Missouri Law Review

Volume 52
Issue 3 *Summer 1987*

Article 5

Summer 1987

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GROWING CROPS IN MISSOURI: THE REAL ESTATE LAW—UCC CONFLICT

I. INTRODUCTION

Introducing comprehensive uniform rules of law into a common law system always presents problems. One such problem is unforseen conflict between the new uniform rules and prior common law. This Comment will explore the conflict between the Uniform Commercial Code (U.C.C.) and real estate law on the issue of who is entitled to growing crops in the event of bankruptcy or foreclosure under a real estate mortgage.

The conflict results from the unusual nature of growing crops. Missouri common law treats crops as real estate in some cases,[1] and as personal property in others.[2] Once the crop is harvested it is considered to be personalty by both common law[3] and the U.C.C.,[4] as the crop is then moveable and is not necessarily associated with any particular piece of land. However, before the crop is harvested it cannot be removed from the land until it is mature.[5]

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1. *See, e.g.*, Dent v. Dent, 350 Mo. 560, 571, 166 S.W.2d 582, 586 (1942); Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 814, 288 S.W. 774, 775 (1926) (en banc); Starkey v. Powell, 315 Mo. 846, 846, 288 S.W. 776, 777 (1926); Holdsworth v. Key, 520 S.W.2d 637, 640 (Mo. Ct. App. 1975).

2. *See, e.g.*, Whitmer v. Atchison T. & S.F. Ry., 90 F. Supp. 253, 256 (W.D. Mo. 1950); Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 288 S.W. 774 (1926) (en banc); Starkey v. Powell, 315 Mo. 846, 288 S.W. 776 (1926); *In re* Estate of North, 320 S.W.2d 597, 600 (Mo. Ct. App. 1959); Hayward v. Poindexter, 206 Mo. App. 398, 406-07, 229 S.W. 256, 259 (1921); Meffert v. Dyer, 107 Mo. App. 462, 466, 81 S.W. 643, 644 (1904); Swafford v. Spratt, 93 Mo. App. 631, 634-35, 67 S.W. 701, 702 (1902).

3. Holdsworth v. Key, 520 S.W.2d 637, 639 (Mo. Ct. App. 1975); Bechler v. Bittick, 121 S.W.2d 188, 191-92 (Mo. Ct. App. 1938); Hayward v. Poindexter, 206 Mo. App. 398, 405, 229 S.W. 256, 258 (1921).

4. Mo. REV. STAT. §§ 400.2-105(1), .9-105(f) (1986) (§9-105(h) in the 1972 version of the U.C.C.), define growing crops as personalty. Severed crops are not specifically included, but it is beyond doubt that severed crops are considered personalty under the U.C.C.

5. In some instances it may be nine months or more between the time the crop is planted and the time it is harvested. In order to harvest the crop one must remain in possession of the land. If someone other than the owner is allowed to keep possession to harvest the crop, the owner may lose substantial rights to the enjoyment of his land. For a case where the secured party was granted possession until harvest, see *In re* Hoover, 31 Bankr. 432 (S.D. Ohio 1983).

Missouri common law generally treats growing crops as realty,[6] while the U.C.C. specifically defines growing crops as personalty.[7] Because of this difference in treatment, a mortgage foreclosure, sale, or bankruptcy involving growing crops presents a serious conflict between the U.C.C. and Missouri case law.

The nearest analogy to the treatment of growing crops may be the treatment of fixtures. The U.C.C. recognizes that fixtures may be so attached to the land that they will be treated as realty, while at other times fixtures are not attached and may be treated as personalty. The U.C.C. has attempted to build in procedures to deal with the conflicting treatment of fixtures but, for better or worse, has ignored similar problems with growing crops.[8]

This Comment will discuss current Missouri law and the impact recent federal decisions may have on Missouri law. Finally, the Comment will discuss the U.C.C. treatment of fixtures to see if it offers any suggestions for improving the current law regarding growing crops.

II. Missouri Case Law

A. *Two Party Transfer*

Missouri common law has generally held that growing crops are realty and pass with the land,[9] or, in the alternative, are so attached to the land as to be appurtenant to the land.[10] Ownership of the land gives rise to a presumption of ownership of the growing crops.[11] In Missouri, when a grantor who owns land with growing crops on it transfers the property to a grantee, the grantee owns the crops after the transfer. The grantor may specifically reserve the right to harvest the crop in the transfer instrument.[12] If such a

6. *See supra* note 1. Growing crops may be treated as personalty in some cases where there is a sale or chattel mortgage of the growing crop, but if there is a prior mortgage, the crop is treated as realty and the prior mortgage creates a lien on the crop.

7. Mo. Rev. Stat. §§ 400.2-105(1), .9-105(f) (1986). Both specifically define goods to include growing crops.

8. The only section recognizing real property consequences of growing crops is Mo. Rev. Stat. § 400.9-204(4)(a) (Supp. 1982). *See also* Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 Ind. L.J. 535, 548 (1963).

9. *See* cases cited *supra* note 1.

10. Cantrell v. Crane, 161 Mo. App. 308, 312-13, 143 S.W. 837, 838 (1912).

11. *See, e.g., In re* Estate of North, 320 S.W.2d 597, 599 (Mo. Ct. App. 1959).

12. *See* Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 814, 288 S.W. 774, 775 (1926) (en banc); Tillman v. Bugenstock, 185 Mo. App. 66, 68, 171 S.W. 938, 939 (1914). Failure to make a *specific* reservation will usually cause the crop to pass with the land.

specific[13] reservation is made, the crop does not pass to the grantee. The ability to reserve the crop is merely an exercise of the right of the parties to override the legal presumption that the crop passes with the land.[14]

Once the crop is harvested, it is severed from the ground and thus becomes personalty.[15] This process is called actual severance and is the only way to remove the crop from the lien of a prior mortgage in Missouri.[16] As long as severance occurs before a transfer, the crop does not pass with the land.[17] For example, if a mortgagor defaults on a loan and harvests the crop before the foreclosure sale, he may keep the crop. Any crop remaining in the field at the time of the foreclosure sale, however, goes to the buyer at the sale.

Transfer of an interest in the crop while it is standing in the field is known as constructive severance. While Missouri recognizes the ability to sell or encumber a crop while it is still growing,[18] such a severance is not effective to remove the crop from any prior lien on the land.[19] The transferee is in the same position with respect to the crops as a transferee of an interest in the land would be with respect to the land until the crop is harvested. After harvest, the prior lien is no longer attached to the crop.

Some courts have held that constructive severance is effective to remove the crop from a prior lien on the underlying land.[20] Some of these decisions may significantly influence the direction of Missouri law.

While courts often speak of ownership as the controlling factor, it appears that a right of possession may in fact be determinative. Ownership and possession are often in the same person, but that is not always the case. *Farris v. Hamilton* held that a lessee in possession had ownership of the

13. For a case where the court presumed a reservation, see Davis v. Cramer, 188 Mo. App. 718, 722, 176 S.W. 468, 469 (1915).

14. One might have problems satisfying the Statute of Frauds if growing crops are considered realty, but in cases where the reservation is included in the deed, the Statute of Frauds requirements should be met.

15. *See supra* notes 3-4 and accompanying text.

16. Holdsworth v. Key, 520 S.W.2d 637, 639 (Mo. Ct. App. 1975). This may not be the law in Missouri after United States v. Newcomb, 682 F.2d 758 (8th Cir. 1982). *See infra* notes 51-66 and accompanying text.

17. *Holdsworth*, 520 S.W.2d at 639. A transfer may be a sale, foreclosure or bankruptcy.

18. *See, e.g., In re* Estate of North, 320 S.W.2d 597, 599 (Mo. Ct. App. 1959); Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 815, 288 S.W. 774, 775 (1926).

19. *See, e.g.*, Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 815, 288 S.W. 774, 775 (1926) (en banc); Starkey v. Powell, 315 Mo. 846, 846, 288 S.W. 776 (1926); *see* Holdsworth v. Key, 520 S.W.2d 637, 640 (Mo. Ct. App. 1975).

20. United States v. Newcomb, 682 F.2d 758, 761-62 (8th Cir. 1982); *In re* Hoover, 31 Bankr. 432, 435 (S.D. Ohio 1983); *see also* Note, *Agricultural Financing Under the UCC*, 12 ARIZ. L. REV. 391, 401 (1970).

crops by virtue of possession of the land.[21] An earlier case suggests that any person in possession of the land at the time the crop is harvested owns the crop regardless of the legality of his possession.[22]

The owner of the land and growing crops may sell or encumber the crops before they are harvested. Such a transfer is valid and enforceable by the parties, and in the absence of a prior lien this presents no problem. To this extent Missouri does recognize constructive severance.

B. *Third Party Situations*

The preceding section concerned transactions involving only two parties, the transferor and the transferee. These parties may effect the desired result by proper drafting of the transfer instrument. When third parties are involved more problems are presented. A common situation arises when there is a mortgage on the land and the landowner sells the growing crop or gives a chattel mortgage with the crops as collateral.[23] Assuming the crop is still in the field when the foreclosure sale is held, the crops belong to the foreclosure sale purchaser.[24] Since the mortgage has priority over the sale or chattel mortgage, the crops are subject to the lien of the prior mortgage.[25] The purchaser of the crops may lose the crops to satisfy the debt of the landowner or, in the case of a chattel mortgage, the chattel mortgagee may lose his collateral. The theory is that the mortgagor may not transfer a greater interest in property than he has.[26] Since the landowner does not have the right to keep the crop on default, he may not give or sell that right to someone else.

A similar situation arises if there is a lease rather than a sale or chattel mortgage. When the lease is executed after the mortgage, the mortgage has priority.[27] When the lessee plants the crop and the owner (Mortgagor) defaults on the loan before harvest, it would seem that the crop would be subject to

21. 144 Mo. App. 177, 180, 129 S.W. 256, 256 (1910). In *Farris*, the party in possession was a lessee whose lease had priority over the subsequent transfer by deed. The outcome may be different if the lease is junior to the transfer.

22. Edwards v. Eveler, 84 Mo. App. 405 (1900).

23. *See supra* note 19. Two of these cases involve outright sales and the other involves a pre-U.C.C. chattel mortgage.

24. *See supra* note 19. If the crop has been harvested prior to the sale it no longer is subject to the prior lien.

25. The sale or chattel mortgage is junior to the mortgage and is, therefore, preempted by the foreclosure sale. The buyer (usually the mortgagee) no longer has a legal interest in the realty or crops.

26. Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 815, 288 S.W. 774, 775 (1926) (en banc). This reasoning assumes that the growing crops are part of the realty and already encumbered by the prior mortgage lien.

27. Since the lease is junior to the mortgage it is preempted by the foreclosure of the prior mortgage.

the lien of the mortgage.[28] This may or may not be the case. If the lease is a sharecrop arrangement, the landowner's share of the crop is covered by the lien,[29] while the lessee's share is exempted from the lien by statute.[30] If the lease is for cash rent, the entire crop is removed from the lien.[31] Prior to the enactment of section 443.290, the lessee could lose his entire crop to satisfy the debts of the landowner.[32]

When a lease is executed before the mortgage or sale of the land, the lessee retains his right to possession because the lease has priority, and therefore, retains his right to harvest the crop.[33] At least one court has presumed a reservation in the mortgage or deed in this situation.[34] In any event, when the lease has priority over the mortgage or deed, the lessee has the right to the crop.[35]

Two other third parties which may come into the picture are a bankruptcy trustee and a judgment lienholder. A judgment lienholder would be in approximately the same position as a chattel mortgagee.[36] In most cases the judgment lienholder would be junior to the prior mortgage. The fate of a bankruptcy trustee is tied to that of a judgment lienholder.[37] In bankruptcy

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28. For an early Missouri case where the lessee lost the crop, see Reed v. Swan, 133 Mo. 100, 34 S.W. 483 (1896). This is no longer good law in Missouri. *See infra* notes 29-31 and accompanying text.

29. *See, e.g., In re* Estate of North, 320 S.W.2d 597 (Mo. Ct. App. 1959). Only the landowner's share of the crop passes in a sharecrop arrangement.

30. Mo. REV. STAT. § 443.290 (1986). Prior to the enactment of this statute the lessee also lost his share of the crop. For cases interpreting § 443.290, see Citizens' State Bank of Trenton v. Knott, 199 Mo. App. 90, 202 S.W. 278 (1918); Nichols v. Lappin, 105 Mo. App. 401, 79 S.W. 995 (1904).

31. Johnson v. Murray, 289 S.W. 977, 983 (Mo. App. 1927). "[U]nder this section (2234 R.S. 1919) [now section 443.290] the tenant's right to the growing crops cannot in any way be affected by the foreclosure and sale of the property. . . ." *Id.*

32. *See supra* note 28.

33. *See, e.g.*, Davis v. Cramer, 188 Mo. App. 718, 722-23, 176 S.W. 468, 469-70 (1915); Tillman v. Bungenstock, 185 Mo. App. 66, 68, 171 S.W. 938, 939 (1914); Farris v. Hamilton, 144 Mo. App. 177, 180-81, 129 S.W. 256, 256-57 (1910).

34. Davis v. Cramer, 188 Mo. App. 718, 722, 176 S.W. 468, 469 (1915). In this case the transfer deed was not before the court. The court held that when the land is sold subject to a lease, there is a presumed reservation of the crop. *Id.*

35. Tillman v. Bungenstock, 185 Mo. App. 66, 67, 171 S.W. 938, 939 (1914). In a sharecrop arrangement, however, the grantor's (mortgagor's) share still passes with title to the land.

36. A judgment lien properly attached would be the same as any other lien on the crop. If it is attached after the mortgage is executed it should still be junior to the mortgage. In some cases the judgment lien may automatically attach to the underlying realty also, but this does not change the analysis. Another interesting issue which is beyond the scope of this Comment is whether growing crops are personalty or realty for purposes of executing a judgment lien.

37. 11 U.S.C. § 544 (1982) provides:

> The trustee . . . shall have . . . the rights and powers of, or may avoid

the prior mortgagee still should have the growing crop to secure his lien. As we shall see, this may no longer be the case.

Inclusion of growing crops in mortgages and deeds does not mean that growing crops are never treated as personalty under Missouri common law. Ownership of the land may be severed from ownership of the crop by sale or by chattel mortgage (now an Article 9 security interest).[38] As between the seller, or chattel mortgagor, and buyer, or chattel mortgagee, the crop is treated as personalty.[39] As between those parties and third parties not having a prior interest in the underlying land, the growing crops are also treated as personalty.[40]

III. The Uniform Commercial Code

Missouri has adopted the 1962 version of the U.C.C..[41] The U.C.C. defines "goods" so as to include growing crops, bringing growing crops within the Article 2 sales provisions[42] and the Article 9 security interest provisions[43] of the U.C.C.. Related provisions allow a present sale of growing crops, even though still attached to the realty,[44] and restrict application of after-acquired property clauses[45] to crops within one year of execution of the agreement.[46] However, if the security interest "is given in conjunction with a lease or a land purchase or improvement transaction evidenced by a con-

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any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by —

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists. . . .

38. *See, e.g.*, Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 815, 288 S.W. 774, 775 (1926) (en banc); Hayward v. Poindexter, 206 Mo. App. 398, 406-07, 229 S.W. 256, 259 (1921).

39. Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 815, 288 S.W. 774, 775 (1926) (en banc).

40. Whitmer v. Atchison T. & S.F. Ry., 90 F. Supp. 253, 256 (W.D. Mo. 1950).

41. Mo. Rev. Stat. § 400.1-101 (1986).

42. Mo. Rev. Stat. § 400.2-105(1) (1986).

43. Mo. Rev. Stat. § 400.9-105(1)(f) (1986).

44. Mo. Rev. Stat. § 400.2-107(2) (1986).

45. After-acquired property clauses allow a lien to attach to property received by the debtor after the security agreement is executed. The U.C.C. generally allows such clauses.

46. Mo. Rev. Stat. § 400.9-204(4) (1986). This provision is designed to keep farmers from encumbering their crops years in advance, therefore tying up what may be their only income.

tract, mortgage, or deed of trust, . . ."[47] the security interest may attach during the period of the transaction if the parties so agree.

These provisions are the bases of a recent federal court decision which may alter Missouri law. It is these provisions specifically defining growing crops as goods which form the basis of the conflict between case law and the U.C.C.. Missouri court decisions since the enactment of the U.C.C. have not recognized the U.C.C. as controlling in determining whether crops are realty or personalty when a prior mortgage is involved,[48] but a federal court has held that the U.C.C. controls.[49] While Missouri courts may not follow this precedent, federal bankruptcy courts will.[50]

IV. UNITED STATES V. NEWCOMB

In *United States v. Newcomb*,[51] a recent Eighth Circuit case, the conflict between the U.C.C. and common law was squarely addressed. In that case, several members of the Rush family purchased land from Newcomb under a contract for deed.[52] The Rushes then planted a crop and executed a security interest in favor of the Farmers Home Administration (FHA).[53] The contract for deed was never recorded, but the FHA was given actual notice of its existence prior to obtaining the security interest.[54] The Rushes defaulted on the contract for deed before the crop was harvested.[55] Newcomb went to court and was successful in having the court declare that the Rushes had forfeited their right under the contract and ejected the Rushes from the property.[56] Newcomb then proceeded to harvest and sell the crops on which the FHA had its security interest.[57] The court refused to apply prior Missouri precedent[58] and held that Missouri's adoption of Article 9 of the U.C.C.

47. *Id.* This provision allows a land mortgagee to acquire a lien on the crop and protect it against future security interests, judgment liens, or bankruptcy trustees.

48. Holdsworth v. Key, 520 S.W.2d 637 (Mo. Ct. App. 1975).

49. United States v. Newcomb, 682 F.2d 758, 761 (8th Cir. 1982).

50. *See, e.g., In re* Kampen, 48 Bankr. 389 (W.D. Mo. 1984). This court allowed a bankruptcy trustee to take free of an unperfected security interest and a prior land mortgage held by a bank.

51. 682 F.2d 758 (8th Cir. 1982).

52. *Id.* at 759.

53. *Id.* This security interest would not be effective to remove the crop from the prior lien of the contract for deed under Missouri case law. *See supra* notes 9-40 and accompanying text.

54. *Newcomb*, 682 F.2d at 759. It is important that the FHA received actual notice of the prior lien since it was not recorded. Otherwise the later security interest would have priority.

55. *Id.* at 759-60.

56. *Id.* at 760.

57. *Id.* Under prior Missouri law, Newcomb would have had the right to harvest and sell the crops.

58. *See supra* note 16.

applies to any transaction intended to create a security interest in growing crops.[59] Therefore, the FHA's security interest had priority over Newcomb's contract for deed.[60] This holding allows constructive severance to remove the crop from a prior lien.

Technically speaking, *Newcomb* is not in direct conflict with any Missouri court decision. No Missouri case has squarely addressed the issue when an Article 9 security interest was involved, but cases which have discussed the same issue concerning pre-U.C.C. chattel mortgages[61] and outright sales of the growing crop have held that the prior mortgage has priority.[62]

The FHA's security interest in *Newcomb* was properly perfected, however it does not appear that it need be perfected to prevail over the contract for deed. The court stated that "under the U.C.C., growing crops are by definition personal property, not real estate, . . ."[63] and are therefore covered by the U.C.C. rules of Article 9 rather than the law of real property. "Thus in order to create a security interest in the soybean crop, Newcomb had to comply with the requirements of article 9; he could not rely upon pre-U.C.C. law holding that growing crops unsevered from the land are subject to the lien of the deed of trust."[64] It appears, then, that Newcomb would need an Article 9 security interest in order to have any claim against another security interest.

Newcomb represents the case where a prior mortgage exists and the owner later encumbers the crop with another lien. A related situation could arise if the Rushes (mortgagor) contracted to sell the growing crop rather than executing a security interest. Since growing crops are goods for purposes of sales,[65] and since Article 2 allows a present sale of growing crops,[66] it appears that the holding of *Newcomb* would also apply in this situation. Thus, sale of the growing crop would be effective to remove the crop from the lien of the prior deed of trust.

Allowing sale or execution of a security interest to remove the growing crops from a prior deed of trust under the U.C.C. amounts to the adoption of constructive severance. Missouri courts have rejected constructive sever-

59. *Newcomb*, 682 F.2d at 761.
60. *Id.* at 761-62.
61. *See, e.g.*, Farmers' Bank of Hickory v. Bradley, 315 Mo. 811, 288 S.W. 774 (1926) (en banc).
62. *See, e.g.*, Holdsworth v. Key, 520 S.W.2d 637 (Mo. Ct. App. 1975).
63. United States v. Newcomb, 682 F.2d 758, 761 (8th Cir. 1982).
64. *Id.* This would require: 1) a signed security agreement which contains a description of the collateral and a description of the land crops are growing on, 2) value be given, and 3) that the debtor have rights in the collateral before a security interest is enforceable. Mo. REV. STAT. § 400.9-203(a) (1986).
65. Mo. REV. STAT. § 400.2-105(1) (1986).
66. Mo. REV. STAT. § 400.2-107(2) (1986).

ance.[67] In *Holdsworth v. Key*,[68] the landowner bought land under a contract for deed and then sold crops growing on the land.[69] Before the crop was harvested, foreclosure occurred.[70] This is the situation discussed immediately above. However, the court in *Key* came to the opposite conclusion of the *Newcomb* court, holding that constructive severance is not sufficient to remove crops from a prior deed of trust and reaffirming prior Missouri holdings that actual severance from the ground is the only way to remove the crop from the prior deed of trust.[71] Therefore, Missouri courts may be more likely to follow *Key* since it does not *directly* conflict with *Newcomb*.

Some problems may arise, however, by treating a sale and a security interest differently. Assuming an unperfected security interest has priority over a deed of trust and a sale to a bona fide purchaser in the ordinary course of business will allow the purchaser to take free of the security interest, the sale must also take priority over the prior deed of trust. Otherwise, a circular priority problem will arise.[72]

A purchaser of farm products cannot take free of a perfected security interest. However, the situation may arise where the sale occurs before the security interest is perfected. The sale purchaser will take free of the security interest even though it is now perfected. Even if a perfected security interest is required in order to prevail over the prior deed of trust, the circular priority problem still exists. Therefore, it makes little difference whether perfection is required to give the security interest priority over a prior deed of trust. Circular priority problems still arise.[73]

Another transaction which may be affected by *Newcomb* is one in which a judgment lien has been entered or a bankruptcy petition has been filed before the crop is harvested. The U.C.C. allows a judgment lienholder to

67. *See supra* note 16 and accompanying text.

68. 520 S.W.2d 637 (Mo. Ct. App. 1975).

69. *Id.* While this is a sale rather than a security interest, the analysis of *Newcomb* should be the same. Therefore, under *Newcomb*, the sale should transfer the crop free of the prior lien.

70. *Id.* at 638.

71. *Id.* at 639.

72. Circular priority in this case would arise if the buyer at the sale did not take free of the mortgage. Then the security interest would have priority over the mortgage, and the mortgage would have priority over the sale, but becuase of MO. REV. STAT. § 400.9-301(c) (1986), in a sale to a bona fide purchaser without knowledge of the security interest in the ordinary course of business, the buyer has priority over the security interest.

73. In some cases a buyer in the ordinary course of business may take free of a perfected security interest even with knowledge of the security interest. *See* MO. REV. STAT. § 400.9-307 (1986). However, there is an exception under section 400.9-307 for farm products purchased from a farmer. This means that if the security interest is perfected there is no way for a sale to take priority over the security interest.

take priority over an unperfected security interest.[74] Following the same analysis used in the case of a sale of the crop, a judgment lien should take priority over the prior deed of trust as to the growing crop.[75]

The U.C.C. does not deal with judgment liens as such. Any change in the treatment of judgment liens arising out of *Newcomb* must either arise incidentally or because of the priority conflict that may arise if judgment liens are treated differently than security interests. The main issue is the extent to which the U.C.C. definition of goods overrides prior law. This issue was indirectly addressed in a bankruptcy context in *Matter of Kampen*,[76] where the court seems to have accepted the analysis of judgment liens discussed above.

If judgment lienholders are given the same treatment as secured parties, it follows that bankruptcy trustees are also treated like secured parties.[77] The Bankruptcy Code gives the trustee in bankruptcy the powers of a judgment lienholder whether or not a judgment lienholder actually exists.[78] If a judgment lienholder may take priority as to the crop, then it follows that a trustee in bankruptcy may also take priority.

Once again, federal courts provide the only direct authority. In *Matter of Kampen*, the bank had a mortgage on land owned by the debtor and also had an unperfected security interest[79] in crops growing on the land.[80] The debtor filed a bankruptcy petition before the crops were harvested.[81] The bank then claimed its security interest gave it priority over the crops.[82] The court held that since the security interest was unperfected the trustee's lien had priority.[83] The bank also claimed that under Missouri law crops pass with the land, and since the bank held the mortgage on the underlying land it also had a lien on the crops.[84] The court held that Missouri real estate law was not applicable when the trustee's lien arose before the foreclosure sale.[85]

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74. Mo. Rev. Stat. § 400.9-301(c) (1987).

75. Interesting questions may arise as to whether the growing crop is treated as realty or personalty for purposes of determining when the judgment lien attaches. Is filing of the judgment in the proper county sufficient, or must the sheriff post notice on the crop? This issue, however, is beyond the scope of this Comment.

76. *In re* Kampen, 48 Bankr. 389 (W.D. Mo. 1984).

77. *Id.* This case allowed a bankruptcy trustee to take over a prior mortgage.

78. *See supra* note 37.

79. *Kampen*, 48 Bankr. at 393. The security interest was unperfected in this case because of an insufficient description of the land on which the crops were growing.

80. Id. at 391.

81. *Id.* at 392.

82. *Id.*

83. *Id.* at 393.

84. *Id.* at 392; *see also* cases cited *supra* note 19.

85. *Kampen*, 48 Bankr. at 393.

Since a bankruptcy trustee's lien is premised on stepping into the shoes of a hypothetical judgment lienholder, the *Kampen* case necessarily requires that a judgment lien properly attached to growing crops will be effective to remove the crop from the lien of a prior mortgage. This case extends the holding of *Newcomb* to its fullest extent.

One consequence of allowing the secured party to take the growing crop free of the prior deed of trust may be to take possession away from the rightful owner regardless of whether he is the foreclosure sale purchaser or the mortgagor. In some circumstances the period of time involved may be significant, possibly up to nine months or longer. For example, assume the owner (mortgagor) plants a corn crop in early April, giving a security interest on the crop at that time, and the mortgagee, whose mortgage does not contain a security agreement, forecloses soon afterwards. If the security agreement is to be meaningful, the crop must remain in the field until maturity. It is possible the crop may not be harvested until December or January. The owner of the land may not get actual possession of the land for a significant period of time.

This result seems inequitable. A similar situation occurred in *In Re Hoover*.[86] The owner of the land leased the property.[87] The lessee then gave a security interest in the corn crop and any subsequent crops on the land.[88] After the corn crop was harvested in the fall the lessee planted wheat, but the lease was not renewed for the next year.[89] Since the wheat was planted within one year of the security interest, the security interest was still effective as to the wheat.[90] The owner could not lease the land to someone else for the next year because the wheat crop would not be harvested in time to plant spring crops. The court was faced with two choices. It could allow the owner to destroy the wheat crop and lease the land to someone else. In that case the security interest would be worthless. Under the U.C.C., however, the security interest should be superior to any real property interest. The court chose to allow the secured party to harvest the crop, but required the secured party to pay rent on the land.[91]

A more difficult question is raised when no security interest, sale, lien or bankruptcy is involved. Does *Newcomb* change the law between the transferor and the transferee of the land itself? The answer depends on the extent

86. 31 Bankr. 432 (S.D. Ohio 1983).

87. *Id.* at 433.

88. *Id.*

89. When the lessee planted the wheat the lessor was absent and did not know of the planting until it was too late. If the lessor had known of the planting in time to stop it and had failed to do so, the court could have found that the lease was renewed for another year. In this case the lessor did not know of the planting and could not have stopped it.

90. U.C.C. § 9-204 (1972).

91. *In re* Hoover, 31 Bankr. 432, 438 (S.D. Ohio 1983).

to which the U.C.C.'s definition of growing crops as personalty is determinative. On one hand, the U.C.C. definition may be restricted in application to questions concerning the U.C.C. itself. On the other hand, the U.C.C. definition of growing crops as personalty may be broadly applied so as to encompass all laws concerning growing crops. Perhaps growing crops are at times governed by both real property law and the U.C.C.. That is, unless there is a direct conflict because of a sale or security interest on the crop, real property law still applies. Under real estate law, title to the crops passes with title to the land unless the grantor expressly reserves the crops in the deed. Ownership means right of possession. The grantee could not in fact have possession of the real estate if he did not own any crops growing on the land, at least with respect to the land occupied by the crop. The owner of the crops must necessarily retain possession of the land until harvest, or at least a right of entry to harvest the crop, which is in fact possession.[92] In the case where the right to ownership of the crops was reserved, both parties would know that possession would remain in the seller until the crop was harvested.

At most, the U.C.C. should only reverse the presumption. That is, in order to pass title to the crop with the title to the land the deed would have to specifically include the crop, and a failure to say anything would leave ownership with the grantor. This could result in leaving possession of the land in the grantor until harvest in cases where the grantee assumed he would get immediate possession. It seems the traditional approach is the better rule. When a sale of the property is involved there is little problem with subsequent interests deriving from the grantor because the grantor no longer owns land or crops. Obviously, any interest arising before the sale would still be senior to the sale.

Where a mortgage or deed of trust is involved rather than a sale, the real estate rule must be displaced somewhat by the U.C.C.. Article 9 allows the use of a security agreement in conjunction with a deed of trust which will allow the mortgagee to also have the lien cover the growing crops.[93] Under Missouri's version of the U.C.C., these security agreements are given preferential treatment. The U.C.C. generally restricts application of security agreements to crops planted within one year of execution of the security agreement.[94] Security agreements made in conjunction with the transfer of an interest in land, however, may last as long as the transfer instrument is

92. One court has held that the lessee only retained a right to ingress and egress to harvest the crops, not possession. Bartlett Trust Co. v. Bishop, 222 Mo. App. 1086, 1087, 14 S.W.2d 5, 16 (1929). However, while the crops are still growing they effectively preclude any other use of the land since other uses will destroy part of the crop.

93. Mo. REV. STAT. § 400.9-204(4)(a) (1986).

94. *Id.*

in effect.[95] The mortgagee, therefore, may protect himself from subsequent sales or security interests.

In the mortgage situation, it is very likely that later interests in the property will be transferred by the mortgagor. The mortgagee may sell the crop under Article 2 or encumber it with an Article 9 security interest. Therefore, unless the parties specifically want the mortgage to cover only the land and not the crop, then security agreements should be executed along with the mortgage and financing statements filed in conjunction with every mortgage.

If the security agreement is executed, the mortgagee is protected against later arising interests and obviously may sell both the land and crop at a foreclosure sale in the event of default. However, if no security agreement is executed and default occurs, does the mortgagee still have the right to sell the crop along with the land? Under real property law the answer is yes. If any later sales of the crop occur or any later security agreements are executed, however, the mortgagee may lose the right to sell the crop free of those interests. This seems to be a strange result, but it should be noted that this was allowed in jurisdictions which recognized the theory of constructive severance. In this situation the mortgagor could sell the growing crop or encumber it when he knew that foreclosure was eminent, therefore effectively cheating the mortgagee out of part of the collateral.

Alternatively, it could be required that unless the mortgage includes a security agreement, at the foreclosure sale the mortgagor retains title to the crop. This result is even worse because it would allow the mortgagor to retain possession of the land to the detriment of the mortgagee. On the other hand, the result may not be that bad if our policy is to protect mortgagors, especially mortgagors who are farmers.

Theoretically, the mortgagor is not hurt if the crop passes to the foreclosure sale purchaser. Presumably, the buyer will pay more for the land and crop than he would pay for the land only. If this creates a surplus over the debt, the mortgagor will get this amount back. If there is still a deficit, the debtor is relieved of the extra deficit there would have been if it were not for the value of the crops. In the real world, however, it is unlikely the crop will bring its fair market value in a forced sale. Both the mortgagor and the mortgagee might be better off if the mortgagor harvests the crop and sells it through normal market channels. The mortgagor, however, would need a way to attach his lien to the severed crops and crop proceeds. It is undoubted that the land itself would also bring more if it were sold through normal channels. We assume a foreclosure sale of the land is appropriate, so why not assume it is also the proper way to sell the crop?

95. *Id.* This provision allows the mortgagee to acquire a protected lien on the growing crops for the duration of the mortgage.

It seems the better rule is that, as between the transferror and transferee, the mortgage or sale of the land also transfers title to the crop (i.e. the real property rule).[96] The only major change in Missouri law then should be that constructive severance is now recognized legislatively. Since the U.C.C. allows long term security agreements in conjunction with the mortgage instrument, this change should not cause problems for mortgagees in Missouri. A security agreement clause may be written into the mortgage and a financing statement will have to be filed, but this should not be difficult since Missouri requires both the mortgage and the financing statement to be filed in the county recorder's office.

It should be noted that the mortgagee cannot completely protect himself from later security interests even if he properly perfects his security interest in conjunction with the mortgage. The U.C.C. allows what amounts to a purchase money interest in the crop to take priority over any prior security interest securing amounts due more than six months before the crop is planted.[97] This allows the debtor to obtain financing to plant the crop and benefits the mortgagee also. If the crop does not get planted, the mortgagee is less likely to get paid and there will be no crop on which the mortgagee's lien can attach in case of foreclosure. The mortgagee's security interest may be junior in case of default, but it will still be valid as to any value of the crop over what is secured by the section 9-312 security interest.

V. The Fixture Analogy

As suggested earlier, the nearest analogy to growing crops may be fixtures. Both fixtures and growing crops are sometimes treated as personalty and sometimes treated as realty. In both situations it may be desireable to allow sales or security interests to attach to the property. In the case of fixtures it is often desireable to allow a purchase money lender priority over prior liens on the property so that the landowner may improve the property. This is allowed by the U.C.C..[98] In the case of crops it is also desireable to allow the landowner to get financing to plant the crop. The U.C.C. allows a lender who gives new value which allows the debtor to produce a crop some priority over other liens.[99] However, it only allows priority over security

96. For a case applying real property law to the parties claiming under a real estate interest, but still recognizing *Newcomb,* see Gallager v. Nelson, 383 N.W.2d 424 (Minn. Ct. App. 1986).

97. Mo. Rev. Stat. § 400.9-312 (1986).

98. U.C.C. § 9-313(4)(a) (1972). This is not the version adopted by Missouri. In Missouri, the security interest has priority if it is attached before the goods become fixtures. Mo. Rev. Stat. § 400.9-313(2) (1986).

99. Mo. Rev. Stat. § 400.9-312 (1986). Giving new value merely means that the security interest may not secure antecedent debt. The creditor must contribute some valuable goods or services at the time the security interest is executed.

interests securing debts due more than six months before the crops become growing crops. This limits the availability of purchase money priority. Prior interests are not hurt by allowing the debtor to get financing to plant a crop. If the farmer cannot plant the crop it is unlikely he will be able to pay on the prior liens. The crop enhances the value of the property in the same way new fixtures enhance the value of property. It would seem logical, therefore, to allow a lender who enables the crops to be grown to take priority over *all* prior interests to the extent he contributes new value in the same way such priority is allowed for fixtures.

The U.C.C. also treats fixtures and growing crops differently with respect to filing. In order to file for fixtures one must file in the real estate records in the county recorder's office in the county where the mortgage would be filed.[100] In the case of crops one files in the personalty records in the county recorder's office in both the county where the debtor resides and in the county where the land is located.[101] No filing is made in the real estate records at all even though the crops are as attached to the realty as any fixture.

A lien on real estate may create a lien on fixtures attached to the real estate without any filing under the U.C.C..[102] In the case of crops, however, no lien arises under real estate law. The mortgagee must file under Article 9 to get an interest in the crops. The reasons for this difference in treatment are somewhat unclear. The major difference between crops and fixtures is that the crops will definitely be severed from the land within a relatively short period of time, but fixtures may remain attached for many years. Perhaps the drafters of the U.C.C. felt that since the crop would generally be severed from the land within nine months, it would be better to treat crops as personalty from the time they are planted. This approach fails to take into account the effect on possession of the real estate if the land is sold at a foreclosure sale.

The preceding discussion of filing may be irrelevant if the mortgagee files a proper U.C.C. financing statement along with the mortgage. The mortgage will then have priority over all subsequent liens on the crop and, since he knows he must file in the personalty records office, the mortgagee can search the records to see if there are any prior security interests in the crops on that parcel of land.

The problem is that Missouri mortgages traditionally have created a lien on the growing crop in themselves, without any further filing.[103] Even in

100. Mo. Rev. Stat. § 400.9-401(1)(b) (1986).

101. Mo. Rev. Stat. § 400.9-401(1)(a) (1986).

102. U.C.C. § 9-313(3) (1972). This is not the version Missuori has adopted, but Missouri's version also seems to allow mortgages to attach to fixtures. Mo. Rev. Stat. § 400.9-313(4) (1986). The 1972 version is more specific on the matter.

103. *See* Holdsworth v. Key, 520 S.W.2d 637 (Mo. Ct. App. 1975).

Key, a case decided long after the adoption of the U.C.C., the mortgage was held to create a senior lien on the growing crops.[104] Few mortgagees, and possibly few attorneys, are even aware that an additional filing may be required to create a lien on the growing crop. Such a mortgagee may loan on the land, after checking the real estate records and not finding any prior encumbrances, only to find out later that a prior security interest existed on the crops, or he may later have part of his collateral (the growing crops) taken away by a later sale of the crop or a later security interest on the crop. This problem could be partially solved by requiring a filing in the real estate records. A filing in the personalty records should also be required (and is) because once harvested, the crop will become personalty.[105]

VI. Conclusion

Even though Missouri has adopted the U.C.C., no Missouri court has yet held that the U.C.C. definition of goods as including growing crops preempts real property law regarding growing crops. It remains to be seen whether Missouri courts will follow *Newcomb*. If they do, the major impact will be that constructive severance will be adopted in Missouri, and any mortgage not including a properly perfected security agreement will not give rise to a lien on the growing crops. Therefore, any sale of the crop will be free of the mortgage even if the crop is still on the land, and any security interest will be senior to the mortgage as to the growing crop.

The bottom line is that all mortgagees in Missouri should also require a security agreement and should file in both the real estate records and the personalty records in order to protect themselves from subsequent liens. Missouri courts may decline to follow *Newcomb*, but the cost of the additional filing is minimal compared to the risk of being deprived of part of the collateral by a security interest in the crops. One additional advantage of having a U.C.C. security interest is that the lien remains after the crop is harvested.

Perhaps the tribunal most likely to follow *Newcomb* in interpreting Missouri law is the bankruptcy court. Given the current state of the farm economy, this is where most disputes concerning growing crops will arise. After *Matter of Kampen*, *Newcomb* is the law in Missouri in the bankruptcy context. Since there are no negative consequences to following the U.C.C. filing procedures, mortgagees in Missouri should take this additional precaution.

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104. *Id.*
105. Mo. Rev. Stat. § 400.9-401(1)(a) (1986).