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Recent Cases

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CONTRACTS—INSTRUCTIONS ON MUTUAL MISUNDERSTANDING.

Rexford v. Phillipi[1]

Plaintiff sued to recover a broker's commission of $10,000 for having procured a purchaser for the capital stock of defendant's tool company, claiming that defendant, in an oral agreement, had employed him to sell this stock. Defendant contended however that he had employed plaintiff to sell the physical property and not the stock. The testimony of each party indicated that in making the agreement, the term "business" was used to designate that which plaintiff was to sell. The court instructed the jury that if at the time of the agreement it was plaintiff's understanding that he was to sell the capital stock, and defendant's understanding that he was to sell the physical property, then plaintiff was not entitled to a verdict. The court further instructed that in order for plaintiff to recover he must have established to the jury's satisfaction that he and defendant entered into an agreement whereby plaintiff was employed to sell the capital stock of defendant's company. Judgment for defendant. Plaintiff appeals. Affirmed.

It is well settled that when the terms of a contract are capable of only one reasonable interpretation, the fact that one of the parties intended a different meaning will not prevent the formation or enforcement of the contract.[2] Likewise, when the terms employed are capable of different reasonable interpretations but are nevertheless given the same meaning by the parties, there is an enforceable agreement.[3] Where, however, such terms are given different reasonable interpretations by the parties at the time the agreement was made and neither of them knew or had reason to know that a different interpretation was attached by the other, there is no contract.[4] Therefore, whether plaintiff is entitled to recover in the principal case would seem to depend primarily upon whether defendant would be reasonable, in view of the words used and other circumstances, in believing that he was employing plaintiff to sell the physical property only; and if so, whether he actually did so believe at the time of entering into the agreement.

The general rule is that the construction of written contracts is for the court,[5] while the construction of oral contracts is for the jury.[6] Some courts hold, however, that the jury shall find the terms of an oral agreement, and that from these terms, or by use of hypothetical instructions to the jury in ascertaining them, the court shall interpret their meaning.[7] An exception to the rule as to written instruments applies when parol evidence is allowed to be introduced to explain the meaning of an ambigious contract,[8] or the special or local meaning

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1. 84 S. W. (2d) 628 (Mo. Sup. 1935).

2. Holland Land & Loan Co. v. Holland, 274 S. W. 951 (Mo. App. 1925), transferred from appellate court, 317 Mo. 951, 298 S. W. 39 (1927); Meyer Milling Co. v. Baker, 10 S. W. (2d) 668 (Mo. App. 1928); Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598 (1910); Plano Mfg. Co. v. Ellis, 68 Mich. 101, 35 N. W. 841 (1888); 1 WILLISTON, CONTRACTS (1921) § 94; RESTATEMENT, CONTRACTS (1932) § 71; (1917) 13 C. J. 376, § 263.

3. Conservative Realty Co. v. St. Louis Brewing Ass'n., 133 Mo. App. 261, 113 S. W. 229 (1908); H. C. Lindsey & Son v. Kansas City Viaduct & Terminal Ry. Co., 152 Mo. App. 221, 133 S. W. 389 (1911); Prather v. Rush, 74 S. W. (2d) 875 (Mo. App. 1934); Haddock v. Woods, 46 Iowa 433 (1877); Newcomb v. Whitehouse, 162 N. Y. Supp. 249 (1916); RESTATEMENT, CONTRACTS (1932) § 71.

4. Robinson v. Estes, 53 Mo. App. 582 (1893); Green v. Bateman, 10 Fed. Cas. No. 5762 (C. C. R. I. 1846); Peerless Glass Co. v. Pacific Crockery etc. Co., 121 Cal. 641, 54 Pac. 101 (1898); Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864); 1 WILLISTON, CONTRACTS (1921) § 95; RESTATEMENT, CONTRACTS (1932) § 71; (1917) 13 C. J. 376, § 262.

5. Fellows v. Dorsey, 171 Mo. App. 289, 157 S. W. 995 (1913); 5 WIGMORE, EVIDENCE (1923) § 2556; 2 WILLISTON, CONTRACTS (1920) § 616.

6. Belt v. Goode, 31 Mo. 128 (1860); Annadale v. Union Cement & Lime Co., 165 Ind. 110, 74 N. E. 893 (1905); Grannon v. Brady Brass Co., 82 N. J. 411, 81 Atl. 727 (1911).

7. Spragins v. White, 108 N. C. 449, 13 S. E. 171 (1891).

8. Philibert v. Burch, 4 Mo. App. 470 (1877); Riggs v. Gish, 201 Iowa 148, 205 N. W. 833 (1925).

of words used therein.[9] Furthermore, in cases of oral agreements, if the terms are undisputed and extrinsic evidence is not necessary to ascertain their meaning, the contract will be interpreted by the court.[10] It should be noted that in any situation, if the evidence is not conflicting,[11] or if reasonable men would not draw different conclusions,[12] a question which would otherwise go to the jury will be decided by the court. But even though there be no conflicting evidence, if the actual intent of the parties to an oral agreement is in issue and is doubtful, this question is for the jury.[13] For the question of intent to be for the jury when the contract was written however, conflicting parol evidence must have been admitted.[14]

The principal case presents an interesting study of the problem of instructing the jury concerning formation of contracts. Inasmuch as the actual understanding of each of the parties would otherwise be immaterial, the effect of the instruction given in this case was to declare that the language used in making this agreement was capable of different reasonable interpretations. Courts may assume in instructions the answer to issues about which reasonable men could not differ,[15] or issues which must in any event be determined by the court.[16] In approving this instruction, the Supreme Court held that the language of the parties might be reasonably interpreted to have referred to physical property or to the capital stock. The holding that either interpretation would be reasonable necessarily amounts to deciding that a holding to the contrary by the jury would be an unreasonable holding, and consequently that the question of the reasonableness of these interpretations need not be submitted to the jury, if, indeed, the question of reasonableness is ever for the jury. Furthermore, since in cases where the actual terms of the contract are undisputed it is necessary to decide whether an ambiguity exists in order to determine whether there is any issue to be submitted to the jury, this preliminary question concerning the existence of ambiguities should be for the court.[17] It would seem, therefore, that although the instruction that there could be no contract if the plaintiff and defendant intended different things could not properly be given in most cases, there is nevertheless a basis upon which it may be defended in the principal case.

The court, in its opinion, attempts to uphold the instruction upon the ground that "a meeting of the minds" is necessary for a contract. It seems unfortunate that courts continue to use this misleading phrase as a general statement of law. Numerous decisions and authorities show that in all but exceptional cases the expression of mutual assent, rather than actual mutual intent, is the essential element in the formation of contracts.[18]

SESCO V. TIPTON

CORPORATIONS—NATURE AND THEORY—WHY CORPORATE ENTITY?

Adams v. Morgan[1]

Upon findings by the referee in bankruptcy that the bankrupt was the owner of the entire capital stock of X corporation, four other record owners holding one share each as his

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9. Thetford v. General Accident Assur. Corp., 140 Mo. App. 254, 124 S.W. 39 (1910); Becker v. Incorporated Town of Churdan, 175 Iowa 159, 157 N. W. 221 (1916); 5 WIGMORE, EVIDENCE (1916) § 2556; 2 WILLISTON, CONTRACTS (1920), § 616.

10. Norton v. Higbee, 38 Mo. App. 467 (1889); (1917) 13 C. J. 783, § 996.

11. Keyes Farm & Dairy Co. v. Prindle, 249 Mo. 600, 155 S. W. 391 (1913); Carrick v. Sturtevant, 28 Ariz. 5, 234 Pac. 1080 (1925).

12. Safford v. Morris Metal Products Corporation, 97 Conn. 650 (1922); Geoghegan Sons & Co. v. Arbuckle Bros., 139 Va. 92, 123 S. E. 387 (1924).

13. Swanner v. Swanner, 50 Ala. 66 (1863); (1917) 13 C. J. 787.

14. Thorn & Hunkins Lime & Cement Co. v. St. Louis Expanded Metal Fire Proofing Co., 77 Mo. App. 21 (1898); Big 4 Realty Co. v. Clark, 145 Mo. App. 632, 123 S. W. 95 (1909); Brooks v. J. R. Watkins Medical Co., 81 Okla. 82, 196 Pac. 956 (1921).

15. Cornovski v. Transit Co., 207 Mo. 263, 106 S. W. 51 (1917); HUGHES, INSTRUCTIONS TO JURIES (1905), § 196.

16. Barada-Ghio Real Estate Co. v. Keleher, 214 S. W. 961 (Mo. 1919).

17. Cameron Mills etc. Co. v. Orthwein, 120 Fed. 463 (C. C. A. 5th, 1903); Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830 (1891).

18. 1 WILLISTON, CONTRACTS (1921) §20, § 94; RESTATEMENT, CONTRACTS (1932) § 71; Note (1929) 29 COL. L. REV. 523.

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1. 52 P. (2d) 643 (Kan. 1935).

nominees, and that the bankrupt had been and was dominating and controlling the corporation as if he were the sole owner, as in fact he was, the trial court entered an order authorizing the trustee in bankruptcy to take charge and assume control of the bankrupt's interest in the property of the corporation and to run and operate the property for the benefit of the creditors of the estate of the bankrupt. On appeal, the Supreme Court of Kansas sustained the order.

The court's approach to and its method of solution of the problem here is typical of the usual method of resolution of cases involving the holding of the corporation's property to satisfy claims against stockholders.[2]

The court first "recognizes the legal entity", saying that "there is a distinction between the stock of a corporation and its corporate entity",[3] but adds the limitation that "the metaphysical entity has no thought or will of its own; . . . and where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act."[4]

The court then states that, "The modern rule . . . is that where an individual owns all, or even practically all of the stock of a corporation and controls its policies and operation, the corporation and such individual are, in proper cases, and sufficient reason appearing therefor, regarded by the courts as one and the same."[5] And further, that "A corporation will be regarded as a legal entity, separate and distinct from its stockholders, unless such consideration is offered to defeat public convenience, justify wrong, protect fraud, or defend crime, in which case the corporation will be regarded as an association of persons only."[6]

The above propositions have been asserted time and again by courts throughout the country, and, as abstract propositions, can be accepted, if relevant. The verbal application of these alleged principles, as made by the court to the case at hand, may sufficiently rationalize the decision, once independently reached, but in and of themselves could lead to conclusions opposed thereto.

The court's final proposition is that, "In the instant case the theory of corporate entity is asserted by Morgan [the bankrupt sole stockholder] purely as a shield to prevent the collection of debts from his insolvent estate . . . [and] if permitted to prevail here, would cer-

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2. 1 FLETCHER, CORPORATIONS (1931) §§ 41-46; LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS (1936) § 3; Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 COL. L. REV. 128. See also: Bethlehem Steel Co. v. Raymond Concrete Pile Co., 141 Md. 67, 118 Atl. 279 (1922); Rice v. Sanger Bros., 27 Ariz. 15, 229 Pac. 397 (1924); Birmingham Realty Co. v. Crosset, 210 Ala. 650, 98 So. 895 (1924). But *cf.* Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720 (C. C. A. 8th, 1927).

3. 1 FLETCHER, CORPORATIONS (1931) § 31. See also Eichelberger v. Arlington Bldg., 280 Fed. 997, 52 App. D. C. 23 (1922); The Gloucester, 258 Fed. 579, 582 (D. Mass. 1923); Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720, 724 (C. C. A. 8th, 1927). But *cf.* United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 254 (E. D. Wis. 1905).

4. Quoting from State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279 (1892).

5. Quoting from ANDERSON, LIMITATIONS OF CORPORATE ENTITY (1931) 80. See also: Gamer Paper Co. v. Tuscany, 264 S. W. 132 (Tex. Civ. App. 1924); State Trust & Savings Bank v. Hermosa Land & Cattle Co., 30 N. M. 566, 240 Pac. 469 (1925); Knight v. Burns, 154 N. E. 345 (Ohio App. 1926). But to the effect that sole ownership and control alone is not a sufficient basis for treating the corporation and individual as one, see: Midwest Air Filters Pacific v. Finn, 258 Pac. 382 (Cal. 1927); Donaldson v. Andresen, 300 Pa. 312, 150 Atl. 616 (1930); Albert Richards Co. v. The Mayfair, 191 N. E. 430 (Mass. 1934). But *cf.* Varni v. Anglo-American Land Co., 284 Pac. 520 (Cal. App. 1930); Jackson v. M. H. Thomas Inv. Co., 46 F. (2d) 252 (C. C. A. 3d, 1930); Pohlman Inv. Co. v. Va. City Gold Min. Co., 51 P. (2d) 363 (Wash. 1935). See also Dixie Coal Min. & Mfg. Co. v. Williams, 221 Ala. 331, 128 So. 799 (1930).

6. Quoting from ANDERSON, LIMITATIONS OF CORPORATE ENTITY (1931) 69. See also 1 FLETCHER, CORPORATIONS (1931) § 41; United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 255 (E. D. Wis. 1905); In re Marcella Cotton Mills, 8 F. (2d) 522 (D. C. Ala. 1925); Carozza v. Federal Finance & Credit Co., 141 Md. 223, 131 Atl. 332, 43 A. L. R. 1 (1925); Sunset Farms v. Superior Court, 50 P. (2d) 106 (Cal. App. 1935); Bush v. Gaffney, 84 S. W. (2d) 759 (Tex. Civ. App. 1935).

tainly justify wrong, if not in fact protect fraud. . . [since] whether a corporation is used to defeat claims of personal creditors by transferring property to the corporation,[7] or whether the theory of corporate entity is asserted for the purpose of defeating creditors, is of no practical consequence. . . . The effect on creditors is precisely the same."

But there is a distinction to be made between the two situations referred to by the court. Where property of the debtor is transferred to the corporation for the purpose of defeating the claims of creditors, the familiar law of fraudulent conveyances would allow the creditors to reach the property so transferred.[8] For this, concern over the corporate entity is totally irrelevant. But the law of fraudulent conveyances has no proper relation to the case at hand. Must the decision then find support in legal theory solely on the basis of a "disregard of the corporate entity"?

The resolution of cases of this nature upon such basis is subject to many objections. To decide cases by answering the question whether or not the corporate entity will be disregarded leads to the phrasing of opinions solely upon such considerations, leaving unmentioned the real issues of the case; and further, the decision of whether or not there is, in the particular case, a "corporate entity" is not always determinative of liability.[9] To test the judicial conclusion that the corporation and the sole stockholder are to be regarded as one and the same, let one ask one's self whether the creditors of the corporation must share pro rata with the creditors of the sole stockholder. The court in the principal case did not discuss the question, the plaintiff having alleged that there were no creditors of the corporation, but it is rather clear that creditors of the corporation have priority in its assets over creditors of the bankrupt sole stockholder.[10]

The desirability of the result of the decision in the principal case is apparent. The creditors of the bankrupt sole stockholder are allowed to reach not merely the stock which he owns, but, as successors to his position of control and management, are allowed, through their representative, the trustee in bankruptcy, to manage and control the corporation for their benefit.

Viewed conceptualistically, the case might be open to the criticism that it "needlessly disregarded the corporate entity."[11] Viewed functionally, the case in no way impinges upon the function of the corporate device, that is, upon limited liability, perpetual succession, etc. To view the problem as one of disregarding the corporate entity because the stockholder in question was the sole stockholder and completely dominated the corporation's affairs would hold the stockholder liable for the debts of the corporation, contrary to authority and the notion of limited liability. Here, the court stated that title to the stock vests in the trustee as of the date of the stockholder's adjudication in bankruptcy. The court, from that point,

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7. The court cited at this point Kellogg v. Douglas County Bank, 58 Kan. 43, 48 Pac. 587 (1897), where the court, in permitting the sale of corporate assets to satisfy claims against the sole stockholder (the latter having organized the corporation and transferred his assets to it for the purpose of hindering and delaying his creditors), said: "Clearly a fraud may be committed in the transfer of a debtor's property to such a corporation, as well as by a transfer to another individual for the purpose of placing it beyond the reach of creditors." The court also cited Edward Finch Co. v. Robie, 12 F. (2d) 360 (C. C. A. 8th, 1926), where two corporations, organized and managed by the bankrupt sole stockholder, were not allowed to assert against his estate claims based upon his notes held by them.

8. GLENN, THE LAW OF FRAUDULENT CONVEYANCES (1931) §§ 282-287; LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS (1936) § 17; (1916) 12 R. C. L. 480, 614-640.

9. LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS (1936) §§ 3-7.

10. See In re Rieger, Karner & Altmark, 157 Fed. 609, 613 (S. D. Ohio, 1927); In re Eilers Music House, 270 Fed. 915, 925 (C.C.A. 9th, 1921); Commerce Trust Co. v. Woodbury, 77 F. (2d) 478 (C.C.A. 8th, 1935). But *cf.* Hamilton Ridge Lumber Sales Corp. v. Wilson, 25 F. (2d) 592 (C. C. A. 4th, 1928); Central Republican Bank & T. Co. v. Caldwell, 58 F. (2d) 721, 726 (C. C. A. 8th, 1932). These cases are discussed in LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS (1936) § 9, where the above conclusion is reached. See also Jackson v. M. H. Thomas Inv. Co., 46 F. (2d) 252 (C. C. A. 3d, 1930).

11. See Note (1920) 8 CALIF. L. REV. 435, commenting on "Needless Disregard of the Corporate Entity", for other examples of such reasoning.

could have avoided any consideration of the bankrupt's control of the corporation, or of the theory of corporate entity, or of the bankrupt's constructive fraud in asserting such theory, by frankly stating that, as incidental to his title to all the capital stock of the corporation, the trustee would be allowed, under the court's supervision, to control and manage the corporation and its property for the benefit of the creditors of the bankrupt sole stockholder's estate.

GEO. S. H. SHARRATT, JR.

CRIMINAL LAW—POSSESSION OF BURGLAR'S TOOLS—INTENTION.

State v. Heflin[1]

Defendant was convicted on a charge of having in his custody certain burglar's tools in violation of statute. The evidence showed that defendant held up a cafe and took five slot machines, and that he was shortly thereafter arrested and in his car were found the slot machines, a pistol and shells, flash-light, prying bar and black-jack. Defendant contended that the state failed to show that these tools were adapted, designed or commonly used for breaking into any of the structures mentioned in the statute, on the theory that such tools must be especially, if not exclusively, designed for use by burglars. In a very exhaustive opinion the court held that the black-jack, flash-light and revolver were not such "tools" as were embraced by the statute, but that the crow-bar or jimmy was included within its terms. The court further held that the tool need not be exclusively designed for use by burglars and said that the intent of the possessor of the tools is an important factor in determining his guilt or innocence; that is, the possession alone is not enough to support a conviction, but it must be shown that the possessor had the tools with the intent to commit a burglary. In this connection the state was permitted to show the prior burglary of the defendant as throwing light on his intent in carrying the tools.

Previous Missouri cases on this subject have omitted any discussion of the importance of the intent of the accused in his possession of the tools charged. In *State v. Oertel*,[2] testimony of officers that the tools were such as were commonly used by burglars was held sufficient to support a conviction. There was no mention or showing of intent. Similar evidence was given in *State v. Layton*[3] and the defendant convicted. In *State v. Jarvis*,[4] the only mention of intention was the testimony of the defendant that he had not intended to commit a burglary. In sustaining the conviction the court failed to discuss the point.

Though the matter does not appear to be one of great importance, yet it is obvious that absurdities might be reached if a literal interpretation of the statute were followed. Ours would indeed be a lawless community, with every member technically a felon. No citizen would be safe from prosecution, for certainly every person will often have in his possession some implement that would be unlawful within the terms of the statute. But certainly no such absurd result was intended and the wisdom of the principal case is palpable.

The question is a phase of the oft discussed one of the necessity of criminal intent. Statutes in many states have expressly required the intent to burglarize in this particular crime[5] and the Missouri court does well to see the importance of the interplay of intent with the physical possession, although the statute is peculiar in that there is no mention of intent. The statute has been attacked on the ground that due process is violated because the statute does not require a guilty mind, but the Missouri Supreme Court held that the statute might dispose with *mens rea*.[6] This is undoubtedly true of minor statutory offenses in the nature of police regulations.[7] But it is doubtful whether a crime punishable as a felony can constitutionally dispense with all criminal intent.[8] The principal case places a different interpretation

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1. 89 S. W. (2d) 938 (1935).
2. 280 Mo. 129, 217 S. W. 64 (1919).
3. 191 Mo. 613, 90 S. W. 724 (1905).
4. 222 S. W. 386 (Mo. Sup. 1920).
5. CODE OF VIRGINIA (1918) § 4437; So. DAK. REV. CODE (1919) § 4174; Cahill's Consol. Laws of N. Y. 1930, c. 41, § 408; Compiled Laws of Mich. (1929) § 16930.
6. Ex parte Roberts, 166 Mo. 207, 65 S. W. 726 (1901).
7. People v. Roby, 52 Mich. 577, 579 (1884); C. B. & Q. Ry. v. United States, 220 U. S. 559 (1911).
8. See Laylin and Tuttle, *Due Process and Punishment* (1922) 20 MICH. L. REV. 614.

on the statute and clearly requires *mens rea*. The ruling puts Missouri in accord with the majority of the states and is obviously the only workable and justifiable view.

E. C. CURTIS

DAMAGES—CONVERSION.

Vetter v. Browne[1]

The plaintiff parked his automobile with the defendant, a parking lot owner, by delivering and turning over full control to defendant's agents in charge of the parking lot. Later plaintiff made demand on defendant for his car in accordance with the agreement of parking, but defendant failed and refused to deliver it. Approximately five months later the automobile was returned to plaintiff who brought an action for damages for the loss of the rental value during the time he was deprived of its use.

The trial court gave judgment for the plaintiff in the sum of $800.00. This amount included $430.00 depreciation plus $370.00 reasonable rental value. On appeal the St. Louis Court of Appeals reversed and remanded the judgment on the ground, among others, that the trial court erred in instructing as to the measure of damages.

Where a chattel has been converted and later returned to the owner, the measure of damages is the difference between the market value as of the time of conversion and the market value at the time of return, plus the reasonable value for the loss of the use during the time the owner was deprived of its use.[2] The trial court in allowing damages for depreciation plus reasonable rental value allowed double damages for depreciation, as rental value necessarily includes depreciation. The Court of Appeals correctly held that loss-of-use value, and not rental value is the measure of damages. The reasonable rental value is only evidence of the value of the loss of use.

The difference between the loss-of-use rule and rental value is not apparent in many cases. For example, if plaintiff in the instant case had been in the business of renting autos his damages would likely have been the reasonable rental value since that would be his damage through loss of use.[3] It is necessary, however, not to lose sight of the true rule in measuring damages in any case.

If reasonable rental value is to be used under the facts of this case, the portion of such value allocable to depreciation and repair must be deducted in order that the actual value of the use may be ascertained.[4]

SAM PAUL KIMBRELL

DISBARMENT—VALIDITY OF LEGISLATIVE LIMITATION UPON TIME OF.

In re Tracy[1]

Disbarment proceedings were brought against the defendant charging him with willfully assuming a status wherein his personal interests were opposed to those of his client. A statute provided that no proceeding for the removal or suspension of an attorney should be instituted unless commenced within the period of two years from the date of the commission of the offense or misconduct complained of, or within one year after discovery thereof. This statute was stressed by defendant because many of his questionable acts had taken place more than two years before the filing of this petition. The court claimed to have sole jurisdiction to suspend or disbar attorneys and ignored the statute.

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1. 85 S. W. (2d) 197 (Mo. App. 1935).
2. 2 SEDWICK on DAMAGES (9th ed. 1912) § 494; Hoffman v. Metropolitan St. Ry. Co., 51 Mo. App. 273 (1892); McFall v. Wells, 27 S. W. (2d) 497 (Mo. App. 1930); Jacobson v. Graham Ship-By-Truck Co., 61 S. W. (2d) 40 (Mo. App. 1933).
3. Cook v. Motor Car Co., 88 Conn. 590, 92 Atl. 413 (1914); Missouri River Packet Co. v. Hannibal and St. J. R. Co., 79 Mo. 478 (1883) (the measure of damages for injury to a steamboat is the charter value of the boat during the time lost.)
4. Brown v. Zorn, 275 S. W. 572 (Mo. App. 1925). In an action for malicious injury to property, owner may elect to base recovery on cost of repairs, plus loss of use while repairing, and add depreciation of car after repair, or deduct increase in value, if any.

1. 266 N. W. 88 (Minn. 1936).

There is some uncertainty among the courts as to whether they should follow the rules of disbarment that legislatures might enact. Even when there are no statutes concerning disbarment the question is often raised as to whether courts have the power under the constitution to decide disbarment suits.[2] In such situations courts assert an inherent right to admit or dismiss attorneys practicing before them.[3]

Courts will generally follow the legislative requirements for admission as a minimum requirement. That is, they will not admit anyone who does not fulfill the legislative demands.[4] But they have asserted the power to make additional requirements to those made by the legislature.[5] In such matters as the manner of conducting examinations, courts hold that they need not follow statutes.[6]

The principal case, which presents a legislative enactment providing for a statute of limitations in disbarment suits, can be distinguished from either of the two situations just considered since there was no legislative enactment in the former and the latter had to do solely with admission to the bar. It is well settled that the general statute of limitations does not apply to disbarment suits.[7] This is because courts find that the legislatures did not intend the statutes to apply to that type of case. In the instant cause, however, the statute expressly states that the limitation is to apply to disbarment suits and the court proceeds on that assumption. So the court, by directly disregarding a statute intending to affect disbarment, presents an unusual case.

A similar question may arise under statutes requiring jury trial in disbarment suits. At the present time several states have statutes setting out this requirement,[8] and at one time this was true in Missouri.[9] In a recent Wyoming case,[10] it was held that while the court need not follow every legislative enactment concerning disbarment, such a statute as one requiring jury trial should be respected. This holding points in the opposite direction from that in the principal case, yet the Wyoming court did not feel that it was being denied an inherent right by conforming to the requirements of the statute.

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2. State *ex rel.* Attorney General v. Harber, 129 Mo. 271, 31 S. W. 889 (1895); State *ex rel.* Johnson v. Gebhardt, 87 Mo. App. 542 (1901); In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); Brummitt v. Winburn, 206 N. C. 923, 175 S. E. 498 (1924); In re Hadderd, 106 Vt. 322 (1934); McCloskey v. Greathouse, 55 Nev. 405, 36 P. (2d) 357 (1934); In re Shoemaker, 168 Okla. 77, 31 P. (2d) 928 (1934); In re Clifton, 155 So. 324 (Fla. 1934); In re Myrland, 45 P. (2d) 953 (Ariz. 1935); In re De Caro, 262 N. W. 132 (Iowa 1935); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 Atl. 139 (R. I. 1935); In re Sparrow, 90 S. W. (2d) 401 (Mo. 1935); In re Opinion of the Justices, 194 N. E. 313 (Mass. 1935).

3. See cases cited in note 2 *supra*. In the Richards case the court says that "it is a fundamental principle of constitutional law that each department of government, whether federal or state, has without any express grant the inherent right to accomplish all objects naturally within the orbit of that department not expressly limited by the fact of the express limitations in the constitution. . . . The primary orbit of the judicial department is to administer justice, and in the light of judicial history the courts cannot long continue to do this without power to admit and disbar attorneys who from time immemorial have been regarded as its officers." *Contra*: Danford v. California, 49 Cal. App. 303, 193 Pac. 272 (1920).

4. Re Bonam, 255 Mich. 59, 237 N. W. 45 (1931); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932).

5. Spalne's Petition, 123 Pa. 527, 16 Atl. 481 (1889); Re Day, 181 Ill. 73, 54 N. E. 646 (1899). *Contra*: In re Cooper, 22 N. Y. 67 (1860).

6. Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725 (1932).

7. In re Smith, 73 Kan. 743, 85 Pac. 584 (1906); People v. Hooper, 218 Ill. 313, 75 N. E. 896 (1905); State Bar Commission v. Sullivan, 35 Okla. 745, 131 Pac. 703 (1912); State v. Mannix, 133 Ore. 329, 288 Pac. 507 (1930).

8. Reilly v. Cavanaugh, 32 Ind. 214 (1869); State v. Foruchy, 106 La. 743, 31 So. 325 (1901); Wernimont v. State, 101 Ark. 210, 142 S. W. 194 (1911); PARK'S ANN. CODE OF GA. (1914) § 4976; BARNES' CODE OF W. VA. (1923) p. 2122; Legal Club v. Light, 137 Va. 249, 119 S. E. 55 (1923); N. C. CODE (1929) §§ 207, 213.

9. MO.REV.STAT.(1855)c.14,§15.Thislaw was changed by the revision of 1879, § 497.

10. State Board of Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263 (1931).

The courts in Missouri and elsewhere have declared that by following legislative enactments they do not deprive themselves of their inherent rights for they will still be the active force causing disbarment. It has been said that the inherent right may be regulated by statute without being destroyed.[11]

On the other hand Missouri courts have held that a statute specifying certain causes for disbarment does not restrict the court from disbarring for other reasons.[12] Recent Missouri cases have emphasized the court's inherent right to admit or dismiss attorneys.[13] The power of the legislature to set the maximum requirements for admission to the bar has been denied.[14] From the general trend of the decisions, the Missouri Supreme Court may be expected to be in accord with the principal case in its disregard of statutes placing time limitations upon disbarment.

JOHN H. FOARD

EXECUTORS AND ADMINISTRATORS—RIGHT TO SUE ON UNADMINISTERED ASSETS AFTER ADMINISTRATION.

Nord v. Nord[1]

The deceased sold land to the defendant and received one-half of the purchase price. The defendant was executor and did not list in the inventory any obligation to pay the remaining amount. The estate was closed in less than two years but the defendant paid interest to the plaintiff on this obligation for nine years. Plaintiff, the residuary legatee, brought suit to collect the unpaid portion and alleged in the alternative a lost note or a contract to pay. The defendant did not deny the obligation but defended solely on the basis that the plaintiff was not the owner of the chose in action. The court held that the defendant was estopped to deny that the plaintiff had the legal capacity to sue.

Title to personal property goes to the personal representative until by the decree of distribution it is vested in the legatees.[2] Here the legal title was in the personal representative, the defendant, but the equitable title was in the plaintiff as residuary legatee. The purpose of retaining title in the personal representative is to protect the interests of creditors of the estate,[3] but if the possibility of creditors has been removed then the plaintiff should be able to recover as the holder of the equitable title. All creditors are barred from asserting a right against administered property after the period provided by the statute for the filing of claims has lapsed,[4] but since this asset was not included in the inventory and was not covered by the final decree of distribution the question arises whether the creditors are barred by the statute as to it. The non-claim statutes of a few states expressly provide that creditors have a right to these assets even though the claim was not filed in time to be asserted against the administered assets of the estate.[5] But in Missouri the statute does not contain such a provision but merely provides that "all demands not . . . exhibited in one year shall be forever barred."[6] There is no suggestion that the creditor should be able to wait beyond the period of the non-claim statute and then discover some asset that was not inventoried and use it to satisfy his claim. The non-claim statute acts as a short statute of limitations[7] and should bar the careless creditor, for its purpose is to permit the legatees

11. State *ex rel.* Jones v. Laughlin, 10 Mo. App. 1 (1881); State *ex rel.* Johnson v. Gebhardt, 87 Mo. App. 542 (1901); In re Smith, 73 Kan. 743, 85 Pac. 584 (1906); In re Saddler, 35 Okla. 650, 130 Pac. 906 (1913); In re Gorsuch, 113 Kan. 380, 214 Pac. 794 (1923); Re Casebier, 129 Kan. 853, 284 Pac. 611 (1930); In re Hanson, 134 Kan. 165, 5 P. (2d) 1088 (1931).

12. State *ex rel.* Jones v. Laughlin, 10 Mo. App. 1 (1881); State *ex rel.* Johnson v. Gebhardt, 87 Mo. App. 542 (1901).

13. In re Richards, 333 Mo. 907, 63 S. W. (2d) 672 (1933); In re Sparrow, 90 S. W. (2d) 401 (Mo. 1935).

14. Rule 38 (d) of the Revised Rules of the Supreme Court of Missouri requires applicants for admission to the bar to have at least two years of college work or its equivalent. This requirement is not set out in the statute dealing with admission to the bar. MO. REV. STAT. (1929) § 11696.

1. 91 S. W. (2d) 223 (Mo. App. 1936).

2. Wass v. Hammontree, 77 S. W. (2d) 1006 (Mo. Sup. 1934).

3. Todd v. James, 157 Mo. App. 416, 138 S. W. 929 (1911).

4. Mabary v. Mabary, 158 S. W. 690 (Mo. App. 1913).

5. ILL. REV. STAT. (1931) c. 3, § 71, cl. 6.

6. MO. REV. STAT. (1929) § 183.

7. Hinshaw v. Warren's Estate, 167 Mo. App. 365, 151 S. W. 497 (1912).

or distributees to take free of claims against the decedent which are asserted after the provided period. The Indiana Court in interpreting a statute similar to the one in Missouri held that where the claim against the decedent's estate was not filed within the time fixed by the statute it was barred and the court was without authority to appoint an administrator *de bonis non* for the purpose of allowance of the claim, even though there were unadministered assets of the estate.[8] It seems that by a proper interpretation of the Missouri statute the possibility of the rights of creditors against this asset is eliminated so the plaintiff should be allowed to recover as owner of the equitable interest.

The court places the right of the plaintiff to recover on the basis that the defendant is estopped to deny that right because of his conduct. This is satisfactory in this case and the result is desirable, but if the debtor was not the executor then no estoppel could be asserted against him. Yet, if the possibility of creditors is eliminated there should be a right for the plaintiff to recover without the expense of a new administration. This case might well have been decided on the broader basis.

ALDEN A. STOCKARD

INSURANCE—SUBROGATION—PROPER PARTY PLAINTIFF.

Subscribers At Casualty Reciprocal Exchange, By Dodson et al., v. Kansas City Public Service Co.[1]

Plaintiff issued its policy of collision insurance with a $50 deductible clause to one of its subscribers, Raymond Teall, on his car. While the policy was in effect, it is alleged that the car was negligently run into by defendant and damaged to the extent of $617.55. Plaintiff paid insured $567.55 and notified defendant that it claimed the right of subrogation. Later defendant, upon consideration of $50, settled with the insured and took a release for all claims. Plaintiff sued in its own name for $567.55. Defendant moved for judgment on the pleading and the motion was sustained. Plaintiff refused to plead further and judgment was rendered in favor of defendant. Plaintiff in a motion for new trial assigned as error the sustaining of the defendant's motion for judgment on the pleadings, "and thereby holding that the release procured by defendant from Raymond Teall after defendant had recognized plaintiff's subrogation rights and had negotiated with plaintiff for settlement barred plaintiff's subrogation rights."[2]

The appellate court said that there was nothing in the record to show on what ground the lower court based its judgment, and that, "it is more probable in this case that the trial court found that, upon the pleadings, the plaintiff was not entitled to recover and the defendant was, than that it found upon the mere grounds set up in plaintiff's assignment of error. At least, it could have so found, and should have so found, and the plaintiff's point is not at all persuasive. It is not of sufficient scope fully to challenge the action of the court."[3]

The case brings out the well settled rule that where the loss exceeds the amount of insurance paid, the insurance company is not the real party in interest so as to permit it to sue in its own name to secure reimbursement for the amount paid the insured.[4] The rule is based upon the theory that to allow such a suit would result in splitting a cause of action.[5]

It is clear that if the plaintiff had paid the loss in full he could maintain a suit in his own name, for then the insured would have no pecuniary interest in an action against the wrongdoer and in reality the insurer is the real party in interest.[6]

The principal case presents the problem where the insured has been paid in ful not by the insurance company alone, but by the insurance company to the extent called for by its policy and the balance by the wrongdoer. In such a situation it has been held that the insurer, who has been subrogated to the rights of the insured, is the sole party in interest within the meaning of a real party in interest statute, and consequently, that it may sue the

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8. Storer v. Carney, 73 Ind. App. 415, 127 N. E. 790 (1920).

1. 91 S. W. (2d) 227 (Mo. 1936).
2. *Id.* at 230.
3. *Id.* at 232.
4. (1935) 96 A. L. R. 882.
5. *Ibid.* See also, Burnett v. Crandall, 63 Mo. 410 (1876); Alexander v. Grand Avenue R. Co., 54 Mo. App. 66 (1893).
6. (1935) 96 A. L. R. 876. See Hartford Fire Insurance Company v. Wabash R. Co., 74 Mo. App. 106 (1898).

wrongdoer in its own name for the amount which it has been compelled to pay the insured, and that the latter is not a proper party to the action.[7] The reasoning of these cases is that the insured after settlement with the insurer and the wrongdoer has no further claim against the wrongdoer. The situation becomes narrowed to the single right of the insurer to recover from the wrongdoer, since he is the only one having an interest in the transaction. Such a suit by the insurer would not be splitting a cause of action for it is the only one that now has a claim against the wrongdoer, all liability to the insured having been settled.[8]

But Missouri, however, refuses to allow suit by a partial assignee in his own name. Thus, by treating the deductible clause as making the insurer a partial assignee, it could recover only if the insured was joined. It would seem that the desirability of such a rule could well be questioned.

LAWRENCE R. BROWN

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7. Hartford Fire Insurance Company v. Wabash R. Co., 74 Mo. App. 106 (1898).

8. *Ibid.*