining the accuracy of the particular unit at the time of summoning a particular defendant. Although these safeguards may be perplexing to some agencies using this device, it would appear reasonable to require compliances with standards at least as stringent as above discussed, as many defendants will have their only contact with the criminal law as a result of a summons for speeding, detected by radar.

IDENTIFICATION

The area of identification of the violator seems to present two problems. First, can the radar operator sufficiently identify the violator, when two vehicles are in the zone of influence at the same time? This goes to the knowledge of the radar operator himself. Second, once the radar operator does know the violator, has he sufficiently identified his vehicle so that the pick up officer knows which motorist to serve with the summons? This goes to the knowledge of the pick up officer.

In dealing with the first problem, it is convenient to quote from Dr. Kopper's article again for clarity:

An important feature of the speedmeter is that it will read the higher of the speeds of two cars running simultaneously through the zone at different speeds. If two cars are running abreast of each other at the same speed through the zone the speedmeter cannot tell which car is being observed, but its reading will be the speed of either of them. It is then up to the operator to ascertain that the cars are traveling abreast of each other. If one is passing the other the speedmeter reads the higher of the two speeds.⁴⁹

In *People v. Sachs* the defendant contended that she was being passed by another vehicle at the time her car passed through the zone of influence. The radar operator testified that he could sufficiently distinguish between the "blips" so as to determine which car was speeding, even when several cars were in the zone of influence at the same time. The court points out that this was submitted to the trier of facts and resolved in favor of the officer and against the defendant, and that such a finding would not be upset. The court recites with approval the method of operation of the radar team, which included the viewing of the violator by the radar officer all the way to the point of apprehension by the pick up officer, and communication by radio at that time that the proper motorist was being served with the summons.

This raises the other point above, the problem of communicating to the pick up officer information of such sufficiency as to insure his arresting the proper motorist. Only one case seems to be directly in point. In *People v. Sarver*⁵⁰ the radar officer

48. 1 Misc. 2d at 156-57, 147 N.Y.S.2d at 809.

49. Kopper, *supra* note 44, at 352.

50. 205 Misc. 523, 129 N.Y.S.2d 9 (Ct. Spec. Sess. 1954).

identified the violator only as "the green truck." The court held that this was sufficient under the circumstances of the arrest.⁵¹

It therefore appears that as to the communication between the officers, identification is a matter of fact to be established upon trial. Undoubtedly, the "dark sedan" during night hours would not be sufficient, whereas the "green truck" during daylight hours was sufficient. As a matter of comment, it would seem that great care should be exercised in this area, for certainly punishing one man for another man's violation is to be avoided at all costs. An error such as this would certainly breed great hostility toward the parties and agencies involved as well as the criminal law in general.

HEARSAY

In several of the reported cases some contention has been made of a hearsay evidence objection.⁵² In only two of the cases has the objection been fertile.

In *People v. Offermann* a hearsay objection was made when the officer in the pick up and test car testified that his speedometer read the same as the radar speedometer when he drove through, and vice-versa. The conviction was reversed for this and other reasons. This defect was cured in the next reported case, *People v. Torpey*, by merely having the test car officer and the radar car officer testify as to the readings on the instruments in their respective vehicles at the time of the test.

The second case in which the hearsay contention was successful is *People v. Sarver* wherein the court holds that the complaint which was filed by the arresting officer rather than the radar officer was based on hearsay information as to the defendant's speed. In this case, however, the conviction was not reversed as sufficient evidence of violation was presented by the testimony of the officers that in their opinion the defendant was travelling in excess of the speed limit, independent of the radar information.

He testified that the defendant's car approached him at a speed of approximately thirty-five miles per hour, so that he could be said to have personal knowledge of the violation. If the city's evidence of speed was solely confined to the speed meter graph, it would seem that officer Rabbitt, who was operating the speed meter, would be the logical person to swear to the information.⁵³

This language raises certain problems and questions of tort liability in the area of false arrest and false imprisonment which will be briefly discussed later.⁵⁴

51. Apparently, no other green truck was in the area.

52. *State v. Dantonio*, 31 N.J. Super. 105, 105 A.2d 918 (1954); *People v. Sarver*, 205 Misc. 523, 129 N.Y.S.2d 9 (Ct. Spec. Sess. 1954); *People v. Torpey*, 204 Misc. 1023, 128 N.Y.S.2d 864 (County Ct. 1953); *People v. Offermann*, 204 Misc. 769, 125 N.Y.S.2d 179 (Sup. Ct. 1953); *Hardaway v. Tennessee*, 302 S.W.2d 351 (Tenn. 1957); *State v. Ryan*, 48 Wash. 2d 304, 293 P.2d 399 (1956).

53. 205 Misc. at 527, 129 N.Y.S.2d at 12.

54. See Annot., 49 A.L.R.2d 469, 476 (1956), which states:

Although no case upon the subject has been discovered, it has been suggested that arrests made in the normal operation of a radar device may be illegal

In the *Dantonio* case a hearsay objection was made in regard to testing the equipment, much as in the *Offermann* case. The court had little trouble disposing of this contention on the same theory as the *Torpey* case; that each officer merely testified to the reading of his own instrument. It is seen that it is necessary for both officers to appear and that this line of objections easily avoided by establishing the reading of the instruments within their respective view at the time of the check.

A rather weak attempt at a hearsay objection is found in *Hardaway v. Tennessee*. The defendant contended that the evidence was not "within the presence" of the officer, but the court holds that this instrument is the same as the speedometer in this regard, and that the officer who saw the instrument made the arrest. This is the case wherein the same officer and car were used for both the timing and the arrest.

In the Washington case⁵⁵ it would seem that the most valid hearsay contention of all was raised. Here, the defendant contended that it was improper for the officer in the pick up car to testify to the speed of the defendant's vehicle. The defendant also alleged a false arrest based on hearsay information. However, the court in affirming the conviction held that since the case was tried to the court, and the court sustained the objection to the evidence on the trial, it would be presumed that the court as trier of fact would disregard the testimony. Apparently Washington follows the common law on matters of arrest.

It would seem that the objection made in the Washington case would be valid in Missouri, as Missouri follows the common law rules of arrest except where changed by statute.⁵⁶ As is stated in *State ex rel. Patterson v. Collins*:⁵⁷

Except for situations where the right is specially given by statute, a peace officer has no authority, without a warrant, to arrest a person charged with the commission of a misdemeanor unless the offense was committed in the officer's presence.⁵⁸

It is therefore seen that a great question exists as to whether the arrest or summoning of the speed violator by the officer in the pick up car, based solely upon information transmitted to him over police radio, is "in his presence" as above stated. As the dial is viewed only by the radar officer, and the results transmitted to the pick up officer over police radio, it is seen that the pick up officer does not have personal knowledge of the violation and must rely upon the communication from the radar officer. Should it be held that this information is not "in the presence" of the arresting officer, then it would seem that his action is both tortious and criminal.⁵⁹

in jurisdictions where an officer is forbidden to make an arrest without a warrant except where the offense is committed in his presence, since the officer in the advance car, who apprehends the driver, relies only upon information radioed ahead by the officer in the radar car.

55. *State v. Ryan*, 48 Wash. 2d 304, 293 P.2d 399 (1956).

56. See §§ 84.090, .440, RSMo 1949, authorizing arrest on suspicion of misdemeanor in St. Louis and Kansas City.

57. 172 S.W.2d 284 (St. L. Ct. App. 1943).

58. *Id.* at 291.

59. § 558.190, RSMo 1949, provides:

If any sheriff or other officer, or any person pretending to be any officer,

If this is in fact an illegal arrest, then it is obvious that a civil action would lie against the arresting officer for false imprisonment. In the event the officer should jail the defendant rather than merely summon him, the damages would be something greater than nominal, to say the least.⁶⁰

The possibility of a defense to the criminal action on the theory that an illegal arrest is involved is a more difficult question. It is held in Missouri, and most common law states, that a police officer has no authority to arrest on mere suspicion that a misdemeanor has been committed, in the absence of a statute to the contrary, and the misdemeanor must be committed in the presence of the arresting officer to constitute a legal arrest.⁶¹

Since the *Sarver* case indicates that it was improper for the pick up officer to file the complaint, it would seem that the court is holding that the violation was not committed in the presence of the pick up officer. Would it follow that the arrest by the pick up officer is illegal? Would it follow that this is the explanation of that holding? Perhaps so. The question remains whether this arrest, if illegal, would provide a defense to the criminal action if the complaint is filed by the radar officer on information gained by the pick up officer as a result of the illegal arrest.

In Missouri, it is held that an arrest has been made when an officer commands the motorist to stop, and the defendant does stop in obedience thereto.⁶² Therefore, it would seem that if the officer has no authority to arrest for a misdemeanor unless committed in his presence and the speed violation is not committed within the presence of the pick up officer, and if stopping upon command constitutes an arrest, the detention of the motorist in this case would constitute an arrest, and for the above reasons, an illegal arrest. In this case, however, the officer merely issues a "summons" to the violator (in all the reported cases) and does not take him to the county jail. Does this change the situation? Research has disclosed no authority in Missouri for

under color or pretense of any process or other legal authority, arrest any person, or detain him against his will, or seize or levy upon any property, or dispossess anyone of any lands or tenements, without due and legal process, or other lawful authority therefor, he shall, upon conviction, be adjudged guilty of a misdemeanor.

60. PROSSER, LAW OF TORTS § 12 (2d ed. 1955), states:

False imprisonment is the confinement of the plaintiff within boundaries fixed by the defendant, without legal justification, by an act or breach of a duty intended to result in such confinement.

61. *State v. McBride*, 327 Mo. 184, 37 S.W.2d 423 (1931); *State v. Gartland*, 304 Mo. 87, 263 S.W. 165 (1924); *State v. Owens*, 302 Mo. 348, 259 S.W. 100 (1924) (en banc); *State v. Dunivan*, 217 Mo. App. 548, 269 S.W. 415 (Spr. Ct. App. 1925). 1 ALEXANDER, THE LAW OF ARREST § 77, at 447 (1949) states:

There is no inherent right, power or authority of any person, officer or nonofficer, to arrest for any misdemeanor not committed in his presence; and where there is any it must be expressly conferred by statute. It is questionable whether a mere local ordinance or traffic rule could confer it; as the matter of arrest is important enough for constitutions or general laws only! And, it is repeated here, that it is of the utmost importance for officers, as well as nonofficers, to know what are misdemeanors.

62. *State v. Dunivan*, *supra* note 61.

the "summons." It appears that the "summons" or "citation" is given to the motorist as a matter of courtesy, and informs him that if he fails to appear at the appointed time and place a warrant for his arrest will issue and he will then be forcibly brought before the appointed person. What then is the "summons"? It is issued in connection with a technical arrest as the mere stopping of the defendant against his will is held to constitute an arrest.⁶³ Perhaps the "summons" can be considered as a lesser included power to arrest, with the net effect that the violator is released upon his own recognizance at that time, a breach of which will cause a warrant to issue. If the arrest is complete when the defendant is stopped against his will it is difficult to see how the arrest is any more legal or could be considered legal merely because the officer issues a "summons" instead of carting the defendant off to the county jail. It is entirely possible that if the defendant attempted to leave the location of the arrest prior to the issuance of the "summons," he would be detained by the pick up officer by the use of all necessary force to effect the detention.⁶⁴

Assuming and not concluding that the arrest is in fact illegal, the question of a defense to the criminal action for the misdemeanor because of the illegal arrest still remains. Even if the arrest is illegal, will this be a defense to the prosecution of the speeding violation? This will be determined by the ruling on a timely motion to suppress the evidence gained by the pick up officer as the product of his illegal act.

What is the evidence gained by virtue of the illegal arrest? Nothing is taken from the defendant. The only evidence the pick up officer obtains is the identification of the violator. As a practical matter, the radar officer in the two-men operation cannot know the absolute identity of the driver of an automobile passing through the zone of influence. He may be able to identify the vehicle well enough that he can describe it sufficiently to the pick up officer, but he cannot know the identity of the driver sufficiently of his own knowledge to swear in court that "this man" was the driver of the violating vehicle. He cannot know the identity of the driver well enough and certain enough to cause a complaint to be filed against him. Practically speaking, the best he can hope to do is to obtain a description of the vehicle and perhaps a few numerals of the license plate, in his fleeting glimpse of the violator. The pick up officer is the person who really "ties down" the identity of the violator, for when he "arrests" him, he has opportunity to examine the operators license and other papers on the person of the driver of the vehicle.

The argument against suppressing the evidence obtained by the pick up officer in this situation is something like this: The general rule is that an illegal arrest is no defense to a criminal action. This concededly, is true, and is as it should be. How-

63. *Ibid.*

64. Woodbridge, *Radar in the Courts*, 40 VA. L. REV. 809, 810 n.1 (1954). In commenting on the Virginia statute quoted in note 25 *supra*, Woodbridge says:

Section (b) is obviously desirable since in the absence of statute an officer has no right to arrest for a misdemeanor not committed in his presence unless he has a warrant. In the case of two-man teams the misdemeanor is committed in the presence of the one who takes the reading and not in the presence of the one who effects the arrest.

ever, the fact situations to which the general rule is applied involve a different situation than here involved. The state has evidence, *obtained by lawful means*, upon which to prosecute the accused; a police officer effects an illegal arrest, either extra-territorially, by trick, or upon some false ground. In this case, all information gained by the officer performing the illegal arrest can be suppressed, but of course all good and lawful evidence obtained by other means cannot be suppressed. Therefore, once the defendant is in custody, the state can proceed against him with the lawful evidence. The mere fact that the defendant is in custody by virtue of an illegal arrest is no defense to the criminal prosecution, provided the state has evidence other than that obtained during the illegal arrest. It is obvious that if the state gains the evidence necessary to the prosecution by virtue of the illegal arrest, it can be suppressed and the prosecution will fail. Therefore, the general rule applies only to taking custody of the body of the defendant, reducing him to possession so to speak, and does not have the broad effect that the mere statement of the rule might convey to the novice.

Can the general rule apply to the case in question? Here, the information necessary to the state's case is obtained by and through the arrest. If the cases allowing evidence to be suppressed if obtained by illegal arrest are applied to this type of evidence, that is, the identification of the defendant, it would appear that the general rule would not apply, and therefore the illegal arrest would be a valid and good defense to the criminal action.

In the liquor cases, arising during prohibition, the area of authority of police officers to arrest without warrant for misdemeanors is clearly set out. It is perhaps unfortunate that the law was laid out in cases involving the antiquated crime of possession of liquor, for the cases tend to be categorized as liquor cases and discounted on that ground. This is unfortunate, for the severity of the penalty in those cases explain their appeal, and few other misdemeanor cases are reported as the penalty imposed seldom warrants appeal. In many of the liquor cases statements against fruitful prosecution are made. This should indicate their value, for they are discounted in importance by the feeling that the rules laid down in them extend the lawful powers of arrest wherever possible in order to obtain convictions. This may have been the case in some jurisdictions, but not so in Missouri. The Missouri court "kept its head" during this era, and applied the law as it existed to those cases and did not become overzealous in favor of prosecution to the extent of "bending" the law.

This is to say that the cases should not be discounted merely because they involve liquor during prohibition, but should be carefully considered for the rules of arrest in misdemeanor cases as expressed in them.

Among the leading cases of that era is *State v. Owens*.⁶⁵ In this case, the sheriff of Stone County, Missouri had been informed by his deputy that someone was in possession of liquor. The sheriff, eager to do his job well, detained the defendant

65. 302 Mo. 348, 259 S.W. 100 (1924).

in front of a restaurant, "seized him, and took a pint bottle of whisky out of Owens' hip pocket. The sheriff, according to his own account of the matter, tempered this violence with a gentle touch, for Owens 'never hollered nor made no big noise' in protest of the unconventional proceeding."⁶⁶ The Supreme Court of Missouri, White, J. writing for the court, delivered an opinion of particular clarity of expression, and points out that misdemeanor cases are such that a police officer has no authority to arrest on suspicion. Further, that these cases are to be distinguished from those involving suspicion of felony, and those wherein the officer sees the misdemeanor committed. The reasons for this rule of law are explained ably, and many cases from other jurisdictions are reviewed.

The basis of the appeal in the *Owens* case is that the defendant filed a timely motion to suppress the evidence obtained by virtue of the illegal arrest. It is pointed out that since the arrest is illegal, the search is also illegal, and therefore "unreasonable" within the prohibition of the Missouri constitution.⁶⁷ Since the arrest was based solely upon the sheriff's suspicion that the defendant was in the possession of liquor, and he did not have personal knowledge of it, the arrest fell clearly within the doctrine that no authority exists for the arrest of misdemeanants on suspicion. The court discusses the constitutional prohibition to great extent, and concludes that the desirability of enforcing the misdemeanor statute does not outweigh the rights to the defendant secured to him by the constitution so as to be "reasonable" in that sense of the word. Since the motion to suppress had been erroneously overruled, the conviction was reversed.

The analogy to be drawn from this and other cases to the present case is *not* perfect. The cases in which the motion to suppress was ruled to be proper all involve the suppression of actual physical evidence, and extend to preclude the officer from testifying about the seizure and his observations at the time of and during the illegal arrest. In the radar case, no physical evidence is obtained by virtue of the arrest. There is nothing taken from the defendant. The only thing in the way of evidence gained by the illegal arrest is the *identity* of the defendant. This poses the question of whether this information can be suppressed in Missouri. It appears that the question has heretofore been only of academic value as this type of arrest has not presented itself in the reported cases. This type of arrest must be distinguished from the two-man arrest wherein the pursuing officer requires aid and assistance from a second officer when the violator is escaping the pursuing officer. In that situation, the second officer may effect a detention of the defendant until the pursuing officer arrives at the scene of the detention. The arrest by the second officer may be illegal and tortious, but the damage to the defendant would be nominal if the action of false imprisonment were brought. The pursuing officer will generally go to the location of the detention, identify the defendant, *and take charge of him*. If a "summons" is issued, it will be issued by the pursuing officer, and not the assisting officer. In the event a motion to suppress were sustained

66. *Id.* at 355, 259 S.W. at 101.

67. Mo. Consr. art. II § 11 (1875), as amended, Mo. Consr. art. I, § 15 (1945).

against the second officer, the prosecution could continue on the complaint and testimony of the pursuing officer. In this case *nothing* in evidence necessary to the case is gained by the arrest by the second officer.

Is the identification of the defendant evidence in the sense that it would be protected by the constitutional provision against unreasonable searches and seizures? Must the evidence to be suppressable be something that has physical properties? Is it the physical properties of the bottle of liquor, of the concealed weapon, of the stolen merchandise of the petit larcenist that which makes it inadmissible when timely motion to suppress is made? Or is it that the spirit of the rule is that the state cannot gain and use in the prosecution of a misdemeanor *information* gained by unlawful arrest? The latter would seem to be the basis of the rule. The seizure of the liquor is the *thing* that makes the state's case complete. Without it, the state has no case. When the evidence which has been illegally obtained in that case is suppressed, the conviction is also suppressed, in that it fails. Can it be that the spirit of this rule, whether constitutional or not, would also preclude the *thing* in the radar case that makes the case for the prosecution complete if it too is obtained by virtue of an illegal arrest? If so, that the evidence obtained does not have physical properties should make no difference. If the identification of the defendant, the completing element to the state's case, is obtained by illegal means, by virtue of an illegal arrest, perhaps the state should be denied the use of such evidence on a timely motion to suppress. As is said in the *Owens* case:

The trend of the argument in favor of admitting such evidence is that it is necessary and the only way to enforce the prohibition law. That brings us squarely to the paradoxical pronouncement: It is necessary to violate the law in order to enforce the law!

The *Mayen* Case makes the further point that this unlawful seizure is complete and finished: The offense is ancient history at the time of the trial, and the exclusion of the evidence would not redress the wrong which the defendant has suffered.

Since the wrong was already inflicted, we should forget it and allow the wrongdoer to enjoy the fruits of it in the approval of the court and the conscious virtue of carrying through his enterprise to a successful finish. The question is not whether the defendant can be redressed in his case upon trial, but whether the reckless officer may be encouraged by the approval of the court to repeat the trespass.⁶⁸

Again, it must be remembered that this is a misdemeanor case, and the social value of a prosecution has been held throughout our law not to outweigh the value of respect for the rules of evidence and the rights of the individual citizen to be free from unreasonable search and seizure of his person and possessions.

In *State v. McBride*⁶⁹ it is held that a search and seizure connected with an illegal arrest is "unreasonable" within the constitutional prohibition against unreasonable searches and seizures:

68. 302 Mo. at 377, 259 S.W. at 109.

69. 327 Mo. 184, 37 S.W.2d 423 (1931).

It follows that whether defendant was arrested before being searched or not, the search of his person was unlawful and was therefore unreasonable within the meaning of our constitutional guaranty against unreasonable searches and seizures. . . . Defendant's motion to suppress the evidence so obtained should have been sustained and at the trial the evidence should not have been admitted, as it was, over his objections.⁷⁰

Statutes authorizing arrest for misdemeanors on mere suspicion in Kansas City and St. Louis have been held constitutional.⁷¹ It would thus appear that freedom from arrest on suspicion of misdemeanor is not a constitutional right, but that the legislature in its wisdom of the social circumstances in those areas has the power to authorize the arrest. As a necessary corollary of this, it would seem that in those areas, under statute, police officers could effect a valid search based upon an arrest for suspicion of misdemeanor, as it is the *illegality* of the *arrest* that renders the search constitutionally objectionable, and not the fact that it is made in connection with arrest for misdemeanor on suspicion. Although the legislature cannot define what will constitute an "unreasonable" search and seizure as this is a judicial question,⁷² the court will determine that a search and seizure connected immediately with a lawful arrest may be reasonable and not prohibited by the constitution, whereas a search connected with an illegal arrest cannot be reasonable and is prohibited by the constitution.

At first blush, this may appear inconsistent, as it looks as though the legislature can determine what will constitute a reasonable search and seizure by either authorizing or prohibiting a certain type of arrest. This is not the case. The court is merely holding that that which is illegal cannot be reasonable. Not all searches and seizures connected with a lawful arrest are reasonable, but certainly those connected with an illegal arrest cannot be reasonable.

This again brings us to the question of whether or not the operation in the radar case involves the principles which the cases above are based upon. Certainly the analogy is not perfect. Again, those cases involve suppression of physical bits of evidence, and the testimony of the officer relating thereto. Is there a valid distinction? To pose a ridiculous example, suppose it were made a misdemeanor to eat onions on Sunday. Could evidence of the breath of the defendant be suppressed if gained by illegally smelling the defendant? Would this be a "search and seizure" within the meaning of the constitution? How does this differ from the bottle of liquor?

If the spirit of the constitutional provision is that "unreasonable" goes to the *method* of obtaining evidence, rather than to the *form* of the evidence seized, it would appear immaterial whether the evidence which makes the state's case complete was in physical form, or merely the identity of the defendant. If the Supreme Court of Missouri still adheres to the doctrine laid down in the *Owens*

70. *Id.* at 189, 37 S.W.2d at 425.

71. *State v. Gartland*, 304 Mo. 87, 263 S.W. 165 (1925).

72. *State v. Owens*, 302 Mo. 348, 358, 259 S.W. 100, 101 (1924).

and *McBride* cases, that evidence obtained by virtue of an illegal arrest is within the constitutional provision and can be suppressed by timely motion, then it would appear that in the radar case, a timely motion to suppress the identification of the violator on the grounds that it was obtained by an illegal arrest should receive the same welcome by being sustained. Perhaps there is a distinction to be drawn, but the distinction would appear to go to the form of the evidence and not to the concept of "reasonableness" which is held to be the guiding light of this constitutional guaranty.

It must be pointed out that the two-man team method of operating the radar device is not the only method of operating it. There are at least two other ways of operating the device which would not involve the principles of arrest herein discussed. The first method is to set the radar up at one location, then take the meters to a point some distance from the device by means of long cables, and use only one officer. The arresting officer is then the viewing officer, and there can be no contention that the violation is not in his presence. The second method is to permit the radar car to pursue the violator and serve him with the summons. This seems to be the method used in the Tennessee case.⁷³ Therefore, any argument of necessity on behalf of the two-man method is without merit. If the two-man method is desirable, then the legislature can by statute authorize arrest on suspicion of misdemeanor in this particular instance, as have the legislatures of other states.⁷⁴ Such legislation would preclude the defense herein discussed, as well as the possibility of a tort action against our law enforcers.

E. MITCHELL HOUGH

DOMICILE REQUIREMENTS FOR DIVORCE IN MISSOURI

The Supreme Court of the United States has held that for a state to grant a divorce entitled to full faith and credit under article IV, section I, of the United States Constitution it must be the domicile of one or both of the parties.¹ This has

73. *Hardaway v. Tennessee*, 302 S.W.2d 351 (Tenn. 1957).

74. VA. CODE ANN. § 46-215.2 (Supp. 1958); MD. ANN. CODE art. 35, § 91 (1957).

1. *Williams v. North Carolina II*, 325 U.S. 226 (1945); *Bell v. Bell*, 181 U.S. 175 (1901); Annot., 157 A.L.R. 1399 (1945).

Domicile consists of physical presence in a given jurisdiction with intent to reside therein permanently or indefinitely. *Haymes v. Columbia Pictures Corp.*, 16 F.R.D. 118, 120 (S.D.N.Y. 1954).

To constitute domicile there must be both the fact of a fixed habitation or abode in a particular place and an intention to remain there permanently and indefinitely. To constitute change of domicile three things are essential: "(1) residence in another place; (2) an intention to abandon the old domicile; and (3) an intention of acquiring a new one." *Elliott v. Boyd*, 182 Ore. 1, 14, 15, 185 P.2d 555, 561 (1947).

Domicile is the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law. RESTATEMENT, CONFLICT OF LAWS § 9 (1934). This Restatement also provides:

been interpreted to require domicile as a constitutional basis for divorce jurisdiction.² Most state courts take the position that domicile is required for divorce jurisdiction.³ On its face, section 452.050⁴ would seem to raise a question whether domicile is required in Missouri. The principal parts of this statute have been in effect since 1825.⁵ They read as follows:

No person shall be entitled to a divorce from the bonds of matrimony who has not resided within the state one whole year next before filing of the petition, unless the offense or injury complained of was committed within this state, or while one or both of the parties resided within this state. . . .

It can be seen that this statute uses "resided" and not "domiciled." Nowhere in the statute is "resided" defined.

However, in *Phelps v. Phelps*⁶ and *State ex rel. Stoffey v. LaDriere*⁷ the courts found that "resided" as used in the statute means or is the same as "domiciled." This is the view taken by many other states where a statute for divorce jurisdiction requires residence.⁸ In the *Phelps* case the Kansas City Court of Appeals said:

The word 'residence' is often but not always used in the sense of 'domicil' and its meaning in a legal phrase must be determined in each case. The courts of the state have held that the 'residence' required by our divorce statutes is equivalent to 'domicil'.⁹

Both the supreme court and the courts of appeals of Missouri have said that residence is acquired by an intention to live at a place permanently or for an indefinite time coupled with actual bodily presence, though this presence need not be continuous.¹⁰ This would be in accord with definitions usually given domicile.¹¹

§ 15 Domicile of choice

(1) . . .

(2) To acquire a domicile of choice, a person must establish a dwelling-place with the intention of making it his home.

(3) The fact of physical presence at a dwelling-place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicile takes place.

2. *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954).

3. *Jennings v. Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948); *Crouch v. Crouch*, 28 Cal. 2d 243, 169 P.2d 897 (1946); *Coe v. Coe*, 316 Mass. 423, 55 N.E.2d 702 (1944); *Wright v. Wright*, 350 Mo. 325, 165 S.W.2d 870 (1942) (en banc); *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952); RESTATEMENT, CONFLICT OF LAWS § 111 (1934).

4. All statutory references are to RSMo 1949 unless otherwise indicated.

5. *Hays v. Hays*, 324 Mo. 810, 24 S.W.2d 997 (1930).

6. 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952).

7. 273 S.W.2d 776 (St. L. Ct. App. 1954).

8. *McCary v. McCary*, 253 Ala. 468, 45 So. 2d 292 (1950); *Walsh v. Walsh*, 215 La. 1099, 42 So. 2d 860 (1949), *cert. denied*, 339 U.S. 914 (1950); *Wray v. Wray*, 149 Neb. 376, 31 N.W.2d 228 (1948).

9. 241 Mo. App. at 1209, 246 S.W.2d at 844.

10. *Nolker v. Nolker*, 257 S.W. 798 (Mo. 1924) (en banc); *Madsen v. Madsen*, 193 S.W.2d 507 (Spr. Ct. App. 1946); *Lewis v. Lewis*, 238 Mo. App. 173, 176 S.W.2d 556 (K.C. Ct. App. 1943); *Bradshaw v. Bradshaw*, 166 S.W.2d 805 (Spr. Ct. App. 1942); *Smoot v. Smoot*, 227 Mo. App. 1246, 61 S.W.2d 373 (K.C. Ct. App. 1933); *Trigg v. Trigg*, 226 Mo. App. 284, 41 S.W.2d 583 (K.C. Ct. App. 1931); *Finley v. Finley*, 6 S.W.2d 1006 (St. L. Ct. App. 1928).

11. See note 1 *supra*.

Often in referring to the requirements of this statute, Missouri courts have used the phrase "residence or domicile"¹² which shows they consider them as one. These decisions make it clear that "resided" in section 452.050 means or is interpreted as "domiciled."

Reading only section 452.050 it may appear that no residence requirement is necessary if the offense or injury complained of was committed within the state, or while one or both parties resided within Missouri. However section 452.040 requires that "the proceedings shall be had in the county where the plaintiff resides."

Again there would be a question of the domicile requirement as laid down in *Williams v. North Carolina II*.¹³ The Missouri cases seem to have removed this question. In *Kruse v. Kruse*¹⁴ decided in 1857, the only Missouri supreme court case found which seems squarely in point in interpreting these statutes, the wife sued for divorce from a husband she had married in St. Louis and with whom she had lived there for a few months. He then left her and went to California. She then lived with her father, apparently in Missouri, some fifteen or sixteen months before going to Kentucky. She resided there when the action was brought. She contended that as the offense occurred in Missouri and while they both resided in Missouri that she did not now need to be a resident. In a very short opinion the court rejected this argument saying "the second section [now appearing as section 452.040] . . . clearly shows that the plaintiff must be a resident of this state."¹⁵ This case thus holds that section 452.050 must be considered with section 452.040 and only if the plaintiff is a resident may he obtain a divorce in Missouri.

In *Pate v. Pate*¹⁶ the defendant moved to dismiss the plaintiff's pleading on the ground that the petition did not contain allegations essential to confer jurisdiction on the court, in that it was not alleged that the plaintiff was a resident of St. Louis County when the petition was filed. The plaintiff contended that the statute required no residence when the offense was committed within the state. The trial court sustained the defendant's contention. The St. Louis Court of Appeals affirmed. They said *Kruse v. Kruse* had given the correct interpretation of the statutes (now sections 452.040 and 450.250) and the plaintiff must be a resident of Missouri.

In *McConnell v. McConnell*¹⁷ plaintiff husband filed for divorce against his wife whom he alleged committed adultery in St. Louis, Missouri. The plaintiff lived in New York and had never resided or lived in St. Louis or any part of Missouri. The trial court denied the divorce. The St. Louis Court of Appeals affirmed and in doing so approved a statement by the trial court which said:

12. *Nolker v. Nolker*, *supra* note 10; *State ex rel. Taubman v. Davis*, 199 Mo. App. 439, 203 S.W. 654 (K.C. Ct. App. 1918).

13. 325 U.S. 226 (1945). At least two other states have statutes somewhat similar to Missouri which could raise the same questions of interpretation. COLO. REV. STAT. ANN. § 46-1-1 (1953); MINN. STAT. ANN. §§ 518.07, .09 (1945).

14. 25 Mo. 68 (1857).

15. *Id.* at 70.

16. 6 Mo. App. 49 (St. L. Ct. App. 1878).

17. 167 Mo. App. 680, 151 S.W. 175 (St. L. Ct. App. 1912).

If the offense or injury complained of was committed within this State, then the plaintiff in the divorce suit need not have resided within the State one whole year next before the filing of the petition; the plaintiff in such case may have resided here less than a year. But the statute nowhere authorizes one who is not a resident of the State to institute suit for divorce in this state under any circumstances. . . .¹⁸

In *Hays v. Hays*¹⁹ the Supreme Court of Missouri touched on the divorce problem. The Jackson County circuit court had held that it had no jurisdiction because all acts charged occurred in Kansas before plaintiff acquired a residence in Missouri. The supreme court reversed and said this in discussing Missouri divorce law:

Section 1804, Revised Statutes 1919, [now section 452.050] must be construed as if it provided in so many words that a divorce shall be authorized for any of the grounds appearing in section 1801, [now section 452.010] no matter where the acts constituting such grounds were committed, if the injured party has resided in Missouri 'one whole year next before filing of the petition'; but that, where the acts constituting the grounds of divorce were committed 'within this state, or whilst one or both of the parties resided within this state,' it is only necessary for the complaining party to be a resident of this state at the time of filing the petition.²⁰

*Kokinakis v. Kokinakis*²¹ involved a Fort Leonard Wood, Missouri, soldier who had not resided in Missouri prior to entering the army. He testified that he then claimed residence at Fort Leonard Wood, Pulaski County. He and defendant were married in Missouri, she being a Missouri resident. The trial court denied a divorce because the plaintiff was not a Missouri resident. The Springfield Court of Appeals reversed, saying:

He was undoubtedly a resident of Missouri. . . . But we do not need to put plaintiff's right to a divorce upon his residence . . . the indignities, occurring in Missouri, . . . were ample to constitute the plaintiff the injured party and to entitle him to a divorce.²²

No cases are cited in the opinion nor is there any mention of section 452.040. The court appeared to take section 452.050 as it stands or reads alone. This does not square with the interpretation made in the earlier decisions.²³

A case reaching a result similar to the *Kokinakis* case is *Montgomery v. Montgomery*.²⁴ This case also involved a Fort Leonard Wood soldier who was apparently a non-resident of Missouri at the time of his being sent to Fort Leonard Wood. He had married his wife in California prior to coming to Missouri. The trial court

18. *Id.* at 682, 151 S.W. at 176.

19. 324 Mo. 810, 24 S.W.2d 997 (1930).

20. *Id.* at 816-17, 24 S.W.2d at 999-1000.

21. 180 S.W.2d 243 (Spr. Ct. App. 1944).

22. *Id.* at 244.

23. *Hays v. Hays*, 324 Mo. 810, 24 S.W.2d 997 (1930); *Kruse v. Kruse*, 25 Mo. 68 (1857); *McConnell v. McConnell*, 167 Mo. App. 680, 151 S.W. 175 (St. L. Ct. App. 1912); *Pate v. Pate*, 6 Mo. App. 49 (St. L. Ct. App. 1878).

24. 185 S.W.2d 870 (Spr. Ct. App. 1945).

denied the divorce because it did not believe him a resident of Missouri. The Springfield Court of Appeals reversed, but did not try to decide whether the plaintiff was a resident. That court said:

According to the decisions of this and other courts, defendant submitted herself to the Circuit Court of Pulaski County, Missouri, by her answer and motion for temporary alimony, and the Circuit Court . . . thereafter had full venue in the case and had the right and power thereafter to pass on the marital relationship between plaintiff and defendant, regardless of ordinary jurisdiction, and we need not consider the question of jurisdiction at all.²⁵

The court quoted at length from *King v. King*,²⁶ including the following statement:

[I]t is now well settled that the provision of the statute requiring that, 'the proceedings shall be held in the county where the plaintiff resides . . . ' merely prescribes the venue of such cases, is not jurisdictional in character, and may be waived.²⁷

However in the *King* case and six of the seven cases relied on in the *Montgomery* case²⁸ it clearly appears that the plaintiff was a Missouri resident, the only question being whether he was a resident of the county where the divorce was asked for or had been granted. In *Werz v. Werz*,²⁹ the other case cited in the *Montgomery* case, there was nothing to show that his wife who had sought the divorce was not a Missouri resident.

The *Montgomery* case thus held that the portion of section 452.040 requiring that the action be commenced in the county where the plaintiff resides is only jurisdictional to the person, that this requirement is not jurisdictional to the subject matter of the action, and that it can be waived by appearance of the defendant, even where the parties are non-residents. The court based its decision on cases involving residents.³⁰ Those cases held that even if the action were brought in a county other than that where the plaintiff resided, the defendant by appearing would waive the jurisdiction required by section 452.040. Later that same year it was stated in discussing the same statute:

Want of residence in the state goes to the jurisdiction of the subject matter. Want of residence in the county goes to the jurisdiction of the person which may be waived by appearance to the merits.³¹

In neither the *Montgomery* case nor *Kokinakis v. Kokinakis* does it appear that

25. *Id.* at 871.

26. 237 Mo. App. 764, 170 S.W.2d 982 (Spr. Ct. App. 1943).

27. 185 S.W.2d at 871.

28. *Osmak v. American Car & Foundry Co.*, 328 Mo. 159, 40 S.W.2d 714 (1931); *Nolker v. Nolker*, 257 S.W. 798 (Mo. 1924) (en banc); *Johnson v. Johnson*, 141 S.W.2d 229 (K.C. Ct. App. 1940); *Tate v. Tate*, 227 Mo. App. 1141, 59 S.W.2d 790 (K.C. Ct. App. 1933); *Walton v. Walton*, 6 S.W.2d 1025 (St. L. Ct. App. 1928); *Lagerholm v. Lagerholm*, 133 Mo. App. 306, 112 S.W. 720 (St. L. Ct. App. 1908) (dissenting opinion).

29. 11 Mo. App. 26 (St. L. Ct. App. 1881) .

30. See cases cited note 28 *supra*.

31. *Barth v. Barth*, 189 S.W.2d 451 (St. L. Ct. App. 1945). The same view is taken in *Phelps v. Phelps*, 241 Mo. App. 1202, 246 S.W.2d 838 (K.C. Ct. App. 1952).

there was any question raised as to the power of a state to grant a divorce where neither party was domiciled there.

In *Madsen v. Madsen*,³² involving another Fort Leonard Wood soldier who sued for divorce claiming to be a Missouri resident, the Springfield Court of Appeals seemed to throw new light on its *Kokinakis* holding. After saying that the evidence showed that the plaintiff was a resident of Missouri one year before filing his petition the court made the following statement citing among others the *Kokinakis* case:

[W]here the injuries or offenses complained of in an action for divorce were committed within this state, the full one year's residence is not a jurisdictional requisite.³³

This statement would always seem to require some residence.

In *Phelps v. Phelps* the plaintiff wife prior to her marriage was a resident of Texas. She married the defendant, a Missouri resident, on March 4, 1947 and lived with him until about March 5, 1949 when plaintiff returned to Texas. The offense if any must have occurred in Missouri or while the parties resided there. The Kansas City Court of Appeals found that the plaintiff was not a resident and could not maintain a divorce action. The court then said that although section 452.040 has been interpreted as venue and not jurisdictional in respect to the subject matter of the action where the plaintiff is a resident, *Kruse v. Kruse* held section 452.040 required the party applying for a divorce to be a resident of Missouri. This is so even though the offense or injury complained of occurred in Missouri.

A case which perhaps strengthens the opinions interpreting the Missouri divorce law as requiring residence or domicile is *Wright v. Wright*.³⁴ There in discussing the validity of a Nevada divorce the Supreme Court of Missouri said:

It is universally held that 'a state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state.'³⁵

Missouri courts then would require some residence akin to domicile as a basis for divorce, including those cases where the offense was committed within the state or while one or both parties resided therein. Only the *Kokinakis* and *Montgomery* cases appear to hold differently. It is questionable whether they carry much weight.

It may well be Missouri courts were of the opinion that even if section 452.050 had not been intended to require domicile, when the offense occurred in Missouri or while one or both parties resided there, nevertheless they could not grant a valid divorce to a non-domiciliary.³⁶ This feeling could have influenced the Missouri courts

32. 193 S.W.2d 507 (Spr. Ct. App. 1946).

33. *Id.* at 508.

34. 350 Mo. 325, 165 S.W.2d 870 (1942) (en banc).

35. *Id.* at 338, 165 S.W.2d at 875.

36. *Williams v. North Carolina II*, 325 U.S. 226 (1945); *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954). See also authorities cited note 3 *supra*.

which decided that section 452.050 must be considered with section 452.040, and thus required residence in Missouri.

Kruse v. Kruse was decided in 1857 and contains nothing to indicate the Supreme Court of Missouri then felt domicile was necessary to divorce jurisdiction. However, Mr. Justice Frankfurter in *Williams v. North Carolina II* says that this conception has been unquestioned since 1789 and even the framers of the United States Constitution were aware of it.³⁷ Judge Hastie says it arose in America in the first half of the 19th century.³⁸ So it is possible that the Supreme Court of Missouri in 1857 was aware of this idea.

Recently, however, at least two cases have taken issue with the domiciliary requirement for divorce jurisdiction. In *David-Zieseniss v. Zieseniss*³⁹ the husband challenged the wife's divorce action on the ground that the statute giving the court jurisdiction to dissolve a marriage when the parties were married within the state was unconstitutional.⁴⁰ The court held that marriage within the state was sufficient to give that state power to dissolve the marriage saying:

Domicile is accepted as a basis of jurisdiction to divorce because a State has a legitimate interest in the marital status of persons domiciled within its borders; and it seems clear to me that the State in which a marriage takes place has certainly as great and as legitimate an interest in the marital status of the parties to that marriage, and that marriage in a State consequently is as good a basis of jurisdiction of divorce as is domicile of one of the parties in the State.⁴¹

In *Wallace v. Wallace*⁴² a serviceman who had been stationed in New Mexico for over a year was sued for a divorce. The trial court based its jurisdiction on the New Mexico serviceman's divorce statute which deems servicemen stationed there over a year residents of the state.⁴³ Assuming the defendant was correct in contending neither party was domiciled in New Mexico the court held it still had jurisdiction to grant the divorce. It was further stated:

. . . We are fully cognizant of the fact that holding a domiciliary intent could be conclusively presumed from a period of residence was tantamount to a repudiation of the theory that domicile is the *only* jurisdictional basis for divorce. It is within the power of the legislature to establish reasonable bases of jurisdiction other than domicile.

37. 325 U.S. at 229.

38. *Alton v. Alton*, *supra* note 36, at 681 (dissenting opinion).

39. 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

40. N.Y. CIV. PRAC. ACT. § 1147(2).

41. 205 Misc. at 844, 129 N.Y.S.2d at 655.

42. 63 N.M. 414, 320 P.2d 1020 (1958).

43. N.M. STAT. ANN. § 22-7-4 (1953) reads in part, as follows:

. . . persons serving in any military branch of the United States government who have been continuously stationed in any military base or installation in the state of New Mexico for such period of one (1) year, shall for the purposes hereof, be deemed residents in good faith of the state and county where such military base or installation is located.

The United States Supreme Court has never held that domicile of one of the parties is the only jurisdictional basis for divorce. This court is convinced that the concept of domicile is not entitled to constitutional sanctity. . . .

The traditionally domiciliary requirement is designed to prevent divorce-minded couples from shopping for favorable residence requirements. The concept of domicile has been notably unsuccessful in achieving this goal.⁴⁴

These two cases could start a trend away from domicile as the only basis for divorce jurisdiction. However, even these cases base divorce jurisdiction on some connection with the granting state. Both cases find that the connection required in their statutes was such that the state had a substantial interest. The *Wallace* case states:

New Mexico has a much more intimate connection with service families who resided here for one year than the 'six-weeks divorce' states ever achieve with most of their alleged domiciliaries.⁴⁵

The *David-Ziesenis* case claimed to have found as much interest in the marrying state as existed in the state of domicile.⁴⁶

Should Missouri courts decide that domicile is not the only basis for divorce jurisdiction, and if this has been a determining factor in their prior decisions in the interpretation of Missouri jurisdictional requirements for divorce, they could decide that section 452.050 is independent and apart from section 452.040 and that when the offense occurred in Missouri or while one or both parties resided there, no domicile or residence requirement in Missouri is necessary. It seems unlikely that the courts would so decide. Even the *Wallace* case required a reasonable basis of divorce jurisdiction—some connection with the state.⁴⁷ It could be questioned whether the occurrence of the offense in Missouri or its occurrence while the parties reside there, would be such a connection with Missouri. If not, then should Missouri allow a divorce without domicile, there could be no proper basis for divorce jurisdiction. Thus, even if the Missouri courts decide that domicile is not always constitutionally required, they will, under the present statutes, continue to interpret section 452.050 together with section 452.040 and require residence, the equivalent of domicile, for Missouri divorces.

JAMES KEITH PREWITT

FINANCE CHARGES OR TIME PRICE DIFFERENTIAL IN INSTALLMENT SALES—USURY?

I. THE PROBLEM

In the recent case of *Sloan v. Sears, Roebuck & Co.*¹ the Arkansas supreme court held that the sale of certain merchandise for a credit price exceeding the cash

44. 63 N.M. at 416-17, 320 P.2d at 1022-23

45. *Id.* at 418, 320 P.2d at 1023.

46. 205 Misc. at 844, 129 N.Y.S.2d at 655.

47. 63 N.M. at 416, 417, 320 P.2d at 1022, 1023.

1. 308 S.W.2d 802 (Ark. 1957).

price was usury, if this difference exceeded the maximum rate of interest allowed by the state constitution. This case followed *Hare v. General Contract Purchase Corp.*² where the court prospectively overruled a long line of Arkansas cases³ holding that the difference between a cash price and a credit price did not come within the constitutional provisions relating to usury.

In the *Sloan* case Sears, Roebuck and Co. had sold a tractor and some automobile tires to Sloan for a total price, less trade-in of \$393.98. This figure was designated as the "total cash price." \$37.17 was added to this amount as a "carrying charge" making a total price of \$431.15. There was a cash payment of \$40.00 leaving a balance of \$391.15. The remaining amount was to be paid off by equal monthly installments of \$22.00. This carrying charge was found to be in excess of the constitutional maximum of ten percent per annum.⁴

Perhaps the more important of the two cases in view of its effect on previous decisions was the *Hare* case. This case recognized the doctrine that the seller might have a higher price for credit and then said, "but there may be a question of fact as to whether the so-called credit price was *bona fide* as such, or only a cloak for usury."⁵ The court then looked at what appeared to be a typical installment sale of a motor vehicle and found a usurious transaction. The court recognized its sharp break with the past and emphasized that its purpose was to keep the spirit of the ban against usury abreast of present day commercial transactions.

Before proceeding further, it might be worthwhile to examine this difference between a cash and credit price in a little more detail. In the bargaining process that often precedes a sale some prospective vendors make it known that they would be willing to accept one price if cash is to be paid when the transaction is closed and another, higher price if payment is to be deferred for some period of time. This difference between the higher credit price and the lower cash price is usually known as the time price differential.

Perhaps the most common example of this situation would be two parties bargaining over the price of an item of merchandise. The seller may have offered to accept one price which the buyer refused. The seller might then say, "I'll take ten per cent less if you will pay cash." This ten per cent discount would then be the time price differential. Another common situation is the relation of the wholesaler to the retailer. Often the custom of the trade requires the wholesaler to extend credit for thirty days. The wholesaler may then offer a two percent discount if the account is paid in ten days or charge the full price if the account is paid in thirty.

2. 220 Ark. 601, 249 S.W.2d 973 (1952).

3. *Garst v. General Contract Purchase Corp.*, 211 Ark. 526, 201 S.W.2d 757 (1947); *Harper v. Futrell*, 204 Ark. 822, 164 S.W.2d 995 (1942); *General Contract Purchase Corp. v. Holland*, 196 Ark. 675, 119 S.W.2d 535 (1938); *Cheairs v. McDermott Motor Co.*, 175 Ark. 1126, 2 S.W.2d 1111 (1928); *Standard Motors Fin. Co. v. Mitchell Auto Co.*, 173 Ark. 875, 293 S.W. 1026 (1927); *Smith v. Kaufman*, 145 Ark. 548, 224 S.W. 978 (1920).

4. ARK. CONST. art. 19, § 13.

5. 220 Ark. at 609, 249 S.W.2d at 978.

This two percent is a time price differential. In both of these cases, one tends to think in terms of a discount for cash payment rather than in terms of interest upon deferred payment.

However, the situation most frequently presented to the courts is somewhat different. It would appear that in most cases the cash price has been arrived at first and an amount expressed in terms of dollars is added for deferred payment.⁶ This figure is usually expressed as a "finance" or "carrying" charge. This difference becomes significant only when the period for deferred payment is known. When we know the amount of the price if cash is paid, the amount added for credit, and the period for which credit is extended we are able to compute the cost of this credit in the same way that interest may be computed on the loan of money.

A relatively recent innovation in credit financing is the revolving charge account, which is gaining in popularity among the larger department stores. It operates very much like a regular charge account except that payments may be spread out over a period of months. A line of credit is extended to a customer up to a stated amount. A monthly payment schedule may or may not be set up and a service charge, stated either in terms of a percentage of the balance or a fixed or sliding dollar charge on the amount of credit used, is provided for. Under this plan the credit may be extended for an indefinite period of time. The typical charge for such credit usually runs about one and one half percent per month on the ending balance. While no cases have been discovered which deal with this type of transaction, it is common business practice to treat these accounts as credit sales and not subject to the usury statutes. This position seems difficult to justify in view of the fact that no pretense is made of adding to the price of individual items for deferred payment. The charge is usually stated as a percentage of the unpaid balance, which certainly seems more in the nature of interest than a time price addition on merchandise.

The problem with these transactions arises when this time price differential exceeds the amount of interest allowed under the usury statutes for the loan of an amount of money equal to the cash price. The Missouri usury statute⁷ provides for interest at the rate of eight percent per annum. Thus if A loans B \$100 for one year he may charge only eight dollars for the use of that money for the year.⁸ But, suppose A offers to sell B an overcoat for \$100 cash or for \$110 if credit is extended for one year? Perhaps the coat is priced at \$110 and A offers to accept \$100 cash. Is this difference to be considered interest and thus subject to the usury statutes? Or, is this difference merely an addition to the margin of profit that the vendor obtains from the sale and thus free from the restrictions imposed by usury statutes?

6. See *Sloan v. Sears, Roebuck & Co.*, *supra* note 1; *Hare v. General Contract Purchase Corp.*, *supra* note 2.

7. § 408.030, RSMo 1949.

8. In order to simplify the example, only the general usury statute is considered here. The Missouri small loan act is considered later in this Comment.

II. THE TRADITIONAL VIEW

A. Application Generally

The general view today seems to be that such time price differential is not "interest" as the term "interest" is used in most general usury statutes.⁹

Apparently the first case to discuss this problem was *Dewar v. Span*,¹⁰ where there was at least dictum to the effect that such a time price differential would constitute usury if it exceeded the statutory rate. However, this case was not followed and the English case of *Beete v. Bidgood*,¹¹ in 1827, held that the sale of a plantation at a greater price for credit than for cash was not usury even though the difference between the two prices was greater than the rate of interest allowed by the usury statute of that day.

The leading American case is *Hogg v. Ruffner*¹² in which the United States Supreme Court adopted the view that a seller had an absolute right to fix one price for cash and another for credit. This view has been generally followed in this country¹³ and has been challenged only since the great boom in installment buying of consumer goods which began after World War I. In general, courts following the traditional rule emphasize that they will go to the substance of a transaction to discover usury, but if there is a bona fide sale, the usury statutes do not apply since there is no loan or forbearance of money.¹⁴

One of the most frequently advanced reasons for this view is that the usury statutes were enacted to protect the borrower who was in need of cash for bare subsistence.¹⁵ This borrower was in no position to bargain over the terms of the loan. At the time these statutes were enacted, the typical purchase involving a deferred payment was a commercial transaction. In this situation the purchaser and seller were in relatively equal bargaining positions. Thus, if the purchaser did not find the terms satisfactory, he could simply refrain from buying and was not in need of the protection of the usury statutes. Whether the position of the credit purchaser of that era is analogous to the position of the modern installment buyer will be considered later in this Comment.

Another possible reason for this limitation on the application of the usury statutes is that such acts impinge upon the freedom of the parties to contract as they see fit, and therefore should be strictly construed.¹⁶ It is sometimes emphasized that

9. *E.g.*, § 408.030, RSMo 1949.

10. 3 T.R. 425, 100 Eng. Rep. 656 (K.B. 1789).

11. 7 B. & C. 453, 108 Eng. Rep. 792 (K.B. 1827).

12. 66 U.S. (1 Black) 390 (1861).

13. *E.g.*, *Bell v. Idaho Fin. Co.*, 73 Idaho 560, 255 P.2d 715 (1953); *Brooks v. Auto Wholesalers, Inc.*, 101 A.2d 255 (D.C. Munic. Ct. App. 1953). See Annot., 143 A.L.R. 238 (1943).

14. *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262 S.W. 425 (K.C. Ct. App. 1924).

15. *Ibid.*

16. See *Berger, Usury In Installment Sales*, 2 LAW & CONTEMP. PROB. 148 (1935).

a loan of money was all that was intended to be protected.¹⁷ In some jurisdictions usury is punished by a forfeiture and courts are reluctant to impose such a penalty except in very clear cases.¹⁸ Perhaps another reason is the recognition that the statutory rate is often inadequate to compensate the seller for the risks involved in transactions of this nature.¹⁹ While this last reason is seldom if ever stated by a court in its opinion, as a practical matter it surely affects the decisions.

B. Application in Missouri

The only Missouri decisions directly in point in this area have been by the courts of appeals. These cases have supported the traditional view that the time price differential is not subject to the usury statutes.²⁰

The Missouri supreme court has never definitely passed on this issue, but in an early decision it indicated by dictum that the parties could contract in such a way as to avoid the taint of usury in a contract for the sale of land, although they had failed to do so in that instance.²¹ In a more recent case the court held that the sale of notes did not fall within the usury statute.²²

The leading Missouri case is *General Motors Acceptance Corp. v. Weinrich*²³ where the Kansas City Court of Appeals held that the installment financing of an automobile did not fall within the usury statute in force at that time (presently in force as Section 408.030, Revised Statutes of Missouri (1949)).

Shortly after the *Weinrich* case the Springfield Court of Appeals, in *Holland-O'Neil Milling Co. v. Rawlings*,²⁴ applied this view to the sale of stock in an automobile agency where the price of the stock had been increased by an amount approximately equal to the estimated income of the firm for the period that payment was to be delayed. These two cases have been frequently cited and have been followed in Missouri as recently as 1951 in *General Contract Purchase Corp. v. Propst*.²⁵

Missouri courts have long emphasized that they will go to the substance of the transaction to determine if usury is present.²⁶ An interesting case in this area is *White v. Anderson*,²⁷ where the plaintiff sold coupon books which could be redeemed for merchandise at local stores. Plaintiff sold defendant two books, each of which

17. *General Contract Purchase Corp. v. Propst*, 239 S.W.2d 563 (Spr. Ct. App. 1951).

18. Berger, *supra* note 16.

19. Ecker, *Commentary on "Usury in Installment Sales,"* 2 LAW & CONTEMP. PROB. 173, 185 (1935).

20. *General Contract Purchase Corp. v. Propst*, *supra* note 17; *Personal Fin. Co. v. Endicott*, 238 S.W.2d 51 (St. L. Ct. App. 1951); *Holland-O'Neil Milling Co. v. Rawlings*, 217 Mo. App. 466, 268 S.W. 683 (Spr. Ct. App. 1925); *General Motors Acceptance Corp. v. Weinrich*, *supra* note 14.

21. *Mitchell v. Griffith*, 22 Mo. 515 (1856).

22. *Webster v. Sterling Fin. Co.*, 355 Mo. 193, 195 S.W.2d 509 (1946).

23. 218 Mo. App. 68, 262 S.W. 425 (K.C. Ct. App. 1924).

24. 217 Mo. App. 466, 268 S.W. 683 (Spr. Ct. App. 1925).

25. 239 S.W.2d 563 (Spr. Ct. App. 1951).

26. *State ex rel. Attorney-General v. Boatmen's Savings Institution*, 48 Mo. 189 (1871).

27. 164 Mo. App. 132, 147 S.W. 1122 (K.C. Ct. App. 1912).

could be redeemed for ten dollars worth of merchandise, and received in exchange for each book a note for ten dollars and fifty cents, due in thirty days. Plaintiff then redeemed the books from the local merchants for ten per cent off of their face value of ten dollars. The court made it clear that "if it has not in it the element of a loan, there cannot be usury."²⁸ But, in holding the transaction usurious, the court went on to say that "the transaction was no less than if plaintiff had gone to the store with defendant and then and there paid the merchant for the coat and taken defendant's note just as he did take it."²⁹

As a practical matter the similarities between the transaction in *White v. Anderson* and the typical installment sales contract are quite striking. First, the borrower does not receive any loan of money, in either instance. In the *White* case he received a book of coupons which had a value to him only to the extent that they could be exchanged for merchandise. In the installment sale of modern consumer goods the purchaser receives the goods directly, but the effect of the transaction is the same. Secondly, in the *White* case, as in the typical installment sale, there was a three party transaction. There was a buyer, a seller, and a third party supplier of the funds to consummate the transaction. In the *White* case the supplier of funds approved the credit risk in advance, while in the typical installment sale the finance company or other supplier of funds does not approve the risk until after the note is executed. However, this latter distinction is more apparent than real. Where the retailer is accustomed to dealing with a supplier of funds, he is reasonably certain that each credit risk is going to be accepted. He must have a reliable source of money if he is to do a regular installment business and cannot afford to be caught holding large amounts of installment paper that he cannot get his money out of. If the retailer has any doubts about the acceptability of a credit risk, it is always possible to check with the supplier of funds to determine if the purchaser-borrower is an acceptable credit risk. It is not inconceivable that the retailer might enter an agreement whereby the supplier of funds agrees to take all such installment paper and allow the retailer to pass on these risks. If the retailer carries his own paper, this problem of prior approval is eliminated, since the retailer is both seller and supplier of funds.³⁰ Other similarities between the transaction in the *White* case and the typical installment contract occur in the flow of cash. The seller in both instances gets the money for his merchandise from the third party and the borrower pays the amount that he owes to this third party supplier of capital.

The court, in *White v. Anderson*, made reference to the fact that defendant "bought"³¹ his book of coupons, which would indicate a recognition that sales could,

28. *Id.* at 136, 147 S.W. at 1123.

29. *Id.* at 138, 147 S.W. at 1123-24.

30. The nature of the funds supplied for credit transactions is discussed later in this Comment.

31. 164 Mo. App. at 138, 147 S.W. at 1123.

under certain conditions, fall within the usury statute. Thus, transactions other than the simple giving of a note in exchange for money could result in interest as the term was used in the usury statute. However, in *General Motors Acceptance Corp. v. Weinrich* this case was cited for its language that there must be an element of a loan in the transaction for the usury statutes to apply, without regard to the fact that the court in *White v. Anderson* found a loan in a transaction somewhat analogous to the *Weinrich* installment credit sale.

In the recent case of *Anderson v. Curls*³² the Kansas City Court of Appeals once again emphasized that it would look behind a transaction to find usury. Anderson gave a note for four hundred dollars which was promptly sold for two hundred dollars. The two hundred dollars was then paid to Anderson, less a twenty dollars commission for obtaining the loan and a five dollar recording fee for a deed of trust. The court held this transaction usurious

It may be concluded that there is at least a possibility the Missouri courts might be willing to look more closely at the mechanics of present day installment financing, to determine if usury is present. Certainly the real positions of the parties to present day installment sales more closely resemble the example drawn by the court in *White v. Anderson* than the traditional situation of two parties of equal bargaining strength, bargaining over the price of an item and agreeing on a price with a discount for cash.

III. THE MODERN VIEW

A. General Statement of the Modern View

The proponents of the view that credit sales may be subject to applicable usury statutes do not attempt to sweep away the entire concept of a bona fide credit price.³³ It is not contended that all such sales are or should be subject to the usury statutes, but rather that the typical installment sale today is not a bona fide credit sale in the sense that the concept was developed in the early cases.³⁴ Thus the arguments advanced for this view should be regarded primarily as an attempt to view each credit sale in the light of our present day economic structure rather than that of the nineteenth century.

This problem has been considered and the modern view advocated in law reviews for some years.³⁵ However, the first case to lend support to this view was not decided until 1944.³⁶ Since that time the trend among courts considering the problem has been to examine installment sales more closely and to find usury even where there

32. 309 S.W.2d 692 (K.C. Ct. App. 1958).

33. *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952).

34. *Hogg v. Ruffner*, 66 U.S. (1 Black) 390 (1861); *Beete v. Bidgood*, 7 B. & C. 453, 108 Eng. Rep. 792 (K.B. 1827).

35. See *Symposium—Installment Selling*, 2 LAW & CONTEMP. PROB. 139-284 (1935) for a complete discussion.

36. *Seebold v. Eustermann*, 216 Minn. 566, 13 N.W.2d 739 (1944).

has been an actual sale.³⁷ Of course the most far reaching of these decisions have occurred in Arkansas since the *Hare* case discussed earlier in this Comment. At least one federal court has also found usury in what appears to be a typical installment sale of an automobile.³⁸

A number of arguments may be advanced in favor of the modern view. The first of these evolves from the frequently made statement that the usury statutes were enacted to protect the needy borrower and that his situation is unlike that of the prospective purchaser who can refrain from making the purchase. This is no doubt true, but is the present day credit purchaser's position so radically different from the cash borrower whom the statutes seek to protect? In the purchase of modern day necessities—automobiles, home appliances, and even food—the needy individual will be more likely to make a credit purchase than to seek a short term loan of cash. It is quite clear that certainly not all credit purchases are made for such necessities, but it is equally clear that not all loans of money go to buy these necessities. The courts have not attempted to establish the need of the borrower in the ordinary loan, for obvious reasons, and there seems to be no more justification for such an attempt in the case of the credit sale. Circumstances of dire need are as likely to exist in the case of the credit buyer as in the case of the man who borrows money.

The needy individual actually has a choice of credit sources. He can obtain a loan from a small loan company or he can purchase the needed items on the installment plan. The typical person has heard of abuses in the small loan business and is likely to have an exaggerated and unjustified fear of doing business with them. Thus he turns to the "easy payment plan", which in the end may cost him more than dealing with a reputable small loan firm. In one case,³⁹ a purchaser made a \$250 down payment on an automobile selling for \$1100, leaving an \$850 balance due, signed a note in blank, and later learned that he was to pay \$53.61 a month for twenty-four months. His total obligation to the finance company in this case was \$1,286.64. The purchaser's cost to finance the \$850 for two years was \$436.64. The purchaser was told that there was insurance included in the note, but he was given no evidence of such coverage. The report containing this illustration indicated that similar complaints had been received. One Columbia, Missouri, grocery, in conjunction with a finance company, offers a monthly charge account advertising a charge of one dollar per month. It is further stated, "The charge is the same regardless of the

37. *Jackson v. Commercial Credit Corp.*, 90 Ga. App. 352, 83 S.E.2d 76 (1954); *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); *White v. Disher*, 232 N.C. 260, 59 S.E.2d 798 (1950); *National Bond & Inv. Co. v. Atkinson*, 254 S.W.2d 885 (Tex. Civ. App. 1952); *Mossler Acceptance Co. v. McNeal*, 252 S.W.2d 593 (Tex. Civ. App. 1952); *Associates Inv. Co. v. Sosa*, 241 S.W.2d 703 (Tex. Civ. App. 1951); *G.F.C. Corp. v. Williams*, 231 S.W.2d 565 (Tex. Civ. App. 1950); *Associates Inv. Co. v. Thomas*, 210 S.W.2d 413 (Tex. Civ. App. 1948); *Associates Inv. Co. v. Ligon*, 209 S.W.2d 218 (Tex. Civ. App. 1948).

38. *Daniel v. First Nat'l Bank*, 227 F.2d 353 (5th Cir. 1955), *supplementary opinion*, 228 F.2d 803 (1956).

39. MISSOURI CONSUMER FINANCE ASSOC., BULL. No. 56, at 8 (August 1958).

amount you charge." At least one patron has reported that his "service charge" has run several times this one dollar amount in at least one month.⁴⁰

Another argument in favor of the modern view is that the purchaser is not really in a position to bargain over a credit price. In many cases it is simply a choice of purchasing at a stated price for cash or at a stated credit price, or more likely simply at so much down and so much a month. In a recent catalogue from a leading mail order house it may be noted that the credit is not figured on the cash price but on the unpaid balance of the cash price. On the minimum balance of fifteen dollars the credit charge is one dollar and seventy five cents, to be paid off at the rate of five dollars per month. Computed on the basis of an annual rate this works out to about seventy percent per year simple interest.⁴¹ As the amount of the unpaid balance increases the rate decreases to an approximation of the small loan rate. However, it is interesting to note that even at the lower rate, no decrease in the charge is made for early payments. Thus in theory the rate could reach absurd proportions. Where the addition is figured on the unpaid balance and the amount is fixed on a "take it or leave it" basis, it seems hardly logical to say that the purchaser has bargained for a credit price.

Another important argument for the modern view revolves around the presence of capital in the transaction which would not be present in a cash sale. There must be capital to provide the seller with money for his merchandise and to take the obligation of the purchaser. The previous discussion of *White v. Anderson* seems particularly appropriate at this point. Here there is a party to the transaction whose sole purpose is to provide funds for this transaction.⁴² Furthermore, there is no need for a separate finance company to show the presence of capital simply for the purpose of supplying money. Suppose that a retail merchant decides to carry his own installment credit. Assume that the merchant has a \$50,000 inventory of merchandise. As he extends his installment credit, to say \$5,000, he is faced with another problem. This installment paper is not money that he can spend to replace the merchandise sold; he must either reduce his inventory to \$45,000 or he must add \$5,000 to this capital to allow him to maintain his \$50,000 inventory. Thus under either approach, he has diverted \$5,000 from his normal business. Obviously a prudent business man will count the cost of this \$5,000, either in terms of interest he must pay for it, or the profit he could earn from it if invested in his regular business. By diverting it to this use, it can only be assumed he has made the rational decision that it is more profitable to provide this money for the use of others, i.e., to loan this money to his customers rather than send them to another lender. Thus he has two profitable businesses; he sells his merchandise for a profit and then makes another profit by

40. A law student at the University of Missouri reports that his service charges for the month of November 1958, totaled six dollars on a balance which did not exceed \$220.00 at any time during the month. He stated that all service charges had been paid for previous months.

41. Computed using a formula given in PHELPS, USING INSTALLMENT CREDIT 22 (1955).

42. *Daniel v. First Nat'l Bank*, *supra* note 38.

lending customers the money to buy that same merchandise. These businesses are mutually reciprocal. By selling the merchandise he has a ready source of borrowers, and by lending the money he has an added source of buyers.

Another argument is found in the traditional willingness of the courts to look to the substance of a transaction to determine if usury is present. This coupled with the traditional ability of the common law courts to adjust to the society in which they operate, presents a strong argument for the adoption of the modern view. The traditional view was adopted during a period when customer installment credit, as we know it today, was nonexistent and the situation presented was one of two parties bargaining from positions of relatively equal strength. In view of the great change which has occurred in the uses of credit sales, the courts would seem to be justified in re-examining the traditional concepts to see if they still fit today's changed commercial practices.

B. Possible Tests for Usury Under the Modern View

It seems to be generally accepted by all courts that not all purported credit sales are necessarily free from the taint of usury.⁴³ The real problem arises as to the test to be applied to these sales to determine if they are, in fact, usurious. The traditional view seems to be that if, at any point in the transaction, there is an actual sale of merchandise then the whole transaction is outside the usury statutes.⁴⁴

The test applied by the courts following the traditional view would be: Was the sale merely a device to enable the loan to be made, or was the loan a device to facilitate the sale? If the latter, then there is a bona fide credit sale free of the usury statutes.⁴⁵

The courts following the newer view would not stop at this simple test, but would separate the transaction into two parts: (1) The sale of the merchandise, and (2) the supplying of the money for the purchase. It is this second part which presents the difficulties. When was there an actual supplying of money and then was there a simple negotiation of the price based on, among other things, when payment was to be made? Certainly the courts can not go into the minds of the parties to determine their intention in each instance; thus some objective standards are needed to test each case. Several possible tests are suggested to determine if the parties did intend a sale and a loan, or simple a sale at an agreed-upon price for payment at some future date.

The first test might be to look at the *type of property* involved in the transaction to determine the type of transaction to which it lends itself. There seems to be one very real but frequently overlooked distinction in the classes of property involved in time price differential cases. This distinction is between property which is in itself

43. *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262 S.W. 425 (K.C. Ct. App. 1924).

44. *Ibid.*

45. See cases cited note 20 *supra*.

productive of revenue (e.g., farms and businesses) and property which is not productive of revenue in itself (e.g., today's consumer goods). The early cases laying down the majority rule that a credit sale was outside the scope of the usury statutes seem to have concerned only property which was by its nature productive of revenue.⁴⁶

This type of transaction seems to be best described in the Missouri case of *Holland-O'Neil Milling Co. v. Rawlings*. In that case stock in a going automobile agency was sold to defendant Rawlings. A cash price was fixed for the stock, but Rawlings was not in a position to pay cash. The business had never failed to earn a twenty per cent return on what was stated as the cash price, and both parties seem to have expected this return to continue. The vendor may be reasonably expected, in a case of this nature, to take the position that it would be foolish to give up an investment which returns him twenty per cent a year and allow the vendee to reap this return while the vendor supplied the capital. Thus the vendor may wish to transfer these shares of stock to the vendee, giving the vendee control of the business, but retaining the expected earnings from these shares until such time as they are paid for. Thus the vendee has the control that he seeks and the vendor retains his income from these shares until his capital is returned. This line of reasoning is even more clearly indicated by the fact that the contract in the *Holland* case called for a reduction of the time price difference in relation to the early payment of the price of the stock.

This seems to be an entirely logical arrangement for the parties. The vendor retains the income from his capital until that capital is in his hands, and the new owner has the opportunity to increase the profits of the business according to his own abilities. There seems to be no objection to a further charge against the vendee to compensate the vendor for the possible loss of his capital and other expenses in administering the obligation. It might be argued that some of this return represents a wage paid for actual management of the business as distinguished from a return of capital wisely invested. However, this need not present any serious difficulty. When the vendor withdraws from the actual operation of the business he no longer expects to be paid for that management effort but expects only a return on his capital investment. The amount which is returned on capital and the amount which is the result of wages of management are matters of bargaining between the parties based on information that they possess in any given situation.

However, a completely different situation is presented by the common practice of installment selling of consumer goods today. Consumer goods literally or figuratively sit on the shelves of the merchants; they earn him no profit unless he can sell them. The prospective customer comes into the merchant's place of business and desires to make a purchase but lacks the funds. The merchant desires to make this sale and says, in effect, "I will supply the money for this purchase if you will buy." His motives are obvious; if he does not sell the merchandise at this time the customer may decide not to buy at all.

46. *Beete v. Bidgood*, 7 B. & C. 453, 108 Eng. Rep. 792 (K.B. 1827) (plantation); *Hogg v. Ruffner*, 66 U.S. (1 Black) 390 (1861) (agricultural rental property).

Thus the consumer goods of today lend themselves to a two-part transaction whereby the merchant both sells the goods and supplies, or makes arrangements for, the money to be used in the transaction. On the other hand, income-producing property is an investment which provides an annual return through dividends or rentals. In many cases this return would be greater than the legal rate of interest. In such a situation it would be absurd to expect the seller to give up this income and receive only the legal rate of interest on his investment. This test will usually serve to protect the weak buyer and still give business men the opportunity to bargain among themselves as they see fit.

A second test which the courts might apply is related to the *type of sale* that is involved. Is this a sale between two parties, neither of whom ordinarily deals in this item or is it a stock in trade of one of the parties? Where only one sale of this type is contemplated, it is much more likely that the parties have negotiated a price based on the value of the product and the terms of payment. Where one of the parties customarily deals in the item it seems more likely that he has consciously or unconsciously determined a selling price based on a cash payment and then computed his costs if he must supply the money for the transaction by extending credit for some period of time.

Third, it is possibly for the court to look at the *relative bargaining positions* of the parties. Common practice would indicate that, while a person might bargain on the price of a car or a stove in dealing with a retailer, the average consumer so little understands the costs of installment buying that he could not intelligently bargain on this matter if he wished to. He is most often presented with a simple "take it or leave it" choice when it comes to finance terms. The typical buyer considers the transaction finished when the price is agreed upon and is largely at the mercy of the seller who may adjust his credit terms in the loan part of the transaction and thereby recoup the profit he has apparently given away in the bargaining over price.

These tests should provide an adequate basis to distinguish between those situations where parties have arrived at a higher price for credit than for cash through the traditional bargaining process, and those situations where the seller is, in effect, operating a loan agency as well as his regular business.

C. *Effect of the Modern View if Adopted in Missouri*

If the Missouri courts should decide that the time price differential in some credit sales was interest and thus subject to the usury statutes, a number of serious questions would be raised as to the status of all credit transactions in the state.

The general Missouri usury statute provides that parties may contract, in writing, for interest not to exceed eight percent per annum.⁴⁷ If a greater rate than this is charged, the chattel mortgage will be invalidated and the borrower may recover the

47. § 408.030, RSMo 1949.

amount paid in excess of the legal rate and his attorney's fee.⁴⁸ If the lender is a bank or trust company and a member of the federal reserve system the entire interest is forfeited and the borrower may recover a penalty of twice that amount.⁴⁹

By proper handling of the transactions, the credit seller and lender could come within the terms of the Missouri small loan act.⁵⁰ However, this would affect only the first \$400.00 of any transaction, and also would raise the problem of the ability of the typical sales clerk to handle the transaction correctly. This would be particularly important since an error could render the entire note and lien void.⁵¹

Clearly a serious problem would be created as to existing obligations if the Missouri supreme court should adopt the modern view. The most serious aspect would probably be the loss of chattel mortgages on automobiles and durable goods. It is also quite likely that a large amount of litigation would develop. This would probably continue until the bar and the lenders understood the full import of the decision and the requirements laid down by it. Because of this any reversal of the present view might take the form of a caveat. This was the form of decision used by the Arkansas court in *Hare v. General Contract Purchase Corp.*

D. Problems Raised by Adoption of the Modern View

A decision to the effect that an installment sale was usurious would raise other questions. What of the wholesaler who offers a two percent discount if paid within ten days, with the full amount due in thirty days? A possible answer might be that through custom of the trade the wholesaler must extend credit for thirty days and the discount is an attempt to avoid this business obligation. His action might be treated as an attempt to avoid being a lender. What of the five percent penalty which some utility companies add to bills which are not paid by the tenth of the month? What of the retailer who choose to sell to *all* customers on credit and fixes his prices accordingly? What if he gives a discount for cash payments? What if he gives no discount? An attempt to answer these questions at the present time would be little more than speculation. They are raised only to illustrate possible problems which might develop.

IV. THE LEGISLATIVE APPROACH

Several legislatures have attempted to solve the problem of retail installment sales. Most states which have enacted legislation in this area seem to have restricted their regulation of maximum rates of return to motor vehicle sales.⁵² Indiana's statute provided for administrative fixing of the rates of return on installment contracts by establishing the price at which these contracts could be sold.⁵³ The

48. §§ 408.050-.070, RSMo 1949.

49. §§ 362.280, 363.630, RSMo 1949.

50. §§ 408.100-.190, RSMo 1957 Supp.

51. § 408.150, RSMo 1957 Supp.

52. *E.g.*, ME. REV. STAT. ANN. ch. 59, §§ 249-59 (Supp. 1957); MD. ANN. CODE art. 83, §§ 116-40 (1957); WISC. STAT. ANN. § 218.01 (1957).

53. IND. ANN. STAT. §§ 58-901-45 (1951).

portion of the statute providing for administrative regulation of prices was held unconstitutional by the Indiana supreme court.⁵⁴ This appears to be the only statute attempting to regulate rates which has been successfully attacked. Other states have enacted legislation which fixes maximum rates of return on all retail installment sales contracts.⁵⁵ Apparently the most recent action in this area has been by Kansas which enacted a comprehensive sales finance act in 1958 covering all retail sales agreements.⁵⁶

In general these statutes have provided for a return of so many dollars on each hundred dollars outstanding, depending on the age of the automobile or cost of merchandise. They have also provided a certain minimum fee for any such transaction.

Could such a law be enacted in Missouri? At least one possible constitutional problem is raised. The Missouri constitution provides for uniform interest rates.⁵⁷ It forbids the classification of lenders and provides that any rate of interest fixed by law must apply to all lenders generally. This might present a problem in any attempt to draft a statute that would apply only to installment credit. A legislative declaration to the effect that this time price differential did not constitute interest might be sufficient. Such a declaration would give the Missouri supreme court another reason for not upsetting the previous holdings by the courts of appeals that

54. *Department of Financial Institutions v. Holt*, 108 N.E.2d 629 (Ind. 1952).

55. N.Y. PERS. PROP. LAW §§ 301-11, 401-18 (Supp. 1958); UTAH CODE ANN. § 15-1-2(a) (1953).

56. Kan. Laws Spec. Sess. 1958, ch. 9. The provisions of section 8 establishing the maximum allowable return, which are typical of this species of statute, are set out below:

Section 8(a) . . . :

(I) As to motor vehicles:

Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made—seven dollars (\$7) per one hundred dollars (\$100) per year.

Class 2. Any new motor vehicle not in Class 1 and any used motor vehicle designated by the manufacturer by a year model of the same or not more than two (2) years [prior ?] to the year in which the sale is made—ten dollars (\$10) per one hundred dollars (\$100) per year.

Class 3. Any used motor vehicle not in Class 2 and designated by the manufacturer of a year model more than two (2) years prior to the year in which the sale is made—thirteen dollars (\$13) per one hundred dollars (\$100) per year.

(II) As to services and goods other than motor vehicles:

(i) On so much of the principal balance as does not exceed three hundred dollars (\$300), twelve dollars (\$12) per one hundred dollars (\$100) per year; (ii) if the principal balance exceeds three hundred dollars (\$300), but is less than one thousand dollars (\$1,000), nine dollars (\$9) per one hundred dollars (\$100) per year on that portion over three hundred dollars (\$300); (iii) if the principal balance exceeds one thousand dollars (\$1,000), eight dollars (\$8) per one hundred dollars (\$100) per year on that portion over one thousand dollars (\$1,000).

Section 8(b) . . . A minimum finance charge of fifteen dollars (\$15) may be charged on any retail installment transaction.

57. Mo. Constr. art. 3, § 44.

the time price differential was not interest.⁵⁸ However, such a course by the legislature would leave any proposed statute open to attack on the basis of legislative price fixing. Whether either of these attacks would be sufficient to make the statute unconstitutional is beyond the scope of this Comment.

V. CONCLUSIONS

While the view that the time price differential is interest within the meaning of the usury statutes has only limited support among the courts of this country, it seems to be the most logical view. The analogy of the needy installment-plan buyer to the needy borrowers of cash seems clear. If the usury statute was designed to protect the person in need of funds, why should not it also protect that person who is in need of the objects that those funds will purchase? Should the person who must own an automobile to continue his employment be protected if he borrows the money to buy the car but unprotected if he buys the car on an installment plan?

Looking further it may be seen that the same kind of capital is present to finance installment purchases as is available for ordinary loans. The same factors are included in determining the rate that must be charged. These are pure interest or profit, administrative costs of the transaction, and bad debt or credit losses.⁵⁹ While these factors may vary according to the transaction they are always present in either installment sales or pure loans of money.

The present day installment sale is a transaction which did not exist fifty years ago. Should the old rules be applied to this class of transactions without considering that these sales may be something entirely different from the transactions which the idea of a bona fide credit sale was meant to cover? If the usury statute is to accomplish the purpose for which it was enacted, should it not be tested against the present day commercial world instead of fifty years ago?

However, it should be noted that the adoption of the minority view will be no panacea for the problems affecting installment selling. A real problem is presented by the present statutory rate of eight percent per annum. It seems obvious that eight percent per annum is not a sufficient return to attract the capital necessary to finance installment credit. The problem of what is a fair rate of return is much more difficult to answer. Certainly the customers, costs and security involved seem to resemble more closely the small loan customer than any other group of people. Few people would question the value of the small loan acts and much the same situation would seem to exist in regard to installment credit insofar as a fair rate of return is involved.

The best solution to the problem would seem to be in the hands of the legislature. It alone is in a position to prevent the abuses to which this area is susceptible and at the same time provide for a fair rate of return on investment in financing credit sales.

58. See cases cited note 20 *supra*.

59. See *PHELPS, USING INSTALLMENT CREDIT* 18 (1955).

The Kansas act could well serve as a model for any action by Missouri. It might well be that a lower minimum fee would be in order since the fifteen dollar minimum provided by the Kansas act provides little protection for the small purchaser. Such a minimum fee could be applied, with equal logic, to the existing small loan legislation since the problem of high costs in relation to a very small loan is much the same.

Assuming such legislation could avoid the constitutional problems mentioned earlier it would provide protection where needed, allow a fair return on capital, and avoid the abuses of a few unscrupulous operators who injure the reputation of reputable firms.

If such legislation is *not* enacted, the Missouri supreme court is faced with two choices if a case involving usury in a credit sale is brought before it. It might allow the old rule to stand, unmodified. This would have the effect of allowing abuses to continue and would leave any remedy to the legislature. Or the court could modify the old rule, which would end the abuses but might very well create a problem, remediable only by the legislature, of providing a fair rate of return for the financing of installment sales. There are several factors which might influence the court's thinking in this matter. The courts seem to have created the traditional rule to exempt a group of persons who did not need the protection of the usury statutes. It seems equally just that they modify this rule to bring under the protection of the usury statutes this new group which seems to have a real need for such protection.

It is the legislature which has fixed the maximum interest rate to be charged a borrower. In theory this rate should be set in such a way as to protect the weak and still provide an adequate return on the lender's investment. The establishment of the rate is clearly a legislative matter.

Thus it seems the problem is one that can be adequately solved only by legislation. This does not seem to be a sufficient reason to say that the courts should not act to provide such relief as they are capable of giving. It would seem that the supreme court has only two choices. It may, in effect, establish a maximum rate that is too low, or it may allow an unrestricted return on installment selling. Faced with these two alternative solutions, neither of which is entirely acceptable, it would seem more in the interests of justice to resolve doubts in favor of the retail installment buyers—that group which is least able to protect itself.

JAMES R. WILLARD

INSTALLMENT CONTRACTS FOR THE SALE OF LAND IN MISSOURI

I. DEED OF TRUST—USUAL PURCHASE MONEY SECURITY DEVICE IN MISSOURI

The person who incurs a large debt in connection with a purchase of real estate will be required in most instances to give his creditor a security interest in

the property. In Missouri the most common type of security used for this purpose is a deed of trust in the nature of a mortgage with foreclosure by non-judicial sale pursuant to a power of sale.¹ When this device is used, the purchaser executes a promissory note to his creditor to evidence the debt, and a mortgage or deed of trust is executed in favor of the noteholder.² The mortgage or deed of trust operates as a lien against the realty, with title and the beneficial rights of ownership remaining in the mortgagor³ as long as there is no default under the terms of the instrument.⁴

If the debt is paid as provided in the note, the security interest is released by marginal release,⁵ and the mortgagor's title is freed of the lien without a reconveyance being necessary.⁶ Should the mortgagor fail to pay the debt in the manner provided in the mortgage or deed of trust, the security interest can be realized on and the land sold to satisfy the debt.⁷ If the sale complies with the terms of the instrument and the statute,⁸ the mortgagor's interest in the land is extinguished⁹ and the purchaser at the sale takes a title valid as against all parties to the foreclosure proceeding.¹⁰ The cost of the sale and amount of debt secured are taken out

1. A power of foreclosure by non-judicial sale in a deed of trust or mortgage is a lawful provision and is a matter of contract between the parties. §§ 443.190, .410, RSMo 1949; *Abrams v. Lakewood Park Cemetery Ass'n*, 355 Mo. 313, 196 S.W.2d 278 (1946) (en banc).

2. The deed of trust or mortgage is security for the debt which is evidenced by the promissory note. *Park Nat'l Bank of Kansas City v. Travelers Indem. Co.*, 184 F.2d 672 (8th Cir. 1950); *Eurengy v. Equitable Realty Corp.*, 341 Mo. 341, 107 S.W.2d 68 (1937); *Allen v. Pullam*, 223 Mo. App. 1053, 10 S.W.2d 64 (Spr. Ct. App. 1928).

3. *In re Thomasson's Estate*, 350 Mo. 1157, 171 S.W.2d 553 (1943) (en banc); *Reynolds v. Stepanek*, 339 Mo. 804, 99 S.W.2d 65 (1936); *Missouri Real Estate & Loan Co. v. Gibson*, 282 Mo. 75, 220 S.W. 675 (1920); *Kenneth v. Plummer*, 28 Mo. 142 (1859); *Mansur, Real Estate Mortgage Theory in Missouri*, 6 Mo. L. REV. 200 (1941); *Eckhardt, Work of Missouri Supreme Court for the Year 1938—Property*, 4 Mo. L. REV. 419 (1939).

4. *Wakefield v. Dinger*, 234 Mo. App. 407, 135 S.W.2d 17 (Spr. Ct. App. 1939); 1 JONES, MORTGAGES § 41 (8th ed. 1928).

5. §§ 443.060, .070, .090, .100, RSMo 1949.

6. *McGehee v. Garringer*, 284 Mo. 465, 224 S.W. 828 (1920) (en banc); *Brown v. Merchant's Bank*, 66 Mo. App. 427 (K.C. Ct. App. 1896).

7. The same type sale, i.e., at public auction after published notice, is held in the case of non-judicial foreclosure as is used when the foreclosure is by court action. *Thielecke v. Davis*, 260 S.W.2d 510 (Mo. 1955); *Petring v. Kuhs*, 350 Mo. 1197, 171 S.W.2d 635 (1943); *Lunsford v. Davis*, 300 Mo. 508, 254 S.W. 878 (1923); *Waples v. Jones*, 62 Mo. 440 (1876).

8. The sale must be held in the county where the property lies. § 443.310, RSMo 1949.

9. This is subject to an exception where the noteholder is the purchaser at the foreclosure sale. When that happens, the mortgagor has a limited statutory right of redemption. § 443.410, RSMo 1949. See generally *Wise, Foreclosure by Power of Sale Inserted in a Mortgage or Deed of Trust*, 4 Mo. L. REV. 186 (1939); *Note*, 1950 WASH. U.L.Q. 617.

10. § 443.290, RSMo 1949, provides for good title in case of sale by a mortgagee. Court interpretation has extended this rule to a sale by trustee. Notwithstanding this statute, it is still possible to have the sale set aside for irregularity. See cases collected in *VERNON'S ANN. MO. STAR. 1949* § 443.290 nn.32-33; *Annot.*, 3 RSMo 1949, § 443.290, at 1469-75.

of the proceeds first; then if there is any surplus, that amount is returned to the holder of the equity of redemption.¹¹

The reason the mortgage or deed of trust with a power of foreclosure by non-judicial sale is used in almost all cases in Missouri is that in case of default in payment the noteholder has a speedy and efficient method of realizing on the security, available at a relatively low cost.¹² The time required to execute a power of sale provision in a mortgage or deed of trust is less than thirty days.¹³ In the typical case, since no court action is required, the total expense will be approximately twenty-five to fifty dollars.¹⁴

II. INSTALLMENT CONTRACTS AS PURCHASE MONEY DEVICE—OUTSIDE MISSOURI

In jurisdictions which do not recognize or permit foreclosure of mortgages or deeds of trust by non-judicial sale,¹⁵ there is an acute problem of finding a quick and inexpensive method of extinguishing the interest of a defaulting purchaser of realty and realizing on the "security". One solution is the use of land installment contracts which closely resemble the conditional sale contracts for chattels. By the use of this type of contract the purchaser can have the advantage of a short-margin "loan" and at the same time the vendor can have, in the case of default, the substantial advantages of a foreclosure by non-judicial sale,¹⁶ and in some cases the additional advantage of a windfall.

A typical transaction of this kind might be described as follows:¹⁷

A man with an income of \$300 a month, and savings amounting to \$2,000, wishes to buy a \$10,000 house. A bank or home loan institution is unwilling to lend more than \$5,000 secured by a mortgage on the property. The owner declines to take a first or second mortgage for any part of the purchase

11. In the typical situation the holder of the equity of redemption will be the purchaser-mortgagor or his successor in title. *Reid v. Mullins*, 43 Mo. 306 (1869); *In re Lacy*, 234 Mo. App. 71, 112 S.W.2d 594 (St. L. Ct. App. 1937).

12. *Wise, Foreclosure by Power of Sale Inserted in a Mortgage or Deed of Trust*, 4 Mo. L. Rev. 186 (1939); Note, 1950 WASH. U.L.Q. 423.

13. At least twenty days of this period will be the statutory notice prior to sale § 443.310, RSMo 1949, *Judah v. Pitts*, 333 Mo. 301, 62 S.W.2d 715 (1933); *Hoffman v. Bigham*, 324 Mo. 516, 24 S.W.2d 125 (1930).

14. It is assumed that the trustee has waived his right to statutory fees as provided by § 443.360, RSMo 1949.

15. Power of foreclosure by non-judicial sale is used in only eighteen jurisdictions, judicial process being required in others. In a number of states, the use of power of sale provision as a method of foreclosure is specifically forbidden by statute.

16. 3 AMERICAN LAW OF PROPERTY § 11.78 (Casner ed. 1952); Notes, 1950 U. ILL. L.F. 249; 39 MINN. L. REV. 93 (1955); 7 RUTGERS L. REV. 396 (1953).

17. The installment contract, sometimes called "contract for deed" or "bond for title," should be differentiated from the ordinary executory contract for the sale of realty. The latter contract is used primarily as a more or less complete binder agreement for the time between the date the bargain was entered and the date the bargain is closed by the passing of title and execution of security devices, if any. The installment contract governs the relations of the parties throughout the life of the debt, whereas in the binder contract situation, the debt relationship after the closing date is governed by the security device and the contract drops out of the picture. NEW YORK LAW REVISION COMMISSION, RECOMMENDATIONS AND STUDY RELATING TO INSTALLMENT LAND CONTRACTS (1937).

price. The parties thereupon enter into a contract under which the purchaser takes possession immediately and the vendor retains title until the full purchase price is paid, or at least until the balance of the price is reduced to a point at which institutional financing becomes available. The parties sign a standard agreement form providing for a total price of \$10,000, \$2,000 to be paid in cash at the time of the contract, the balance payable at the rate of \$75 per month, including 6% interest; taxes, special assessments and fire insurance costs are charged to the buyer.¹⁸

It is clear from this transaction that title to the realty remains in the vendor and the purchaser's interest is equitable. When all payments have been made the purchaser will receive a conveyance of legal title and the security interest of the vendor will be released.

The difficult problem is to define the remedy the vendor has in case the purchaser fails to make his payments and the vendor finds it necessary to realize on his security interest. On usual contract principles it would seem the vendor could bring suit: "(1) for the installments which are due with interest thereon; (2) for specific performance of the contract; (3) for damages for the breach; (4) to foreclose his vendee's rights; (5) to quiet title";¹⁹ or if he should desire, he may merely rescind the contract.²⁰

Since all of these remedies involve the use of court action, the vendor still would not have a remedy to take care of the situation where the amount paid prior to default was so small that court action would not be feasible, or where court action would be too slow or expensive. To alleviate this situation the typical land installment contract will usually contain the following provisions:

1. Time shall be of the essence;
2. Prompt payment on dates due is a condition precedent to the vendor's duty to convey.²¹
3. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure to make any payments when the same shall become due or within — days thereafter, the Seller shall, at his option, be released from all obligations in law and equity . . . and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may, at his option, re-enter and take

18. This example is taken from Bodenheimer, *Forfeitures Under Real Estate Installment Contracts in Utah*, 3 UTAH L. REV. 30 (1952), in which the author gave acknowledgment to the Salt Lake City Title and Escrow Co. for use of their files in procuring the same.

19. Comment, 27 CALIF. L. REV. 583 (1939).

20. Rescission would rarely be used since the purchaser, unless he agreed to the contrary, would be entitled to be put in status quo. This would mean the vendor, to regain possession of the land, would have to return all installments paid. Thus the vendor would be deprived of rent for the time the purchaser was in possession. Corbin, *The Right of Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013, 1019-23 (1931). Cf. *Haynes v. Dunstan*, 104 S.W.2d 1025 (K.C. Ct. App. 1937).

21. 3 AMERICAN LAW OF PROPERTY § 11.78, at 196 (Casner ed. 1952).

possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller.²²

If the contract is enforceable as written and if title will not be clouded, it is clear this contract gives the vendor a very favorable remedy, much more advantageous than would be available under a purchase money mortgage or deed of trust. The vendor is not only able to repossess the land quickly, but also retains all that has been paid by the purchaser.²³ The further the contract proceeds toward completion, the more the purchaser will tend to be aware of seriousness of breach. Also it is probable that the retained payments will more than cover the damages occasioned by a breach even though there is little or no initial payment.

Unfortunately it is this possibility of forfeiture, not alleviated by the privilege of tardy redemption, which has led to much dissatisfaction and uncertainty with an otherwise effective instrument. When a contract of this type is viewed from the standpoint of a purchaser it is clear there is a serious possibility of a harsh and oppressive result. The further the contract proceeds toward completion, the more the purchaser stands to lose and the more the vendor stands to gain from a default—intentional or inadvertent. Thus in reality the provision for the vendor to retain all payments as liquidated damages becomes a provision for a penalty, a thing not usually sanctioned in either law or equity.²⁴

This possibility of penalty has given the courts much trouble whenever such a contract has come before it. The result is that there are many conflicting decisions on the issue of whether forfeiture clauses are valid. By the weight of authority the vendor under a land installment contract with strict forfeiture provisions can retain the payments made and recover possession of the realty from the defaulting purchaser.²⁵ A minority of jurisdictions²⁶ refuse to enforce strict forfeiture provisions where a penalty would result and allow the defaulting purchaser to recover the installments he has paid, less such amount as will compensate the vendor for the damages he received as a result of the breach.²⁷ Other jurisdictions, while

22. This language is taken from a real estate contract form used in Illinois. The word "forfeited" should never be used unless the local cases clearly hold it to be harmless. It is much better to say simply that the payments made shall be "retained" by the seller as liquidated damages. Bodenheimer, *Forfeitures Under Real Estate Installment Contracts in Utah*, 3 UTAH L. REV. 30 (1952).

23. 3 WILLISTON, CONTRACTS § 791 (rev. ed. 1936).

24. *Id.* § 776.

25. *Id.* § 791; Corbin, *The Right of Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013, 1031 (1931); Vanneman, *Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342, 350 (1930); Annots., 134 A.L.R. 1060 (1941), 59 A.L.R. 189 (1929).

26. 3 WILLISTON, *op. cit. supra* note 23, § 791; Simpson, *Legislative Changes in the Law of Equitable Conversion By Contract: II*, 44 YALE L.J. 754, 777 (1935).

27. *E.g.*, in *Lytle v. Scottish Am. Mortgage Co.*, 122 Ga. 458, 468, 470, 50 S.E. 402, 406-07 (1905), the court said:

As in a mortgage, so in its equitable equivalent, a conditional sale of land, a forfeiture will not be enforced even for the vendee's default. There is no difficulty in making an exact computation of the damages. . . . While

acceding to the majority view in theory, have indulged in all sorts of ameliorative devices to avoid its full impact.²⁸ For the most part the courts have kept the actual state of the law cloudy by giving unqualified recognition to the forfeiture clause in some cases, and granting relief in other cases where the facts indicate a penalty will result.²⁹ Despite the tendency of most courts to hedge, it is still possible to find cases where strict forfeiture resulted in a heavy penalty to the purchaser.³⁰ It is this type of case which has drawn criticism from legal scholars and prompted their advocacy of relief against such forfeiture provisions.³¹ Relief to the defaulting purchaser has been advocated by the American Law Institute, in its *Restatement of Contracts*.³²

many courts have taken a different view of this subject, the decisions in this State are to the effect that before the vendor on rescission can recover the property sold, he must account for so much of the purchase money as has been paid.

Perkins v. Spencer, 121 Utah 468, 243 P.2d 446 (1952), is probably the soundest recent decision involving attempted forfeiture under a land installment contract. In that case the court held the purchaser could recover the excess of his payments above the vendor's actual damages. The purchaser had defaulted on an installment contract with forfeiture provisions after paying \$2,725 of a total purchase price of \$10,500.

28. "Strict doctrines as to forfeitures inevitably produce loose doctrines as to 'waiver.'" Pound, *Progress of the Law, 1918-1919, Equity*, 33 HARV. L. REV. 929, 952 (1920).

29. This is true even in jurisdictions which purportedly follow the majority rule. For example in Illinois, where the land installment contract is a common and acceptable device for real estate financing arrangements, it has been said that the courts have failed to produce a clear decision which can be applied beyond the facts of the case in which it was rendered. Note, 1950 U. ILL. L.F. 249.

30. *Hansborough v. Peck*, 72 U.S. (5 Wall.) 497 (1866) (forfeiture upheld though vendee had paid \$40,000 on a total purchase price of \$100,000); *Gregory v. Nelson*, 147 Kan. 682, 78 P.2d 889 (1938) (upholding forfeiture of \$15,000 on a total purchase price of \$80,000); *Norpac Realty Co. v. Schackne*, 107 Ohio St. 425, 140 N.E. 480 (1923) (upholding forfeiture of \$12,500 on a total purchase price of \$50,000).

31. Practically all writings have forcefully advocated protection of the purchaser and the rejection of the strict legal doctrines by which forfeitures have been enforced. 3 WILLISTON, *CONTRACTS* § 791 (rev. ed. 1936); Ballantine, *Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329 (1921); Bodenheimer, *Forfeitures Under Real Estate Installment Contracts in Utah*, 3 UTAH L. REV. 30 (1952); Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931); Havighurst & Lawrence, *Forfeitures Under Real Estate Contracts in Illinois*, 29 ILL. L. REV. 714 (1935); Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract: II*, 44 YALE L.J. 754 (1935); Vanneman, *Strict Foreclosure on Land Contracts*, 14 MINN. L. REV. 342 (1930); Comment, 27 CALIF. L. REV. 583 (1939); Notes, 34 U. DET. L.J. 209 (1956); 52 HARV. L. REV. 129 (1939); 1950 U. ILL. L.F. 249; 39 MINN. L. REV. 93 (1955); 7 RUTGERS L. REV. 396 (1953).

32. RESTATEMENT, *CONTRACTS* § 357 (1932) reads, in part: § 357. Restitution in Favor of a Plaintiff Who is Himself in Default.

(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment, except as stated in Subsection (2), for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if

(a) the plaintiff's breach or non-performance is not wilful and deliber-

Despite the increased use of land contracts as a security device there has been a relatively small amount of legislation regulating them.³³ Only thirteen states at present appear to have statutes which could be applied to land installment contracts.³⁴ These statutes are largely of two types. One group grants relief against all forfeitures and penalties, but this type statute has been considered as not applicable to the land installment contract, and thus is of little value here. The other type statute has been enacted for the specific purpose of aiding the defaulting purchaser in a land installment contract. The relief given is a statutory grace period after default, with reinstatement to be allowed if the purchaser remedies his delinquency within this time. It is submitted that as yet there has been no legislation which gives a completely satisfactory remedy for the problems that are occasioned by a purchaser's default on a land installment contract.³⁵

III. LAND INSTALLMENT CONTRACTS IN MISSOURI

A summary comparison will indicate that the desired end, an efficient and inexpensive remedy, which has led to the use of land installment contracts in certain other jurisdictions, is an achieved reality in Missouri when one uses a deed of

ate; or

- (b) the defendant, with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in specie is still not unreasonably difficult or injurious.

(2) The plaintiff has no right to compensation for his part performance if it is merely a payment of earnest money, or if the contract provides that it may be retained and it is not so greatly in excess of the defendant's harm that the provision is rejected as imposing a penalty.

(3) The measure of the defendant's benefit from the plaintiff's part performance is the amount by which he has been enriched as a result of such performance unless the facts are those stated in subsection (1 b), in which case it is the price fixed by the contract for such part performance, or, if no price is so fixed, a ratable proportion of the total contract price.

The second illustration of subsection (2) reads:

7. A contracts for the sale of land to B for \$5,000, payable in five annual installments. It is provided that time shall be of the essence and that, upon any default, A may declare the contract terminated and may retain all installments paid. After B has paid \$4,000, he is unable to make the fifth payment on time. Upon B's default, A at once gives notice the contract is terminated, resumes possession of the land, and sells it to C for \$6,000. In an action for restitution, B proves that A has suffered no harm other than deprivation of rent. B can get judgment for \$4,000, less the value of the use and occupation enjoyed by him.

33. Comment, 39 MINN. L. REV. 93 (1955); NEW YORK LAW REVISION COMMISSION, REPORT 377 (1937).

34. ARIZ. REV. STAT. ANN. §§ 33-741, 742 (1956); CAL. CIV. CODE §§ 3275, 3369; GA. CODE §§ 20-1403, 37-216 (1933); IOWA CODE § 656.1-.6 (1950); LA. REV. STAT. § 9:2941 (1950); ME. REV. STAT. ANN. c. 107, § 4 (1954); MD. ANN. CODE art. 21, § 118(1) (1951); MICH. COMP. LAWS § 630.25 (1948); MINN. STAT. § 559.21 (1953); MONT. REV. CODES ANN. §§ 17-102, 17-704 (1947); 3 N.D. REV. CODE § 32-1801 (1943); OKLA. STAT. ANN. tit. 15, § 213 (1937); S.D. CODE § 37.3101 (1939).

35. The Maryland statute is the most recent and seemingly the most effective enactment on this subject. The efficacy of this statute cannot be appraised until it has had further court interpretation. A similar attempt at comprehensive legisla-

trust with a power of sale provision. The problem in Missouri is not essentially which type of instrument to use, because the advantages in favor of the deed of trust with a power of sale are overwhelming.³⁶ Rather the problem is what to do in case a lender makes the wrong choice and uses a land installment contract. Most often the lender will use the land installment contract without having consulted a lawyer.

At the outset it should again be made clear that what is being dealt with here is a contract designed to take the place of the deed of trust with power of sale. It is plainly not the ordinary contract of sale which is in common everyday use as a binder agreement until closing date.³⁷ On the binder instrument the law is relatively well settled and will not be discussed here. On the true land installment contract, Missouri case law is definitely meager.³⁸ To make the situation more difficult, the cases which do consider this instrument fail on close scrutiny to warrant any broad categorical statements as to just what the law in Missouri is.³⁹

*A. Vendor's Right to Retain Payments if
There Is No Express Provision for Forfeiture*

In the only Missouri cases which have dealt with the vendor's right to retain payments where there is no express provision for forfeiture, the contract under consideration was of the binder type as distinguished from the installment contract.⁴⁰ For this reason the only money sought to be retained was the down

tion failed to be adopted by New York in 1938. See NEW YORK LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO INSTALLMENT LAND CONTRACTS 343-85 (1937).

36. It is not intended to suggest that a land installment contract never should be used in Missouri as a security device. There are some special situations where competent lawyers have advised their use notwithstanding their patent disadvantages. One such type of case is that of the heavily promoted, highly speculative subdivision of cheap lots, where the buyer is not apt to make improvements and is likely to regret his bargain and default. Even the low cost of a deed of trust foreclosure may be too much in view of the small value of the lots and the small payments made. See the discussion of marketable title in note 76 *infra*.

37. Such contracts are hereinafter referred to as binder contracts. (As used here, "binder" does not refer simply to the overly short, inadequate contract for the sale of land, often used in Missouri.) As indicated *supra* note 17, this type of contract is usually found in the majority of real estate transactions and has as its principal purpose the governing of the rights of the parties during the typical one or two month period intervening between the signing of the contract and the closing of the sale. After the deed and security instruments have been executed and delivered, this binder contract ordinarily drops completely out of the picture.

38. The principal consideration must be what the courts have done, since Missouri, like thirty-four other states, has never enacted any legislation applicable to land installment contracts.

39. This is said with the realization that it is contrary to what appears to be the only prior discussion of land installment contracts in Missouri. See GILL, MISSOURI TRUSTS § 1659 (3d ed. 1931) where it is stated:

A contract to sell and purchase real estate where a certain number of monthly payments are to be made before a deed will be given, is valid. A provision in such a contract that all money paid will be forfeited upon delinquency, is upheld (unless the forfeiture is fraudulent). . . .

40. It is submitted that the disposition of the Missouri courts on this point in the case of a binder contract would reasonably apply a fortiori to an installment contract.

payment made at the time the agreement was entered into. On this question, Missouri courts hold, contrary to a majority of jurisdictions, that in order for a vendor to regain the property, where there is no provision for forfeiture, the vendor must return all payments made by the purchaser, less the vendor's actual damages.⁴¹

In *Haynes v. Dunstan*⁴² the vendor brought ejectment to recover possession of 451 acres of land. The land was sold to the defendant on a contract on which defendant defaulted. The purchaser counterclaimed for \$1,800 of the \$2,000 in payments he had made on the contract prior to default. The court gave plaintiff-vendor judgment for possession of the land and the purchaser the \$1,800 he sought by counterclaim. This was considered the amount purchaser paid on the contract less the vendor's damages for the breach. The court said:

The defendant did not rescind the contract; he merely failed to perform the terms of the contract within the times therein provided. When the plaintiff brought this suit, he elected to rescind the contracts, and he may not have both the land and the purchase money received by him, in the absence of provisions in the writings to the effect that failure of the defendant to fully perform forfeited the payments made.⁴³

B. *Effect of Express Forfeiture Provision on
Vendee's Right to Specific Performance*

The majority of cases in which Missouri courts consider land installment contracts are suits by a purchaser for specific performance after the purchaser has defaulted and the vendor has attempted a forfeiture.

*O'Fallon v. Kennerly*⁴⁴ is the earliest Missouri case in this field. There the defendant vendor entered a bond to convey certain realty to the plaintiff, plaintiff to pay the purchase price in stated installments. The contract contained strict provisions to the effect that if all installments were not promptly paid all prior payments would be forfeited. The plaintiff defaulted and defendant refused to convey, claiming the forfeiture. Notwithstanding his default plaintiff sought specific performance claiming defendant had waived the strict forfeiture provision by accepting the first payment after it was long overdue. The court denied relief to plaintiff on the ground that plaintiff's proof failed to show he had ever made the payment he alleged defendant accepted after overdue. The court, by dictum, recognized the validity of the forfeiture provision when it said:

41. *Bennett v. Adams*, 238 S.W.2d 442 (K.C. Ct. App. 1951), 30 TEXAS L. REV. 909 (1952); *Haynes v. Dunstan*, 104 S.W.2d 1025 (K.C. Ct. App. 1937); *Norris v. Letchworth*, 140 Mo. App. 19, 124 S.W. 559 (K.C. Ct. App. 1910).

42. 104 S.W.2d 1025 (K.C. Ct. App. 1937).

43. *Id.* at 1026. While the court uses the word "forfeited" it would seem "retention of payments for liquidated damages" would be a better phrase, even though Missouri courts have indicated the important question is the substance of the provision rather than the words used. *Yerxa v. Randazzo Macaroni Co.*, 315 Mo. 927, 288 S.W. 20 (1926); *May v. Crawford*, 150 Mo. 504, 51 S.W. 693 (1899); RESTATEMENT, CONTRACTS § 339 (Mo. Annot. 1933).

44. 45 Mo. 124 (1869). This case has been cited for the general proposition that land installment contracts with forfeiture provisions are valid in Missouri. See GILL, MISSOURI TITLES § 1659 (3d ed. 1931).

There is no doubt that equity may decree a specific performance of a contract for sale of property, notwithstanding a default in payment upon the day specified. The books are full of instances where such relief has been granted, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles. It will by no means be given as a matter of course, but some circumstance must exist to show that the party is justly entitled to it; as, for instance, where the purchaser has gone into possession and made valuable improvements or paid a considerable portion of the purchase money, or the default is occasioned by the act of the vendor, or he has waived it by receiving part of the purchase money, or otherwise, or where any other circumstances exist that would render a forfeiture in equitable. But I have never seen a respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at the time . . . in which he [plaintiff] has obtained this relief.⁴⁵

There was another ground which precluded relief for the plaintiff, namely, that he had failed to make a tender of the amount due.

This case, by dictum, places Missouri in line with the majority view when the court says that unless there is some equitable ground for relief, a forfeiture provision should be strictly enforced. This same view is stated in almost all subsequent cases where a defaulting purchaser has sought specific performance.

Despite those decisions, specific performance in favor of defaulting purchasers has not been denied as consistently as one might expect from the language. Since the case of *O'Fallon v. Kennerly*, the issue of waiver, sought to be raised there, has become increasingly important. This has been in large measure due to the convenience waiver presents to the courts which have been forced to deal with the strict forfeiture provisions. If the court can find, even on slight grounds, that there has been a waiver of the strict provisions, the tendency is to seize that as a means for relieving against the forfeiture.

*Bogad v. Wachter*⁴⁶ is a good illustration of how waiver has become the controlling issue in cases involving forfeitures of land installment contracts. There the suit for specific performance was brought by a purchaser in default. The plaintiff had purchased a trailer court near Ft. Leonard Wood on a land installment contract. The terms of the contract provided that the price was \$15,000, payable \$400 per month, title to be conveyed to purchaser upon full payment. The contract also provided:

Time is expressly made the essence of this contract and if Parties of the Second Part fail for 30 days after any monthly installment becomes due and payable to pay same, then this contract shall become null and void and Party of the First Part [vendor] shall retain all payments made as liquidated damages and may sell said property to other parties for their own benefit.⁴⁷

The plaintiff failed to make his fourth payment within the 30 day grace period but claimed defendant accepted that payment 17 days after that period. Thereafter

45. 45 Mo. at 127-28. It is supposed that the court was speaking only in general, since the contract before the court was not wholly executory.

46. 365 Mo. 426, 283 S.W.2d 609 (1955).

47. *Id.* at 427, 283 S.W.2d at 611.

plaintiff defaulted on other payments and defendant exercised the forfeiture provisions of the contract, putting a third party in possession of the trailer camp.

Plaintiff's theory in the action for specific performance was that defendant by accepting the fourth payment 17 days after the grace period, had waived his right to the benefit of the strict forfeiture provisions. The evidence was not too clear that defendant did accept the payments late and the proof rested solely on plaintiff's testimony which defendant denied. On this point the court said:

Forfeitures are not favored in equity; and it is not our understanding that proof of waiver of forfeiture must be so clear etc., as to leave no room or reasonable ground for hesitancy on the part of the chancellor, as contended by the defendants. . . .⁴⁸

The court found that since there had been a waiver, defendant could not stand on the strict provisions of the contract. On this point the court said:

Even when time is of the essence of the contract the vendor may waive the condition or requirement in that respect and he does so by receiving payments after a default. Forfeitures are not favored and if the contract does not provide for it or if time is of the essence but has been waived it is necessary that the vendor give the vendee notice of his intention to forfeit the contract before the vendee may be deprived of equitable relief against the forfeiture.⁴⁹

The court also discussed the effect on the strict forfeiture provisions of improvements made on the land:

In addition to the acceptance of payments out of time and of lesser amounts than due, the case involves improvements made by the vendees with the vendors' knowledge and consent. . . . The vendors knew of the necessity for the improvements. The improvements were of a permanent nature and in furtherance of the use to which the vendors had devoted the property . . . the vendees produced records indicating expenditures totaling \$2,575.79 over the period involved. The improvements made by the vendees were several times the amount due the vendors when the purchaser was dispossessed. . . . The vendors' actions appear oppressive and with a view to securing an unfair advantage under the letter of the contract.⁵⁰

This case would seem to indicate that even though the supreme court gives lip service to the validity of forfeiture provisions, there may be situations in which the court will relieve against the strict forfeiture provisions and grant specific performance of the contract, if sought.⁵¹ Other recent cases which have considered this point seem to support this view.⁵²

48. *Id.* at 432-33, 283 S.W.2d at 613.

49. *Id.* at 433, 283 S.W.2d at 614.

50. *Id.* at 434, 283 S.W.2d at 615-16.

51. On the basis of *Bogad v. Wachter*, a court may not allow forfeiture: (1) whenever vendor accepted payments late; (2) in a different amount than due; (3) whenever the purchaser has made considerable improvements on the land; or (4) if it appears that the vendor's actions in forcing strict forfeiture are oppressive and with a view to securing an unfair advantage.

52. The usual statement is that if the contract provides for an express forfeiture, that provision must be given effect. However the court will then normally find there has been a waiver of the strict provisions. Since *O'Fallen v. Kennerly*, 45 Mo. 174 (1869), the courts have always been able to grant specific performance of his

*C. Purchaser's Right to Restitution of Payments
After Default Even Though Contract Expressly Provides for Forfeiture*

A problem arises when the purchaser feels that the amount paid on the contract, prior to default, is greater than the rental value of the property plus reasonable damages for the breach, and sues for restitution of his payments. The court must then decide whether to disregard the express provisions of the contract and give relief to the purchaser, or deny restitution and thereby make the court a party to a possible penalty.

This problem was first considered in Missouri in *Burris v. Shrewsbury Park Land & Improvement Co.*⁵³ In that case the plaintiff and defendant entered into a contract whereby defendant would convey to plaintiff certain real estate. The deed was to be given to plaintiff when plaintiff had paid eleven installments of \$10 each. The contract further provided:

[I]t is agreed that, if the purchaser shall not faithfully comply with the provisions of this contract, after the lapse of sixty days from such failure this contract shall become null and void without notice. . . .⁵⁴

Plaintiff paid the first ten installments but defaulted on the eleventh. The defendant immediately notified plaintiff that:

. . . unless he continued said payments, [defendant] would declare said exhibit "A" [the contract] forfeited, and that all and singular and several sums of money paid by him thereon would become the property of [defendant] absolutely.⁵⁵

Plaintiff thereupon demanded defendant return his payments and on defendant's refusal brought this action to recover the same. The court in determining the basis of plaintiff's action said:

It is obvious that the respondent's [plaintiff's] action is predicated on the assumption that the contract described in his petition was rescinded, and that he was therefore entitled to recover back the money paid thereunder.⁵⁶

Since there was no rescission of the contract, the plaintiff's relief was denied and the vendor's forfeiture upheld. The court stated that the plaintiff would not be entitled to rescind the contract as long as he was in default. The plaintiff was thought to be in essentially the same position in seeking restitution as he would have been had he sued for breach of contract. Thus the court said, "a party cannot rescind, if the breach is occasioned by his own fault."⁵⁷

contract to the purchaser in default, despite the presence of strict provisions for forfeiture. *Rayburn v. Atkinson*, 206 S.W.2d 512 (Mo. 1947); *Parkhurst v. Lebanon Publishing Co.*, 356 Mo. 934, 204 S.W.2d 214 (1947); *Branch v. Lee*, 159 S.W.2d 677 (Mo. 1941); *Bammert v. Kenefick*, 261 S.W. 78 (Mo. 1924); *Randolph v. Ellis*, 240 Mo. 216, 144 S.W. 483 (1912); *Gray v. Gurley*, 252 Mo. 410, 159 S.W. 1076 (1913).

53. 55 Mo. App. 381 (1893).

54. *Id.* at 384.

55. *Id.* at 385.

56. *Id.* at 387.

57. *Id.* at 388.

Even though the court made it clear an action for restitution of the payments would not lie, there was dictum that weakened the case for the general proposition that provisions for forfeiture extinguish a purchaser's equity when there is a default in payment. This dictum indicates that if the plaintiff had sought specific performance of the contract he, in all likelihood, would have been successful.

Only two other cases have been found where a Missouri court has considered the problem of whether a defaulting purchaser under a land installment contract can have restitution of his payments when the contract provides for forfeiture. One of these is not in point for this discussion.⁵⁸

In *Orr v. Zimmerman*⁵⁹ the plaintiff was the assignee of a purchaser of 80 acres of land under an installment contract which provided for strict forfeiture in case of default. Under the assignment, the plaintiff's assignor, the original purchaser, was to pay the contract price of the land left owing to the vendor, in discharge of a debt owed the plaintiff. The defendant, a third party, induced the vendor to declare a forfeiture under the terms of the contract on the basis of delinquency in payments by the plaintiff's assignor. After the forfeiture, the vendor executed a new installment contract with defendant and put defendant in possession. The plaintiff then brought an action for restitution of payments already made by the plaintiff's assignor and prayed that the land be sold to satisfy these payments. The theory of plaintiff's action was that the vendor had waived the strict forfeiture provisions. The court gave judgment for the plaintiff on the ground that the vendor could not stand on the strict forfeiture provisions after he had repeatedly waived them by accepting late payments from plaintiff's assignor. The court, in announcing its decision, used language which has often been repeated and is probably the cause of much of the confusion in subsequent cases:

Although courts of equity, notwithstanding their abhorrence of forfeitures, will not interfere where the exaction is made for the protection of the vendor, and under circumstances where a strictly legal right is fairly claimed . . . yet, where the right has been repeatedly waived, and valuable improvements have been made . . . the sudden exaction of a forfeiture . . . would not be very favorably viewed by a court of equity. . . .⁶⁰

It would seem apparent that on the basis of these cases, an attempt to anticipate the exact result to be expected in Missouri when a defaulting purchaser seeks

58. In *Doerner v. St. Louis Crematory and Mausoleum Co.*, 80 S.W.2d 721 (St. L. Ct. App. 1935) the problem was raised, but restitution was denied because the purchaser was clearly in default.

59. 63 Mo. 72 (1876).

60. *Id.* at 77-78, citing *Hansbrough v. Peck*, 72 U.S. (5 Wall.) 497 (1866), a landmark case from Illinois, in which the Supreme Court of the United States upheld forfeiture provisions in a land installment contract that cost the purchaser in default upwards of \$40,000. In that case the court said at 506-07:

[T]he party who has advanced money, or done an act in part-performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.

restitution of installments would be very difficult. It is possible that the disposition of Missouri courts on this question may have changed completely in the years that have elapsed since these cases⁶¹ were decided.⁶² There are two analogous contract situations which seem to offer a good indication of what might be the present disposition of Missouri courts on penalties and forfeitures resulting from land installment contracts. The first is the conditional sale contract for chattels, where it is required by statute that, before the vendor can retake possession after the purchaser's default, there must be a refund of seventy-five per cent of the payments already made.⁶³ The other situation involves the surplus, if any, after foreclosure of a mortgage or deed of trust. Here the law is clear that after payment of expenses and the mortgage debt the surplus must be returned to the holder of the equity of redemption.⁶⁴

*D. Vendor's Right to Possession After Purchaser's Default
Where Installment Contract Provides for Forfeiture of Payments*

The most recent case to construe a land installment contract is *Atkinson v. Smothers*.⁶⁵ In that case plaintiff and defendant entered into a written contract wherein plaintiff agreed to sell defendant a piece of realty. Defendant was to pay the purchase price in installments of \$10 per month; upon full payment plaintiff was to give defendant a deed to the property. By the terms of the contract, time was to be of the essence and if defendant failed to make any payment when due or within a fifteen day grace period, the plaintiff had the option to declare the contract null and void and retain all payments as rent and liquidated damages. The defendant defaulted on the contract and the plaintiff gave him notice to quit the premises as provided in the forfeiture clause. When defendant refused to move, plaintiff brought an action in ejectment. The defendant's answer admitted plaintiff was legal title holder, but attempted to set up a superseding oral contract as an affirmative defense, also asserting a counterclaim for plaintiff's breach of that contract. The court refused the defendant's counterclaim for want of certainty and lack of proof. The court granted the plaintiff's action of ejectment saying:

The principle is firmly established that where one goes into possession under a contract of purchase, and then makes default in the payment of the

61. *Orr v. Zimmermann*, 63 Mo. 72 (1876); *Burris v. Shrewsbury Park Land & Improvement Co.*, 55 Mo. App. 381 (St. L. Ct. App. 1893).

62. See Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract*: II, 44 YALE L.J. 754, 776 (1935):

The doctrine that equity will enforce forfeiture provisions in land contracts where time is expressly made of the essence developed in this country during the latter half of the nineteenth century, at a time when extreme ideas as to 'freedom of contract' were influencing American judicial decisions in every field . . . the courts were thinking in terms of free-willing individuals entirely able to look after themselves rather than in terms . . . of a socialized law taking a realistic account of inequalities of economic position and bargaining power.

63. § 428.110, RSMo 1949.

64. See authorities cited note 16 *supra*.

65. 291 S.W.2d 645 (St. L. Ct. App. 1956).

purchase price in accordance with the terms of the contract, he may be turned out by the vendor in an action of ejectment.⁶⁶

The court seems to have overlooked the distinction that in the cases it cited the forfeiture involved was only a down payment made to bind the agreement, whereas in the contract before the court the provision was for forfeiture of the payments made prior to default. It is submitted that a provision for retention by the vendor of a down payment in case the purchaser fails to go through with a binder agreement is well recognized as a fair measure of liquidated damages. However, in the case of an installment contract, where all payments are forfeited, it is more difficult to say such a provision is a fair measure of liquidated damages. Considering the extreme penalty possible when all payments are forfeited, it would seem highly improbable that the court intended to apply the doctrine of the cases it cited as strictly as indicated. It is more probable the court was considering the principal case only in light of its own facts. Since those facts indicate the defendant defaulted on the contract after making only eight \$10 payments, there were no penalty consequences to warn of the distinction between forfeiture provisions for down payments and forfeiture provisions for installments of the total debt. On that basis the case would seem rather weak for the proposition that forfeiture provisions in installment contracts are to be accorded the same validity as liquidated damage provisions in a binder contract.

The position of Missouri courts is further complicated by *Parkhurst v. Lebanon Publishing Co.*⁶⁷ In that case the parties entered into an installment contract whereby plaintiff was to sell to defendant a piece of real estate in Lebanon, Missouri. By the contract, defendant was to pay the purchase price in monthly installments of \$50 each, a deed to be given when the total price was paid. In case of defendant's default the contract gave the plaintiff the power to declare the contract null and void, retain all payments and require defendant peacefully to surrender possession. The defendant went into possession and paid the first two installments as provided in the contract. However he overlooked payment of the third installment until seven days after expiration of the fifteen day grace period. The plaintiff refused to accept this installment and invoked the strict provisions of the contract. When the defendant refused to surrender possession, plaintiff brought an action for ejectment and defendant counterclaimed for specific performance of the contract. The court refused plaintiff's action of ejectment and granted defendant specific performance of the contract, notwithstanding the default. The refusal of plaintiff's action of ejectment was based on the fact that plaintiff had failed to "furnish" defendant with an abstract as provided in the contract. Thus being in default himself, he could not invoke the strict provisions of the contract in regard to defendant's delinquent payment.

On the issue of specific performance in favor of the defendant, the court took

66. *Id.* at 648, citing *Waugh v. Williams*, 342 Mo. 903, 119 S.W.2d 223 (1938); *Wright v. Lewis*, 323 Mo. 404, 19 S.W.2d 287 (1929); *Heller v. Jentsch*, 303 Mo. 440, 260 S.W. 979 (1924); *De Barnardi v. McElroy*, 110 Mo. 650, 19 S.W. 626 (1892).
67. 356 Mo. 934, 204 S.W.2d 241 (1947).

the position that even though defendant was in default, this did not preclude the remedy:

. . . if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief.⁶⁸

The court noted that there were several factors in favor of defendant's specific performance:

. . . 'judicial notice' that real estate values in and around Lebanon had increased 'very materially' . . . [as motivation for plaintiff seeking to terminate the contract]. The delay was unintentional and due to oversight, inadvertence and mistake, under unusual facts to which the vicissitudes of war and illness apparently contributed.⁶⁹

The court added, "no facts appear which would make it unjust or inequitable to grant the affirmative relief asked."⁷⁰

This case indicates the same tendency on the part of the court that seemed to be present in the cases where the defaulting purchaser sought specific performance in the first place. If there is anything present besides the strict forfeiture provision, upon which the case can turn, that factor will decide the case.⁷¹ Here the court grounded the refusal of plaintiff's ejectment action on his failure to "furnish" an abstract in the manner provided in the contract. On close reading of the facts, that is found to be very forced reasoning. The contract in effect provided that the defendant was not required to pay any portion of the purchase price pending receipt of the abstract and a reasonable opportunity to examine the same.⁷² The facts indi-

68. *Id.* at 944, 204 S.W.2d at 247.

69. *Id.* at 945, 204 S.W.2d at 247. The court said at 938, 204 S.W.2d at 242-43: [W]hile Fred W. May was in foreign service in the far East . . . Virginia B. May, wife of Fred W. May, notified the plaintiff [Parkhurst] that the defendant corporation [Lebanon Publishing Co.], of which she was acting president, chose to . . . buy the property . . . and the said Virginia B. May . . . inexperienced in business affairs . . . signed said contract on behalf of defendant corporation.

70. *Id.* at 945, 204 S.W.2d at 248.

71. *Gray v. Gurley*, 252 Mo. 410, 159 S.W. 1076 (1913). In that case the plaintiff sought to eject a defaulting purchaser who had held over on an installment contract containing strict forfeiture provisions. The court refused plaintiff's remedy and granted the defaulting purchaser specific performance of the contract on the basis of "waiver" of the strict provisions by the plaintiff when he said "pay when you can and it will be alright." There was the following dictum in the case at 421, 159 S.W. 1079:

It is true that poor people must comply with their contracts the same as those who are more fortunately situated, but in forfeiting contracts for nonperformance the situation of the parties and the degree of their intelligence should never be entirely ignored.

See also *Tetley v. McElmurry*, 201 Mo. 382, 392, 100 S.W. 37, 39 (1907), where plaintiff vendor was refused action of ejectment against purchaser in default because the court found there had been no forfeiture as required in the contract. The court said:

[A]s Tetley's right to possession grew out of a forfeiture, then, if the forfeiture be waived and become as though dead, the right to possession (an incident) is dead also.

72. 356 Mo. at 943, 204 S.W.2d at 246.

cated that plaintiff gave the abstract to defendant, who had it certified to date six days after the contract was entered into. No reason was given why defendant did not have the abstract examined nor was there any objection to payment of the first three installments without having had it examined. Thus it would seem the court was rather eager to find an excuse to refuse plaintiff his strict forfeiture rights, since it would seem clear that defendant by making his payments without objection waived the right to have plaintiff strictly comply with the abstract provision.

*E. State of Title Where Purchaser Has Been Dispossessed
By Operation of Forfeiture Provision in Land Installment Contract*

The risk of impairment of title marketability is one of the most serious problems that arises from the use of land installment contracts in Missouri. If there was any certainty the Missouri courts would enforce the vendor's forfeiture provisions there would be little problem with marketability of titles under land installment contracts. However, in light of the small number of decisions on forfeiture provisions, and the diversity of their results, any action the vendor takes under the contract, other than court action, presents a threat to the marketability of the title to the property.

A case which illustrates what can happen to the title to land when a purchaser is dispossessed and forfeited out under an installment contract is *Price v. Rausche*.⁷³ In that case the plaintiff, purchaser under a land installment contract, brought an action to quiet title against her vendor and a third party. The latter party had purchased the land after the vendor had attempted to extinguish plaintiff's rights by the forfeiture provisions in the contract. The court found that the vendor had waived the right to declare a forfeiture by accepting plaintiff's payments after the grace period. This was held binding on the subsequent purchaser of the land since he purchased with knowledge of plaintiff's interest. This being the case, the court ordered that upon payment of the remainder of the purchase price, title be quieted in the plaintiff.

From this case and from the previous cases which indicate the willingness of Missouri courts to grant specific performance to purchasers in default, it would seem clear that it would be nearly impossible for a vendor to convey marketable title⁷⁴ to land recovered from a prior purchaser who had defaulted on a land installment contract,⁷⁵ unless the subsequent vendee should happen to be an innocent purchaser for value without notice of the first purchaser's interest.⁷⁶

73. 186 S.W. 968 (Mo. 1916).

74. By marketable title is meant:

[T]he kind of title that would not only enable the record owner to hold his land, but to hold it in peace and, if he wishes to sell the land, to be reasonably sure that no flaw or doubt will arise to disturb its market value.

Nixon v. Franklin, 289 S.W.2d 82, 87 (Mo. 1956); *accord*, *Ott v. Pickard*, 361 Mo. 823, 237 S.W.2d 109 (1951); *Thomas J. Johnson & Co. v. Mueller*, 356 Mo. 1109, 205 S.W.2d 521 (1947).

75. This statement assumes a situation where the vendor has not been able to procure a quitclaim deed of the property from the defaulting first purchaser. In many cases the quitclaim deed back will be the common practice since the pur-

IV. CONCLUSION

In Missouri the conventional deed of trust with power of foreclosure by non-judicial sale will accomplish all of the favorable results sought in some jurisdictions by the use of the land installment contract.

From the existing case law on the land installment contract it is apparent that, if used in Missouri at all, it should be used with extreme caution and only after all the possible unfavorable consequences have been given careful consideration.

In the cases to date the courts by failing to take careful stock of their language, have failed to give a clear indication of the validity of a provision for strict forfeiture of all payments in case of default inserted in a land installment contract. The tendency would seem to be away from strictly enforcing the agreement of the parties regardless of the consequences. Instead, the tendency seems to be in favor of relief to the purchaser if a penalty seems imminent. But it should be kept in mind that the nature of the action and the status of the moving party as vendor, vendee, bona fide purchaser, and the like, may have an important bearing on the outcome of these suits.

It would seem that the simplest and most desirable way for the courts to handle the land installment contract with forfeiture provisions would be to utilize the same principles that govern other contracts with liquidated damage provisions. In a particular case, if it appears a serious penalty will result, the court should consider the provision invalid and determine the actual damages sustained by the vendor as a result of the default. The court would be under no greater hardship in assessing damages than would have existed if the contract had contained no forfeiture provisions.

TERENCE C. PORTER

WHAT CONSTITUTES "FARM LABOR" UNDER THE WORKMEN'S COMPENSATION LAW OF MISSOURI

One of the significant features that most workmen's compensation laws in the United States have in common is the exclusion of farm or agricultural workers from

chaser wants to get out from under the whole situation and does not desire to avoid the forfeiture provision or is not aware that it is remotely possible to do so. In some cases the purchaser will be required to execute a quitclaim deed to be placed in escrow at the time the installment contract is entered into. This protects the vendor against the possibility that the purchaser will refuse to do so after default and forfeiture. However, the recorded quitclaim deed itself may suggest some possible outstanding equity.

76. It has been suggested that in a situation where the land conveyed is to be unoccupied and the contract is not to be put of record, the land installment contract can be used without fear of clouding title. If the purchaser defaults, the vendor can exercise the forfeiture provision and sell to a bona fide purchaser thereby cutting off the prior defaulting purchaser's equity. This should be particularly expedient, as mentioned in note 36 *supra*, in a speculative sub-division venture where the value of the lots is so small that even the very inexpensive foreclosure of a deed of trust or mortgage with power of sale would not be feasible.

compulsory coverage.¹ It would seem that this is largely an American innovation in the field of workmen's compensation, as no similar exclusion is found in the compensation acts of the more important European countries.² However, some of our legislatures have included agricultural workers employed in the use of heavy machinery or power equipment, or have provided an election for agricultural workers to come under the protection of the act. One writer tells us that in actual practice many of those who hire sizable numbers of farm laborers have found it necessary to carry compensation insurance for their own economic protection.³

The purpose of this Comment is to explore the pertinent section of the Missouri workmen's compensation act and the cases construing that section. No attempt will be made to cover the many differing statutes and cases of other jurisdictions, except as they have been cited and applied by Missouri courts or where they materially aid our undertaking of the Missouri situation.

In Missouri the applicable provision is section 287.090, Missouri Revised Statutes (1949), which provides:

1. . . . [T]his chapter shall not apply to . . . (2) Employments of farm labor.

Various suggestions have been made from time to time as to the reason why such an exclusion should have been made by the legislatures enacting workmen's compensation laws. One reason commonly accepted is that "the farm industry is perhaps less able than others to add the cost of compensation insurance to the market price of its product and pass it on to the consumer because that price is as a rule fixed by those in control of distant markets, and is perhaps also more quickly affected by the law of supply and demand than the products of most other industries."⁴ Larson rather effectively demolishes this argument when he points out:

This might be true if an isolated state attempted compulsory coverage, but if all states extended coverage to farm labor, there would be no competitive disadvantage so far as the domestic market is concerned. As to the disparity between the domestic and world market, that problem already exists, and will not become essentially different because of a slight change in one domestic agricultural cost factor.⁵

Another reason sometimes set forth to support the exemption is that inclusion of farm workers would throw unreasonable accounting and record-keeping burdens upon the small farmer.⁶ However, the compulsory compensation acts usually differentiate between so-called "major" and "minor" employers, compelling compensation only as to "major" employers.⁷ It is evident that any farmer qualifying as a "major

1. See, e.g., Mass. Acts & Resolves of 1953, ch. 656, § 1. Ohio, OHIO REV. CODE ANN. § 4123.01 (Baldwin 1958), and Vermont, VT. STAT. §§ 8070-75 (1947), do not recognize this exemption.

2. 1 LARSON, WORKMEN'S COMPENSATION § 53.00 (1952); 2 SCHNEIDER, WORKMEN'S COMPENSATION § 628 (3d. ed. 1942).

3. 1 LARSON, *op. cit. supra* note 2, § 53.10.

4. 2 SCHNEIDER, *op. cit. supra* note 2, § 628, at 615.

5. 1 LARSON, *op. cit. supra* note 2, § 53.20.

6. *Ibid.*

7. See § 287.050, RSMo 1949 (defining a "major employer" as one having more than ten regular employees).

employer" necessarily will have an adequate accounting and record-keeping system already established for income taxation purposes. The presence of the "farm labor" exclusion in our law thus allows the large dairy, truck, and cattle farms to escape one of the responsibilities of industry.

However, the Kansas City Court of Appeals in *Johnson v. Bear*, a decision applying the factory acts, put its finger on the true reason for statutes of this type in Missouri, if not in a large part of the nation, when it said:

. . . our Legislature, containing at all times among its membership a large contingent of rural representatives as well as urban members, well understood the marked distinction between an industrial or merchantile enterprise and the pursuit of agriculture, and never intended or designed the factory act for application to the farm. Certain other laws indicate this distinction. The Workmen's Compensation Act, section 3303, Rev. St. 1929, separates the farm laborer from industrial workers, and expressly excludes "employments of farm labor." The statute prescribing that eight hours shall constitute a day's work does not apply to farm labor. Section 13205, Rev. St. 1929. And likewise, the statute designed to protect working children does not apply to agricultural labor. Section 14084, Rev. St. 1929. There may be other instances. These indicate a legislative policy which recognizes the distinction existing in the condition of the farm labor and the industrial employee.⁸

At the time most of our compensation laws were enacted, the population was still predominantly rural, resulting as the court points out, in a large number of rural legislators. While we do not like to admit the possibility, it may have been that the "farm labor" exclusion was a political necessity to prevent defeat of the proposed bill, both in the legislature and upon referendum. In this connection, one writer has stated, "The exclusion of farm labor was perhaps more on legislative expedience than upon sound reason."⁹

The Missouri statutes and cases do not give an original definition of the term "farm labor." However, the following examples of language adopted by the Missouri courts can serve as an introduction to the basic problem of defining the exclusion:

The growing of grass and grain and the raising and care of stock are the ordinary uses to which a farm is put, and the work of raising, tilling, and harvesting the grain and caring for the stock is ordinarily farm labor.¹⁰

All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harnesses, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is a part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new point on the plow, doctoring a sick horse, butchering the hogs, greasing the wagons,

8. 225 Mo. App. 1097, 1103, 40 S.W.2d 481, 485 (K.C. Ct. App. 1931).

9. 2 SCHNEIDER, *op. cit. supra* note 2, § 628, at 615.

10. *Plemmons v. Pevely Dairy Co.*, 241 Mo. App. 659, 665, 233 S.W.2d 426, 429 (St. L. Ct. App. 1950), *quoting* *Shafer v. Parke, Davis & Co.*, 192 Mich. 577, 581, 159 N.W. 304, 305 (1916).

assisting the threshers, driving the team to market, and innumerable other familiar duties.¹¹

[T]he commission rightly . . . attempted to distinguish the common and ordinary significance of the terms "farm" and "farm labor" from the specialized meanings thereof when, in exceptional and rare instances, the use of the word "farm" is extended to embrace such areas as a worm, rattle-snake, crocodile or even oyster farm. These instances clearly are not within the common and ordinary usage of the term "farm."¹²

Some of the cases prefer to speak of "farm laborers" rather than "farm labor," but are in general agreement with the view that "any man employed to work on a farm, and to perform the work ordinarily done there, is a farm laborer."¹³

Most of the cases on the subject have avoided any definition of the term "farm labor." The courts are usually content merely to examine the facts of the particular case and pronounce that the employment involved therein was or was not farm labor according to the general meaning of the term. However, the judges are not alone in this tendency as most of the text writers have followed the lead of the cases in this respect.

The courts have, however, recognized a very real difference between the two terms "agricultural employment" and "farm labor." This distinction was first recognized in Missouri in *St. Louis Rose Co. v. Unemployment Compensation Comm'n*, in which the court was construing a provision of the unemployment compensation law excluding "agricultural labor." The court stated:

It is true that the word agriculture usually covers all things done by a farmer or on a farm. [citing cases] But agriculture is more comprehensive than farming. In its broader sense it applies as well to horticulture in a garden or nursery. . . . This statement is supported by the accepted definitions of agriculture as the term is commonly understood. . . .

In order to sustain the Commission's contention it would be necessary for us to substitute the term "farm labor," a narrower classification, for "agricultural labor" or to write into the law that only such agricultural labor as is performed on a farm is exempt. This we may not do. In view of the commonly understood meaning of the term the legislature would have included such a restriction had it intended one.¹⁴

This distinction was directly applied to the field of workmen's compensation by the Supreme Court of Missouri in *Dost v. Pevely Dairy Co.*, where the court said:

11. *Cloughly v. Equity Mut. Ins. Co.*, 243 S.W.2d 961, 967 (Mo. 1951), quoting *Coleman v. Bartholomew*, 175 App. Div. 122, 124, 161 N.Y. Supp. 560, 561 (1916).

12. *Dost v. Pevely Dairy Co.*, 273 S.W.2d 242, 245 (Mo. 1954), quoting *Cedarburg Fox Farms v. Industrial Comm'n*, 241 Wis. 604, 610, 6 N.W.2d 687, 689 (1942).

13. *Shafer v. Parke, Davis & Co.*, *supra* note 10.

14. 348 Mo. 1153, 1156, 159 S.W.2d 249, 250 (1941). This distinction was also applied in *Damutz v. William Pinchbeck, Inc.*, 158 F.2d 882, 883 (2d Cir. 1946), concerning the Fair Labor Standards Act which excepted "any employee engaged in agriculture." That act contained a definition of agriculture which the opinion states covers ". . . much more than what might be called ordinary farming activity."

Our Legislature has used the narrower classification "farm labor" in the Workmen's Compensation Act instead of the more inclusive term "agricultural labor" and we must assume that it did not mean to exclude from its benefits all of those who could be included in a broad construction of the broader term. Sec. 287.800 states that the provisions of the Workmen's Compensation Act shall be liberally construed with a view of the public welfare. This has been interpreted to mean that the Act should be construed "with a liberality calculated to effectuate its purpose and so to extend its benefits to the largest possible class and restrict those excluded to the smallest possible class." [citing cases] . . . It is our view that our Legislature meant to use the term "farm labor" in its ordinary and customary usage and did not intend to exclude from the benefits of the Workmen's Compensation Act all of those who could be included in the broadest scope of the term "agriculture." We think this intent appears from the restricted wording of Sec. 287.090 and from the Workmen's Compensation Act considered as a whole.¹⁵

Significant of the changing times and the rise of so-called industrial farming is the fact that some twenty-five years elapsed between the passage of the workmen's compensation law in Missouri containing the "farm labor" exclusion and the first case applying that particular provision. This case was *Plemmons v. Pevely Dairy Co.*,¹⁶ argued before the St. Louis Court of Appeals in 1950. The deceased worker was employed on defendant's farm, and it was stipulated that his duties were: "the care and breeding of the cows on the farm, particularly the care of the dry cows, care of such cows when calving, care of the calves, in barns and fields, the mixing of feed and the feeding of dry cows and calves."¹⁷ Death came as a result of a goring by a bull from the herd. The court held that the employment was clearly one of farm labor, laying down the rule, after a review of cases from other jurisdictions, that "it is the character of the work itself, and not the business of the employer, that is determinative."¹⁸ Therefore, not everyone who works on a farm is a farm laborer. Certainly a bookkeeper, secretary, or tax consultant employed by a large industrial farm could not be classified as a farm laborer.¹⁹

Unfortunately, as is so often the case when a short and concise rule of law is attempted by the courts, some confusion with regard to excursions into or out of farm labor was created by the *Plemmons* case. The court quoted with approval the following language:

'Whether a laborer is or is not a farm employee is determined from the character of the work he is *required* to perform.' This rule is properly interpreted in *Peterson v. Farmers' State Bank*, 180 Minn. 40, 230 N.W. 124 by the holding: 'Neither the pending task nor the place where it is being performed is the test. The whole character of the employment must be looked to, to determine whether he is a farm laborer. That is what is meant by the statement that it is "the character of the work which the

15. 273 S.W.2d 242, 244 (Mo. 1954).

16. 241 Mo. App. 659, 233 S.W.2d 426 (St. L. Ct. App. 1950).

17. *Id.* at 663, 233 S.W.2d at 427.

18. *Id.* at 663, 233 S.W.2d at 428.

19. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 222 (1944).

employee is *hired* to perform, which is the test of whether the employee is a farm laborer.' (Emphasis added.)²⁰

The *Plemmons* opinion did not elaborate on the inconsistency between work *required* and work *hired* to perform. Thus some uncertainty remained as to whether farm labor was to be determined from the work being done at the time of the injury or the work the employee was hired to do.

In 1954, the case of *McCaleb v. Greer*,²¹ came before the Springfield Court of Appeals. In that case, the employer was engaged in the general real estate business and also operated several guest homes. Claimant was her general manager and supervisor of both businesses. In the course of her real estate operations, employer purchased a farm upon which was kept some livestock, although no one lived on the farm. Claimant also supervised and managed this farm, hiring local help to feed the stock, build fences and do other work. It was shown that claimant would go out to the farm every week to bring feed for the stock, as well as other supplies and material, and sometimes would stay overnight in the house on the farm in order to supervise the help. At the time of the accident, claimant was on the farm, had checked work to be done, had paid for completed work, had checked the stock, and was reviewing his duties in his mind when he slipped, fell, and broke his leg.

The court enumerated the general rule of the *Plemmons* case that "it is the character of the work itself, and not the business of the employer, that is determinative"²² and proceeded to say:

Since the opinion of the St. Louis Court of Appeals in *Plemmons v. Pevely Dairy Co.*, *supra*, the Supreme Court has passed upon the question in issue in *Cloughly v. Equity Mut. Ins. Co.*, Mo. Sup. 243 S.W.2d 961, 964, 965.

. . . We must follow the law as last decided by our Supreme Court and we think that that rule of law is definitely stated in the above cited case as follows on page 965:

'It may be first observed that the test which must be applied is, could a jury reasonably infer that Swantner was reasonably engaged in the general business covered by the [insurance] policy, or, was his work incident to or connected with the operation of plaintiff's farm. In applying that test it must be kept in mind that under this [insurance] policy it is the character and purpose of the work Swantner performed, and neither the place of its performance nor the previous calling of the performer, that is determinative.'²³

After quoting this language from the *Cloughly* case, the court of appeals stated:

The controlling principle in this case must be, was claimant engaged in doing such acts at the time of his injury that are usually performed in the operation of farms.²⁴

20. 241 Mo. App. at 669, 233 S.W.2d at 431, quoting *Dowery v. State*, 84 Ind. App. 37, 39, 149 N.E. 922, 923 (1925).

21. 241 Mo. App. 736, 267 S.W.2d 54 (Spr. Ct. App. 1954).

22. 241 Mo. App. at 663, 233 S.W.2d at 428.

23. 241 Mo. App. at 747, 748, 267 S.W.2d at 60, 62.

24. *Id.* at 749, 267 S.W.2d at 62.

The decision reached was that claimant was engaged in farm labor at the time of his injury and was within the statutory exclusion.

It is difficult to see just where the court obtained the principle that the acts at the time of the injury governed the determination whether claimant was engaged in an employment of farm labor. It can readily be seen from the quoted portions of the *Cloughly* case, above, as well as from an examination of the case itself, that no such rule or principle was laid down. Indeed, it is difficult in retrospect to see how the court of appeals could rely upon the *Cloughly* case as precedent. As the supreme court pointed out at a later date in *Dost v. Pevely Dairy Co.*:

The *Cloughly* case did not involve a construction of our Workmen's Compensation Act but was based on the construction of a provision of an insurance policy, which insured against loss not covered by the Act as well as liability under it. This was a very broad provision including 'all operations necessary, incident and appurtenant' to the insured's business operations described (covering repairs and alterations on his farms among other things) 'whether such operations are conducted at the work places defined and described [the farms] . . . or elsewhere in connection with, or in relation to, such work places.' [243 S.W.2d 962.] This case is not helpful in construing the provision of our Workmen's Compensation Act herein involved.²⁵

According to the facts of the *Cloughly* case, plaintiff was injured while salvaging lumber from a wrecked building in St. Louis, preparatory to taking the lumber to the employer's farm. If such a rule had been laid down in the case, as claimed by the *McCaleb* decision, the *Cloughly* case would have found no farm labor since the acts that claimant was doing at the time of the injury were those of a salvager of materials and not of a farmer.

Since no other similar language is to be found in the *Cloughly* or *McCaleb* cases, the court of appeals apparently obtained its "principle" from the following language quoted in its own opinion from a Maryland supreme court opinion:

' . . . "Farm laborers" . . . shall mean any employees who, at the time of the accident, are engaged in rendering any agricultural service'. . . .²⁶

When it took this language out of context, the court of appeals evidently overlooked the fact that the quoted language was not the opinion of the Maryland court, but a part of the Maryland workmen's compensation law, explanatory of the term "farm laborers," and that no similar provision appears in the Missouri statute.

It should also be pointed out that, from the decision in the *McCaleb* case, it is evident the court of appeals disregarded the testimony that claimant was general manager and supervisor of *all* the employer's business, since they considered his supervisory work in the farm as entirely separate from his other duties and used this work only as determinative of his status as a "farm laborer."

Fortunately, *Dost v. Pevely Dairy Co.*²⁷ partially removed the general confusion caused by the *Plemmons* and *McCaleb* decisions. By holding that the *Cloughly* case

25. 273 S.W.2d 242, 243 (Mo. 1954).

26. 241 Mo. App. at 747, 267 S.W.2d at 60.

27. 273 S.W.2d 242 (Mo. 1954).

was not applicable to the workmen's compensation law, the court cast considerable doubt upon the validity of the *McCaleb* decision, although distinguishing it upon the facts. The *Dost* case did not involve diversions to or from farm labor, but rather, whether greenhouse work constituted farm labor. Thus there was no occasion to clarify completely the rule laid down in the *Plemmons* case, other than to hold that the decision was correct.

After some seven years of misunderstanding as to the test of "farm labor" regarding excursions into and out of the usual work, the Springfield Court of Appeals handed down its decision in *Davis v. McKinney*²⁸ which appears to have set the matter at rest. The facts of the case show that claimant was castrating a bull calf on Paul McKinney's farm when the calf kicked the knife into claimant's left hand, inflicting the injuries complained of. It was pointed out rather humorously that claimant was "sort of an expert" at this operation he was performing "as 'a common favor' to Paul, albeit not to the bulls." Defendant testified that it "was just a simple occurrence (again from the standpoint of the human actors but not the surgical subjects) for which claimant neither sought nor received compensation."²⁹ The court, familiar with the ways of the people of the Ozarks, assumed that there was an employer-employee relationship at the time of the injury and then stated:

It is settled that whether an employee is or is not engaged in farm labor is to be determined from the character of work he is required to perform. We recognize that, in proper interpretation and application of the principle: 'Neither the pending task nor the place where it is being performed is the test. The whole character of the employment must be looked to to determine whether he is a farm laborer.'³⁰

It would appear that this statement recognizing the work "hired to perform" test, quiets the confusion which has reigned since the *Plemmons* decision.

In addition to his farm, McKinney also had a sales barn, and there was some evidence that he intended to hire claimant in the future in connection with the sales barn operation. However, the court said, "the rights of the parties are to be determined on the basis of the relationship actually existing when claimant was injured."³¹ The court seemed to feel that if there was any employment relation, it was for the particular job of castrating the bulls and that it was not a continuing relationship. In connection with the sales barn operation, the court further pointed out:

Under some circumstances and in some employments, the care of livestock is not farm labor; and, if instant claimant's work at the time of his injury had been in connection with the sale barn operation, regarded by Paul as "a business enterprise" rather than a "farm operation" it may be conceded that claimant would have been under the Compensation Law. But, the care of livestock on a farm *usually* is farm labor.³²

28. 303 S.W.2d 189 (Spr. Ct. App. 1957).

29. *Id.* at 191, 192.

30. *Id.* at 192.

31. *Id.* at 193.

32. *Id.* at 192.

In view of the other language used by the decision, it would appear that the above quoted material refers to the *whole character* of claimant's work at the time of his injury.

It is also interesting that the court pointed out, "any attempt to classify an employee's labor on the basis of the intended use or disposition of the produce or stock with which he is working would lead to hopeless, unspeakable confusion."³³

Thus, the Missouri law on excursions into or out of "farm labor" appears to be that the whole character of the employment is to be looked to, *i.e.*, the work, and all of the work, that the employee is hired to do, and not just the particular task that is being performed at the time of the injury.

SUMMARY

Horovitz suggests four things which must "combine before the farm labor exclusion is effective, and the failure of any one to exist may be fatal to the exclusion: (1) that the employer be a farmer as distinguished from any other occupation; (2) that there be a farm; (3) that the injured worker be a farm laborer; and (4) that the injury occur during farm operations on that farm."³⁴

It readily can be seen that the Missouri law does not coincide with this statement. Naturally, no one will deny that there must be a farm involved and that a farm laborer must be injured. However, the *Plemmons* case specifically states that the employer's occupation is not determinative of whether the employee is a farm laborer.³⁵ Likewise, when the test is applied as to the whole character of the employment, it is apparent that an occasional excursion into or out of farm labor does not constitute a covered employee a farm laborer, or change a farm laborer to a covered worker. The excursion is "disregarded when the employee by virtue of his regular employment has status as either a covered or exempt employee."³⁶ As Larson points out: "it is impractical to construe the act in such a way that employees and employers dart in and out of coverage with every momentary change in activity."³⁷ Thus, a worker normally covered by the workmen's compensation law, who is sent to do jobs on a farm at odd intervals does not become a farm laborer, but retains the status originally determined by his general employment, whether he be carpenter, plumber or mechanic.³⁸ Conversely, one normally engaged in farm labor does not suddenly come under the coverage of the act simply because he is assigned to a certain task not to be performed on the farm. It is to be noted, however, that if the deviations from the general employment become substantial, the nature of the general employment may be changed, thus changing the employees's status under the compensation law.

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33. *Id.* at 193.

34. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 217 (1944).

35. 241 Mo. App. 659, 663, 233 S.W.2d 426, 428 (St. L. Ct. App. 1950).

36. 1 LARSON, *WORKMEN'S COMPENSATION* § 53.00 (1952).

37. *Id.* at § 53.40.

38. HOROVITZ, *op. cit. supra* note 34, at 222.