Missouri Law Review

Volume 6
Issue 1 *January 1941*

Article 9

1941

Comments

MISSOURI LAW REVIEW

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

Vol. VI JANUARY, 1941 No. 1

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Subscription Price $2.50 per volume 85 cents per current number

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

Comments

TAXATION—DECISIONS BY THE MISSOURI SUPREME COURT DURING THE YEAR 1939.*

I. *Taxation of income derived from transactions partly within and partly without this state*

Artophone Corporation v. Coale[1] was a suit to abate income taxes assessed against the company for the year 1936. The circuit court refused to abate part of

*This comment should be read with the symposium on *The Work of the Missouri Supreme Court for the Year 1939* (1940) 5 MO. L. REV. 377.

1. 133 S. W. (2d) 343 (Mo. 1939). The opinion was written by Cooley, C.

the tax assessed, and the company appealed to the supreme court. The agreed statement of facts, upon which the case was submitted, disclosed that the company's only places of business were its principal office, warehouse and service department in St. Louis, and a branch office, warehouse and service department in Kansas City. The company was engaged in the business of distributing electrical appliances, such as washing machines, radios, and refrigerators, in a territory comprising parts of Missouri, Kansas, Illinois and Kentucky. A staff of traveling salesmen was maintained at the head office, and they procured orders throughout that territory. However, all such orders were taken subject to the approval of the head office in St. Louis. The goods were shipped by rail or by trucks, owned by others but under contract with the company, to purchasers outside Missouri from its warehouses in Missouri, or were shipped direct from the manufacturers, all of which were located in states other than Missouri, to the out-of-state purchasers.

The question involved in this case was the manner in which the sales to out-of-state purchasers should be treated in computing the company's income tax liability for the year 1936. The company claimed that the income derived from those sales resulted from transactions partly within and partly without Missouri and, therefore, should be allocated. On the other hand, the state auditor and the assessor contended that all of the income so derived was taxable by Missouri.[2]

The statute provided for the taxation of all corporations, both foreign and domestic, only on income derived from sources in this state.[3] Where income results from a transaction partially in this state and partially in another state or states, and that part of the income attributable to transactions in this state cannot be segregated, the statute sets out a formula which the taxpayer may elect to use in computing its net income.

In holding that the company might elect to compute its income in accordance with that formula, the court relied heavily on the historical background of that particular section of the income tax statute. The first income tax law, enacted in 1917, imposed a tax on the net income of domestic corporations from all sources, but taxed the net income of foreign corporations only when it was derived from sources in this state.[4] In 1927 the law was changed to tax both domestic and foreign corporations on the same basis, that is, on income received from sources within this state.[5] The formula for allocating income from transactions partly

2. *Id.* at 345. Prior to 1933 the state auditor interpreted the act to permit allocation under facts similar to those here presented. However, in that year a different person became state auditor, and he interpreted the act contrary to his predecessor. The problem of the weight to be given administrative rulings and regulations and changes therein is not considered by the court. Evidently it thought the statute so clear that administrative interpretation would be unnecessary. In such a situation it is well settled that an administrative interpretation changing the clear meaning of a statute will have no validity. See, for example, Campbell v. Galeno Chemical Co., 281 U. S. 599 (1930), and International Railway v. Davidson, 257 U. S. 506 (1922).

3. Mo. Rev. Stat. (1929) § 10115.

4. Mo. Laws 1917, p. 524.

5. Mo. Laws 1927, p. 475.

within and without the state first became a part of the law in 1929.[6] The court thought this statutory history showed an intent on the part of the legislature to eliminate discrimination between domestic and foreign corporations and to tax income derived from corporate activities covering several states on a proportionate basis.

Although the contract of sale was formed in Missouri, due to the necessity of approval by the head office in St. Louis, the court felt that the term "transaction" should be given a broad interpretation and should not be considered synonymous with "contract." It then went on to hold that the several activities of the company and its agents properly fell within the concept of "transactions," since that word "may comprehend a series of many occurrences."[7] The interstate or several-state character of these activities brought them within the statutory requirement of transactions partly within and partly without this state.

In its opinion, the court notices the familiar, but frequently neglected, rule that taxing statutes are to be strictly construed in favor of the taxpayer.[8]

II. *Inheritance tax on personal property received by widow under deceased husband's will*

In *In re Bernays Estate v. Major*,[9] the testator left all his property, with the exception of a nominal specific bequest, to his widow and the St. Louis Union Trust Company, as trustees, in trust to pay the income to his widow for her life and then to his daughter for her life, with remainder to his daughter's issue, and in default of such issue to distribute the corpus in accordance with the Missouri statute of descent and distribution obtaining at his daughter's death. One section of the will stated that "the provisions herein made for my wife, shall be in lieu of her dower, homestead, allowances, rights of election and all other rights in my estate."[10] The widow renounced her statutory rights and elected to take under the will. An appraisal of the estate, which consisted entirely of personal property, placed its net value at $133,321.05, which, on the basis of mortality tables, was distributed $83,032.32 to the widow, $23,431.16 to the daughter and $26,857.57 to corpus. In computing the tax on the widow's share, the appraiser allowed her an exemption of only $20,000.00, and in computing the tax on corpus he applied the higher rate established by statute for collateral relations rather than the lower one set for lineal descendants. Exceptions filed by the executors to these two items in the appraiser's report were overruled by the probate and circuit courts, and this appeal followed.

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6. Mo. Laws 1929, p. 423.
7. The court was quoting from Moore v. New York Cotton Exchange, 270 U. S. 593 (1926).
8. In support of this rule of construction, the court cites State *ex rel.* Ford Motor Co. v. Gehner, 325 Mo. 24, 27 S. W. (2d) 1 (1930). That this rule is used more as a justification for a result than a technique of construction can be seen from the court's citation of and quotation from Cummins v. Kansas City Pub. Serv. Co., 334 Mo. 672, 66 S. W. (2d) 920 (1933), to the effect that the fundamental rule of statutory construction is ascertainment of the lawmaker's intent.
9. 344 Mo. 135, 126 S. W. (2d) 209 (1939).
10. *Id.* at 138, 126 S. W. (2d) at 211.

Appellants claim that in addition to the $20,000.00 exemption, the widow should be allowed, free from tax, a deduction for her statutory "child's share"[11] which, when added to the $20,000.00 exemption, would equal more than the appraised value of her share, with the result that no tax should be assessed against her. On the other hand, respondent contends that the widow took her interest in the estate by will, bringing her directly within the provisions of the inheritance tax law. The supreme court affirmed the lower court's decision approving the appraiser's report.

An understanding of the decision in this case requires an analysis of the theories of succession both by will and intestacy, as well as a consideration of the incidence of inheritance taxation.

The inheritance tax statute imposes a tax on the transfer of any property "when the transfer is by will or by the intestate laws of this state."[12] Despite the rather clear indication to the contrary in the statute, the court says the tax is imposed on the right to receive rather than on the right to transfer property after death.[13] The justification for this view, or at least the reason behind it, is the determination of exemptions and rates of tax on the basis of the status of the person receiving the property rather than the amount of the net estate.[14]

Where a husband dies intestate, his wife, at common law, held a dower right in his real property. This right was said to have been inchoate during the husband's life, attaching after coverture and seisin. Thus, when the husband dies, the pre-existing right of dower was thought to ripen into an estate in the realty. This alteration or change in the wife's rights on the husband's death was held by many courts not to be a "transfer" within the meaning of inheritance tax statutes.[15] When the wife relinquished dower and took under the will in lieu thereof, it has been argued in several cases, and was argued by appellants in this case, that she gave a valuable consideration for the property and was, therefore, a purchaser rather than a transferee within the statute.

Although the wife had no common law rights in her husband's personal property, statutes have ordinarily accorded her a right therein on her husband's death.[16] However, this right can hardly be thought to come into existence until death, and even at that time it is a limited one, being subject to the payment of her husband's debts. In an earlier decision[17] the Supreme Court of Missouri

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11. Mo. Rev. Stat. (1929) § 323, gives the surviving spouse an absolute share in the deceased spouse's personalty "equal to the share of a child of such deceased husband or wife."
12. Mo. Rev. Stat. (1929) § 570.
13. 344 Mo. at 140, 126 S. W. (2d) at 212. The Federal Estate Tax is imposed on the transfer of the net estate, (see 26 U. S. C. § 810 (Supp. 1934)); also, Edwards v. Slocum, 264 U. S. 61 (1924), and is measured by the value of the net estate.
14. Mo. Rev. Stat. (1929) § 572.
15. For example, see McDonald v. Byrkett, 120 Ark. 295, 179 S. W. 491 (1915); *In re* Strahan v. Wayne County, 93 Neb. 828, 142 N. W. 678 (1913); and *In re* Weiler's Estate, 122 N. Y. Supp. 608 (Sur. Ct. 1910), *aff'd*, 139 App. Div. 905, 124 N. Y. Supp. 1133 (1910).
16. See note 11, *supra*.
17. *In re* Rogers' Estate, 250 S. W. 576 (Mo. 1923).

held that a widow who renounced the provisions of the will took her statutory "child's share" in the personalty entirely free from inheritance taxes. Without overruling that case, the majority of the court in the instant decision holds that a widow who fails to renounce but takes under the will is taxable under the express provisions of the statute.

Commissioner Westhues, in a minority opinion, concurred in by Judge Leedy and Commissioner Bohling,[18] approves the result but says the earlier decision should be overruled. If taxability is to be determined solely on the fact of rejection of the will, he believes the statute would be unconstitutional because of an unreasonable discrimination.

With respect to the question of the rate applicable in taxing the corpus, the court says it should be the higher one applied to collateral relations, since a distribution to lineal descendants is contingent on the daughter having issue at her death. In the event the corpus is in fact distributed to lineal descendants, the statute provides for a rebate of the excess tax to them.[19]

III. *Exemptions from real property tax*

During the year 1939 the Missouri Supreme Court decided three cases, each of which involved the question of exemptions from real property taxes.

In *National Cemetery Association v. Benson*,[20] the association, which had been incorporated pursuant to the laws relating to manufacturing and business corporations, sought an injunction to restrain sale of its lands because of delinquent taxes. In 1911 it had purchased approximately 194 acres of land in St. Louis County, a part of which was later subdivided into burial lots. However, sixty-five acres of that tract were never platted for burial purposes and were subject to disposition or use by the association for other purposes. The court held that sixty-five acres taxable. Before land might be exempted under the constitutional provision exempting cemeteries,[21] the court said it must in some effective manner be "set apart" for the burial of the dead. Inherent in the very definition of the word "cemetery" is the idea that land must be used or at least effectively dedicated for burial purposes. That had not been done in this case. On a motion for rehearing, the court observed that the constitutional exemption covered cemeteries operated by private enterprise for profit, as well as cemeteries operated by religious and benevolent corporations, although the court adhered to its view that the land involved in the instant case was not exempt, since it could not properly be called a cemetery.

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18. The result of the majority opinion which was written by Commissioner Cooley was concurred in by Commissioners Westhues and Bohling. That opinion was adopted as the opinion of the court, with Tipton, C. J., and Ellison, J., concurring.

19. Mo. Rev. Stat. (1929) § 597.

20. 344 Mo. 784, 129 S. W. (2d) 842 (1939).

21. Mo. Const. art. X, § 6. Since this provision says certain property shall be exempt, the court holds it to be self-executing.

In *Young Women's Christian Association v. Baumann*,[22] the association sought an injunction against the collection of property taxes levied on certain real estate owned by it in St. Louis. The constitution provides that certain property may be exempted from taxation when it is "used exclusively for religious worship, for schools, or for purposes purely charitable."[23] A statutory provision says such property shall be exempted.[24] The property in question, which was a building in St. Louis, was used by the association in its program of assisting and aiding young girls on spiritual, physical and economic problems. Thus, an employment bureau, swimming pool and gymnasium were maintained in the building, and various religious, social and educational programs were conducted in it. A few bedrooms in the building were rented for a small charge to women transients. In 1932 a cafeteria was operated by the association, but it was discontinued early in 1933. However, the association continued to serve luncheon to its members and their guests for which a charge sufficient to cover cost only was made.

The court held the property exempt since it was used exclusively for religious, educational and charitable purposes. The use of part of the building for a cafeteria in 1932 was held incidental to the primary use for charitable purposes, and thus not destructive of the exclusiveness of that use. Three earlier decisions by the court,[25] refusing to exempt property owned by the Young Men's Christian Association, were distinguished on the ground that in those cases part of the property had been either leased to others for commercial purposes or used by the association itself for various forms of commercial enterprise.

Laret Investment Co. v. Dickmann,[26] was a suit to enjoin the Mayor of St. Louis and others from executing an agreement between St. Louis and the Housing Authority of St. Louis. Plaintiff alleged that the agreement attempted to exempt the property of the Housing Authority from taxation, contrary to constitutional and statutory provisions. The act under which the Housing Authority was created[27] did not say its property should be exempt from taxation. However, it did say the Authority should be a municipal corporation, and the constitution itself exempts from taxation property of municipal corporations.[28] The court held that the Housing Authority was a municipal corporation, since it was a body created by law and devoted to the performance of an essential public function.[29] Therefore, under the express and self-executing provision of her constitution, its property was exempt from taxation.

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22. 344 Mo. 898, 130 S. W. (2d) 499 (1939).
23. Mo. CONST. art. X, § 6. Since this exemption is permissive in terms, it is not self-executing.
24. Mo. REV. STAT. (1929) § 9743.
25. State *ex rel.* Koeln v. St. Louis Y. M. C. A., 259 Mo. 233, 168 S. W. 589 (1914); State *ex rel.* St. Louis Y. M. C. A. v. Gehner, 320 Mo. 1172, 11 S. W. (2d) 30 (1928); St. Louis Y. M. C. A. v. Gehner, 329 Mo. 1007, 47 S. W. (2d) 776 (1932).
26. 134 S. W. (2d) 65 (Mo. 1939).
27. 8 Mo. STAT. ANN. (1940) § 14813.1, see particularly § 14813.4.
28. Mo. CONST. art. X, § 6.
29. This rather broad definition of "municipal corporation" has been con-

IV. *Miscellaneous*

Several other cases dealing to some extent with taxation problems were decided by the court in 1939. Since no new or unusual problems were presented in them, they will be accorded a more summary treatment.

In *Vincent Realty Co. v. Brown*,[30] plaintiff, a corporation, sought a declaratory judgment on the theory that a cloud was cast upon title to its property by the section[31] of the Missouri statutes which provides that taxes due from a corporation are a lien against its assets; that payment of such taxes is a condition precedent to the right to transfer the whole or a major portion of its assets; and that any such transfer without first paying accrued taxes is void. It was contended that the section in question violates certain provisions of State and Federal Constitutions. Demurrers to the petition were overruled and judgment for the plaintiff on the pleadings was entered. In reversing and remanding the case, the supreme court held that no cause of action was stated under the Declaratory Judgment Act. The court's conclusion was based upon the reasoning that the lien declared by the statute does not attach until the corporation makes a transfer of the whole or major part of its assets. Since plaintiff had not transferred the whole or major part of its assets, it had no "present interest" in the determination of the question of the validity of the section.

The court gave no specific consideration to the fact that the statute in question appears to impose a lien for all taxes or fees due and provides against loss of the lien upon transfer by the corporation.

The case having gone off on the procedural point leaves the question of the validity of the statute entirely unsettled.

Hull v. Bauman[32] upholds the validity of recently enacted statutes[33] providing for the collection of delinquent tax bills in St. Louis. It had been contended that the statutes were unconstitutional.[34]

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sistently applied by the Missouri Supreme Court. See State *ex rel.* Caldwell v. Little River Drainage District, 291 Mo. 72, 236 S. W. 15 (1921), and Grand River Drainage District v. Reid, 341 Mo. 1246, 111 S. W. (2d) 151 (1937).

30. 344 Mo. 438, 126 S. W. (2d) 1162 (1939).

31. 3 Mo. STAT. ANN. (1940) § 4598a. The material part of that section reads:

> "All taxes . . . due . . . the State . . . or any political subdivision thereof, by any . . . corporation, . . . are hereby declared to constitute a . . . lien . . . against the assets of such corporation, . . . and said lien shall not be lost on said assets by any transfer thereof. The payment of all taxes which are due . . . by any corporation, . . . is hereby declared to be a condition precedent to the right of said corporation . . . to sell, give away, assign or transfer the whole or the major portion of its assets . . . and any such sale, gift, assignment or transfer . . . without all taxes . . . having been paid . . . prior to the sale, gift, assignment or transfer of such assets, is hereby declared to be null and void."

32. 131 S. W. (2d) 721 (Mo. 1939).

33. 12 Mo. STAT. ANN. (1940) §§ 9952A-2 to 9952A-18.

34. Among these were objections based on alleged violations of the constitutional provisions as to titles of bills, enactment of special laws, and unreasonable discrimination.

In *Duffley v. McCaskey*,[35] plaintiff had been endowed with a life interest in certain lands of which defendant was remainderman. Suit had been brought by the state against both life tenant and remainderman to foreclose a tax lien, and the remainderman bought the land at the foreclosure sale. In this suit plaintiff claimed that this purchase did not operate as a conveyance of her life interest but merely as a payment of taxes and sought to have her title quieted against the remainderman's claim. The court held that the purchase by the remainderman operated as a conveyance of the life interest. Since, as between life tenant and remainderman, the former is liable for taxes,[36] there is no reason why the remainderman should not have all the rights of an ordinary purchaser at a tax sale.

J. W. MCAFEE[37]

CONSTITUTIONAL LAW—STATE GROSS RECEIPTS TAX AFFECTING INTERSTATE COMMERCE

The City of New York imposed a tax upon purchasers for consumption of tangible property. The tax was fixed at two per cent of the amount of receipts from all sales in the city. "Sale" was defined as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor."[1] The tax provision specified that the tax should be paid by the purchaser to the vendor, and in turn, the vendor was made liable as an insurer for its payment to the city. Purchasers for resale were exempt, and the purchaser who paid the tax and later resold was entitled to a refund.

A Pennsylvania corporation, engaged in mining coal in that state, maintained sales offices in New York, where it entered into contracts of sale. To fill these contracts, coal was mined in Pennsylvania, transported by train to a New Jersey pier, and from there carried by seller's barges to the purchaser's plant or steamship in New York where delivery was made. The purchaser did the unloading. The United States Supreme Court held the tax was constitutional as applied to sales made in New York by the Pennsylvania corporation.[2]

The subject of a gross receipts tax affecting interstate commerce has, from its inception, been a very complex one. Such complexity is attributable in part to the inevitable conflict between an unrelenting worship of a doctrinal phraseology and a realization that the full developments of such a doctrine must be strictly modified in the interests of state taxation.

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35. 134 S. W. (2d) 62 (Mo. 1939).
36. This is the general rule. See citations in (1940) 126 A. L. R. 853, 863.
37. Attorney, St. Louis. LL.B., University of Missouri, 1926. Former Judge of the St. Louis Circuit Court.

1. N. Y. Laws Ex. Sess. 1933, c. 815, § 1(e).
2. McGoldrick v. Berwind-White Coal Mining Co. 309 U. S. 33 (1940).

Article I, Section 8, of the Federal Constitution specifies that "Congress shall have power . . . to regulate commerce with foreign nations, and among the several states. . . ."

Chief Justice Marshall, in his famous decision in *Brown v. Maryland*,[3] suggested a broad and exclusive construction of this grant of federal power when he asked:

> "If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of reëxportation?"[4]

Marshall spoke of the Imports and Exports clause of the Federal Constitution, but his statements, as *dicta*, were intended to embrace commerce between the states as well.[5]

The less famous dissenting opinion of Justice Thompson, in *Brown v. Maryland*, advanced the normal reply to Marshall's fear of a future burden on commerce—that as a practical matter the contested law required no more of the importer than was required of any other dealer in the article imported.[6] Justice Marshall had feared that a tax affecting sale would be certain to affect the Constitutionally protected act of importation and thus endanger foreign commerce. The dissent asserted that such a reason was untenable, pointing out that any tax, as, for example, the clearly valid retail sales tax on the broken package, would affect the act of importation. Thus nothing short of total exemption from state charges, in any form at any time, would answer the supposed object of the Constitution, and such an exemption is clearly not warranted by the Constitution.[7] The dissent's third criticism was that the power of the state to tax was sovereign and the attempt of the national government to abridge such a power was an unauthorized assumption of power.[8] While the dissent may have overestimated the scope of state power in this respect, the contention was noteworthy in that it realized that some respect must be given to the necessity for state taxation in instances where the commerce clause overlaps the state taxing power.[9]

Justice Marshall's characteristic attempt to extend his doctrine beyond the facts of the case was frustrated in *Woodruff v. Parham*,[10] where Justice Miller confined the "original package" doctrine of *Brown v. Maryland* to imports from foreign nations. The reason of Marshall's doctrine, fear of the possibility of burdening commerce, still persisted, however, in later decisions.[11] It is clear, then, that at an early date there existed two definite philosophies as to the degree of protection to be afforded interstate commerce, and further, these philosophies

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3. 12 Wheat. 419 (U. S. 1827).
4. *Id.* at 449.
5. "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State." *Id.* at 449.
6. *Id.* at 450.
7. *Id.* at 455.
8. *Id.* at 456.
9. Note the necessity which Justice Stone finds for reconciling the necessity of protecting interstate commerce with the purpose of the state taxing power in the Berwind-White case, 309 U. S. 33, 49 (1940).
10. 8 Wall. 123 (U. S. 1868).
11. Notably, Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887).

diverged on the single issue of whether interstate commerce was to be held to be impervious to the possibility of future state burdens, or whether the actuality, the necessity of state taxation, was to form an element in the solution of any problem involving the interstate commerce clause.[12]

The first statute involving a gross receipts tax came before the Court in 1872.[13] Two principle reasons were advanced for the decision upholding a tax levied on a percentage of a corporation's gross receipts. First, the Court observed that the tax was collected every six months and by that time the receipts would have been separated from the interstate source and mingled with the property mass of the taxpayer.[14] Secondly, the Court construed the levy to be an excise tax upon the franchise of a state corporation, and the gross receipts to be the appropriate measure of such a tax.

Two more cases involving the gross receipts tax faced the Court in 1887. In *Fargo v. Michigan*,[15] the Court distinguished the *State Tax on Railway Gross Receipts* case, for in the *Fargo* case the corporation sought to be taxed by Michigan was a Pennsylvania corporation, and for that reason the corporate income could never be mingled with the corporation's Michigan property, and the corporation had no Michigan franchise upon which an excise could be levied.[16] In invalidating an attempted state tax upon a steamship company's gross receipts in *Philadelphia & Southern Steamship Co. v. Pennsylvania*,[17] Justice Bradley asserted that the first ground of the *State Tax on Railway Gross Receipts* case was untenable as "no matter when the tax is exacted . . . it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it."[18] The

12. The latter impulse, apparent in Thompson, J.'s, dissent in Brown v. Maryland, is even clearer in the opinion of Bradley, J., in Brown v. Houston, 114 U. S. 622, 633 (1885), where, in sustaining the application of a Louisiana tax on coal of out-of-state origin which had come to rest in Louisiana, some of which was later exported, he said: "Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grainfields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not?"

Note (1939) 4 Mo. L. Rev. 64, suggests that a basis for the reluctance of later cases to sustain state gross receipts taxes may be based on Justice Marshall's assertion in McCulloch v. Maryland, 4 Wheat. 316, 431 (U. S. 1819), that "the power to tax involves the power to destroy," and the notewriter points out that the fallacy of such a fear lies in its inability to recognize distinctions of degree, as Justice Holmes realized in his dissent in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223 (1928).

13. State Tax on Railway Gross Receipts, 15 Wall. 284 (U. S. 1872).

14. Note (1940) 40 Col. L. Rev. 653, 654, n. 4, suggests that this was an attempt to use the rule of Brown v. Maryland in the gross receipts situation. The note disproves this approach, pointing out that even if we assume that the receipts had become a fund in the possession of the railroad, the fact remains that the tax was levied upon them with respect to their source as receipts from transactions in interstate commerce, not as money in the possession of the company.

15. 121 U. S. 230 (1887).

16. *Id.* at 243.

17. 122 U. S. 326 (1887).

18. *Id.* at 342.

second reason advanced in the early case was held inapplicable to the facts of the case,[19] though Justice Bradley's *dictum* approved it.[20]

The chief importance of the *Philadelphia & Southern Steamship Co.* case, however, lies in its realization that a tax on the receipts from an enterprise has the same effect as a tax on the enterprise itself.[21] This realization was essential to a construction of the commerce clause to give it the full effect the Court has allowed, for taxation of the receipts was the logical means of state levy. When the Court took this step, it had completed the background for its doctrinal approach to the determination of the validity of state taxes upon the gross receipts of an enterprise engaged in interstate commerce, and it remained only for the courts to reach further and further in their disregard of the important consideration that "interstate commerce must pay its way"[22] in their anxiety to protect interstate commerce from an anticipated but non-existent burden, multiple taxation. Subsequent cases illustrate such an extension.[23]

It was apparent, however, in the earliest cases that the mere label "Gross Receipts" was not sufficient to require invalidation of a given tax. Since the rationale of invalidity in the gross receipts cases necessitated a regulation of interstate commerce[24] or a burden thereon, either actual[25] or possible,[26] many taxes using gross receipts as a measure, as well as many taxes imposed on articles of interstate commerce, have been held valid. Thus, a tax imposed "in lieu" of a property tax and using gross receipts as its measure has been sustained.[27] The tax, as a property tax, must be reasonable, however, and if it exceeds the amount which could properly be levied under the property tax law, the tax is void as a regulation of commerce.[28] Similarly a tax may be levied on net income which is wholly derived from interstate commerce.[29]

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19. *Ibid.* "It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania."

20. *Id.* at 345: "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state. . . ."

21. *Id.* at 336. An excellent discussion of the earlier cases is found in Note (1940) 40 COL. L. REV. 653.

22. Holmes, C. J., dissenting in New Jersey Bell Tel. Co. v. Tax Board, 280 U. S. 338, 351 (1930).

23. See note 30, *infra.*

24. Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887).

25. Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217 (1908). *Cf.* New Jersey Bell Tel. Co. v. Tax Board, 280 U. S. 338 (1930), where the tax paid for the use of highways to string wires on telephone poles amounted to $3200 per mile.

26. Robbins v. Shelby County Taxing Dist., 120 U. S. 489 (1887).

27. United States Express Co. v. Minnesota, 223 U. S. 335 (1912); Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (1918). The "in lieu" tax furnishes a practical plan for state taxation, for in many businesses intangible assets are exceedingly productive. Thus a busy newspaper has a definite "going concern value" which greatly surpasses the value of its equipment. Unless the "in lieu" tax is imposed on gross receipts, many of these valuable intangible assets escape assessment.

28. Postal Tel. Cable Co. v. Richmond, 99 Va. 102, 37 S. E. 789 (1901).

29. United States Glue Co. v. Oak Creek, 247 U. S. 321 (1918). In Maine v. Grand Trunk Ry., 142 U. S. 217 (1891), the Court sustained a tax interpreted as a franchise tax measured by gross receipts. The tax of this case was rein-

A formidable body of Supreme Court decisions has protected interstate commerce from the perils of a state privilege tax.[30] The foundation for this series of judicial assertions seems to have been the case of *Robbins v. Shelby County Taxing District*,[31] where the Court held that a flat fee privilege tax was invalid as applied to a drummer soliciting sales from samples for future shipment from an out-of-state point, when the taxing statute exempted regularly licensed houses of business in the taxing district from the operation of this privilege tax, though the resident businesses were forced to pay a tax on their stock of goods and a privilege tax as well. Justice Bradley, speaking for the Court, conceded that goods shipped from another state are taxable by the receiving state as part of the state's general property. Such a tax is invalid only if it discriminates against the goods of foreign origin. He declared, however, that ". . . to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself."[32] The majority refused to adopt actual discrimination as the test of the validity of a tax so closely affecting the sale, asserting: "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."[33]

The actual discrimination test was urged by Mr. Chief Justice Waite, dissenting, with whom two justices concurred. He asserted: "The tax is upon the business, and this I have always understood to be lawful, whether the business was carried on by a citizen of the state under whose authority the exaction was made, or a citizen of another state, unless there was discrimination against citizens of other states."[34] The dissent anticipated, as well, one of the major reasons for later modifications of the early rigidity—that failure to tax the negotiation of interstate sales would operate as discrimination against the negotiation of local sales and produce a manifestly undesirable result.[35] The majority's response to this objection, that this is the fault of the taxing state which might avoid such difficulty by imposing no tax at all on such negotiations, local or interstate,[36] seems illogical in view of the necessity of state taxation in some form.

As an absolute assertion of doctrinal principle, the *Robbins* case doctrine was somewhat weakened by a decision of the Court three years later, *Ficklen v. Shelby County Taxing District*.[37] The Court sustained a tax upon brokers in the taxing district who gave a bond to report their gross commissions at the end of a year. The tax was determined by a percentage of the year's commissions. The broker

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terpreted by the Court in Galveston H. & S. A. Ry. v. Texas, 210 U. S. 217 (1908), as a property tax. See Comment (1930) 18 CALIF. L. REV. 512.

30. Robbins v. Shelby County Taxing Dist., 120 U. S. 489 (1887); Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925). Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617, n. 10. This article was cited by the majority in the Berwind-White case.

31. 120 U. S. 489 (1887).

32. *Id.* at 497.

33. *Ibid.*

34. *Id.* at 500.

35. *Id.* at 501.

36. *Id.* at 499.

37. 145 U. S. 1 (1892).

against whom the tax was assessed negotiated all interstate sales. In distinguishing the *Robbins* case, the Court stated that the tax in that case was, in effect, on Robbins' principals rather than on Robbins, "while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."[38] The only real distinction between the cases, however, seems to be in the means of determining the tax.[39] Such a means of determination, it is submitted, should not be the criterion; the effect on interstate commerce should be the test used by the courts. The dissent asserted that the taxing plan which saved the instant tax was a "very clever device to enable the Taxing District of Shelby County to sustain its government by taxation upon interstate commerce."[40]

The apparent conclusion to be drawn from the *Robbins* and *Ficklen* cases, on the basis of the distinction between the facts of the cases, seems weakened by the *dictum* of the Court in *Crew Levick Co. v. Pennsylvania.*[41] After stating that as far as the question of gross receipts tax was concerned there was no difference between interstate and foreign commerce,[42] the Court proceeds to hold that "That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."[43]

The "immunity doctrine" reached its climax in a series of injunction cases. In *Bowman v. Continental Oil Co.*,[44] the Court approved an injunction against the imposition of a tax upon the sale of goods requiring subsequent interstate

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38. *Id.* at 21.

39. It is true that the tax of the Ficklen case is not a direct levy upon a percentage of gross receipts, but since the tax was a fixed percentage of a commission which in turn was a fixed percentage of the amount of sales receipts, the tax is in fact a percentage levy, as contrasted with the flat fee of the Robbins case. Query, did the fact that the tax was a step removed from an imposition directly upon the gross receipts influence the Court? But compare Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939), where the tax was a fixed percentage of commissions, but the commissions were not determined by a percentage of receipts from sale but by a fixed price on each box of fruit sold. Held: The tax could not be applied. It would appear that the fact that the tax was a step removed from the gross receipts exerted no influence on the Court in this latter case. See note 67, *infra.*

40. The rationale of the distinction is very capably criticized by Lockhart, *supra* note 30, at 630. He states: "It is inconceivable that the same result would have been reached had the case involved a tax in a fixed amount for doing the interstate business."

41. 245 U. S. 292 (1917). Black, J., dissenting in Gwin, White & Prince v. Henneford, 305 U. S. 434, 453-454 (1939), attributes the origin of the Court's aversion to the gross receipts tax to the *dictum* of the Crew Levick case and to the *dictum* of United States Glue Co. v. Oak Creek, 247 U. S. 321 (1918), wherein the Court contrasted the net income tax it sustained with a gross receipts tax on the apparent assumption that the latter was invalid.

42. 245 U. S. 292, 296 (1917). Lockhart, *supra* note 30, points out that this *dictum* is not sound for the imports-exports clause may prohibit state action while the commerce clause does not.

43. *Id.* at 297. It is submitted that the apportionment which sustained the tax in the Ficklin case was assumed by the word "hence" to invalidate the tax of the instant case. The reasoning is not altered by the fact that the tax was in the buyer's state while the Crew Levick tax was in the exporting state.

44. 256 U. S. 642 (1921).

shipment. A year later, the Court, in *Texas Co. v. Brown*,[45] sustained an injunction against an excessive inspection fee imposed by the state of Georgia. Powell[46] concludes that the latter case establishes the proposition that an interstate sale, one requiring shipment of the goods into the taxing state in fulfillment of the contract of sale, is immune from a state tax imposed on the sale.

The Court gave judicial recognition to the pressing necessity for state taxation in *Sonneborn Bros. v. Cureton*,[47] decided shortly more than a year after *Texas Co. v. Brown*. The taxpayer had shipped oil into Texas from outside the state and sold it from company storehouses in the original, unbroken package. In sustaining an "occupation tax" of two per cent of the gross amount from the sale of the oil, the Court rejected the argument that sale is the final step in interstate commerce and thus the tax was a direct burden upon one of the steps of the interstate commerce. The Court adopted the distinction of *Woodruff v. Parham*,[48] "that the immunity (of an import) attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."[49] The Texas authorities had made no effort to impose the gross receipts tax upon the sales requiring subsequent interstate shipment. The Court was not, then, bound to discuss such an imposition, still it flatly asserted: "Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it."[50] Though the statement was *dictum*, it was authoritative *dictum* and the majority in the *Berwind-White* case was forced to deny it.[51]

The *Sonneborn* case marked the climax of a period when the Court, without adequately justifying its stand, had condemned the taxation of what were technically interstate sales, but sanctioned the imposition of taxes upon sales after the interstate shipment was complete. It is submitted that such a distinction is unsound, for the time of shipment has never been the reason for invalidating a gross receipts tax; the basic reason has always been the prevention of the imposition of a burden upon interstate commerce.[52]

Three later cases[53] chose a new criterion for testing the validity of the gross

45. 258 U. S. 466 (1922).
46. Powell, *New Light on Gross Receipts Taxes* (1940) 53 HARV. L. REV. 909, 914.
47. 262 U. S. 506 (1923).
48. 8 Wall. 123 (U. S. 1868).
49. 262 U. S. 506, 510 (1923).
50. *Id.* at 515.
51. 309 U. S. 33, 36 (1940).
52. The distinction is abolished by the Berwind-White case, *id.* at 55.
53. Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938); Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938); Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939).

receipts tax. These cases expressed the rule that a state tax affecting interstate commerce was invalid if it exposed the commerce to the threat of multiple tax burdens.

In *Western Live Stock v. Bureau of Revenue*,[54] the Court sustained a tax of two per cent on the income from sales of advertising space by a publisher, although part of the advertising came from outside the taxing state as a result of extra-state solicitation, and although the circulation of the magazine embraced several states. The Court recognized that the purpose of the interstate commerce clause was not to relieve the interstate trader from paying his just share of the state tax even though the cost of doing business was increased.[55] The Court announced its "multiple burden" plan by a justification for the judicial condemnation of past taxes:

> "The vice characteristic of those (local taxes measured by gross receipts) which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."[56]

In the instant case the Court further observed that the events on which the tax was based could be taxed in no other state than the one seeking to impose the tax in question.[57]

In *Adams Manufacturing Co. v. Storen*,[58] the Court refused to sanction the application of a "gross income tax" measured by a certain percentage of gross receipts to a local company selling 80% of its products to out-of-state customers, when the goods were sold on order from company salesmen, shipped from Indiana to the out-of-state purchasers, and the remittance made to the home office. The Court grounded its decision upon the "multiple burden" doctrine rather than upon the "immunity" doctrine of the older cases.[59] Some years before, in *American Manufacturing Co. v. St. Louis*,[60] the Court had sustained a license tax measured by percentage of the gross receipts of the previous year's sales, as applied to a manufacturing company which removed its products to an out-of-state ware-

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54. 303 U. S. 250 (1938), (1939) 52 HARV. L. REV. 502, (1938) 86 U. OF PA. L. REV. 787.

55. *Id.* at 254.

56. *Id.* at 255. Thus presented, the doctrine furnishes a rationalization of the views of the older cases and an attempt to formulate a basis for the solution of future problems. Clearly the doctrine is not new; it is a natural outgrowth of the fears of the Court in the older cases. See Note (1940) 40 COL. L. REV. 653.

57. *Id.* at 260. The reason, it is submitted, is not in accord with the "multiple burden" doctrine, for other events which could easily be made the subject of taxation occur in other states. The majority in the Berwind-White case advances the same contention and the dissent there advances its logical refutation.

58. 304 U. S. 307 (1938), (1939) 4 Mo. L. REV. 64.

59. *Id.* at 211: ". . . the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed. and which the commerce clause forbids."

60. 250 U. S. 459 (1919).

house from which they were sold to out-of-state customers. The Court in the *Adams* case distinguished the *American Manufacturing Co.* case as being a tax on the privilege of manufacture, and not a sales tax.[61] The distinction is plainly unsound if the rationale of earlier cases, the protection of interstate commerce from the barriers of state taxation, is followed. Clearly, the name applied to a tax does not alleviate the burden it imposes upon interstate trade. Nor is the fact that a different year is chosen as a basis of measurement a valid ground of distinction, since such a basis is not relevant to the extent of the handicap imposed on interstate commerce. A well-written dissent by Justice Black in the *Adams* case pointed out that if the nominal designation of the taxes were disregarded, and the Court were to consider the operative effect of the two taxes, the tax burdens were identical.[62] Further, Justice Black's dissent furnished the most practical study of the gross receipts problem of any decision in the history of the subject. After pointing out that taxation and regulation are not synonymous, and that a tax may affect commerce without regulating it in the constitutional sense,[63] he observed that taxes based on net income are admittedly valid, and that "failure to make a profit should not of itself create a *constitutional* exemption from a tax which the State might otherwise impose."[64] His most important criticism was directed toward the newly asserted "multiple burden" doctrine. He admitted that unfair burdens should be avoided, but argued that the Constitution was never intended to give interstate commerce a preferred status over intrastate commerce or to relieve interstate commerce from paying for the protection which the taxing state afforded it. Justice Black felt that only Congress had the power to formulate rules, regulations and laws to protect interstate commerce from the threat of possible future burdens.[65]

The dissent's most convincing argument carried the "multiple burden" doctrine to its logical conclusion with the realization that if mere possibility of exposure to a burden may be enough to invalidate a tax, then no tax could be levied at any stage of an interstate product's history, for any tax operates as one of the multiple burdens which the doctrine seems to fear. Finding in the

61. 304 U. S. 307, 313 (1938).

62. *Id.* at 329. There seems to be a logical basis for either interpretation of the tax of the American Mfg. Co. case. Justice Black's approach, a consideration of the operative effect of the tax, is the more practicable solution of the problem in light of the ultimate aims of the commerce clause. If the tax is viewed, however, as it was by the Court in the American Mfg. Co. case and by the majority in the Adams case, as a condition precedent to the right to carry on a local business, manufacturing, with the ascertainment of the value of the goods postponed until the time of sale, the tax would be valid. Horn Silver Mining Co. v. New York, 143 U. S. 305 (1892); New York v. Roberts, 171 U. S. 658 (1898). It may be questionable, however, whether the "entire business" of the American Manufacturing Co., as taxed, did not include an interstate sale. *Cf.* Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 (1925).

63. *Id.* at 320.

64. *Id.* at 326. This argument, however, leaves unanswered the determinative query as to the actual burdening of interstate commerce. Clearly a gross income tax burdens such commerce more than a net income tax, which can affect only company profits.

65. *Id.* at 328.

state of Indiana a taxable event, the receipt of income, which could not be taxed in any other state, Justice Black felt a tax could be imposed thereon.[66]

The third case applying the "multiple burden" doctrine was *Gwin, White & Prince v. Henneford.*[67] The State of Washington had imposed a tax for the privilege of engaging in business activities, measured by a percentage of gross receipts. The Court held the tax could not be applied to a marketing agent with principle offices in Washington, who usually made shipments of produce to out-of-state representatives whose duty it was to negotiate sales, make deliveries, and remit the purchase money to the home offices. Justice Stone, speaking for the majority, made the questionable assertion that the *risk* of a multiple burden amounted to actual discrimination, and for this reason the tax could not be sustained.[68]

Again Justice Black dissented, asserting his arguments in the dissent of the *Adams* case, and new ones as well. Once more he asserted that in so vigorous a protection against discrimination against interstate commerce, the Court, as a practical matter, discriminated against local commerce.[69] Further, he asserted that the time to solve the problem of future burdens was when the future burdens arose.[70] There would be no problem of double taxation, he declared, for as between the buyer's and seller's states, earlier cases had held the buyer's state could not tax the receipts of such a sale.[71] Justice Black attributed the dangers contemplated by the "multiple burden" theory to our federal system, since they were the price paid by the interstate business man for governmental protection and maintenance in all the states where he did business.[72] As a problem of Federalism, he felt they should be dealt with by Congress. He urged the propriety of sanctioning the gross receipts tax instead of the net receipts tax because of the ease of concealment and uncertainty which the latter tax entails,[73] and because the gross receipts may be a clearer indicia of benefit received from the state government than would the annual profit and loss statement.[74] Since he felt the problem

66. *Id.* at 330. Compare the dissenting assertion of Hughes, C. J., in the Berwind-White case that it is not the fact that the single event may not be taxed in another state which controls, but the fact that there are other taxable events in other states which cumulatively form a burden or the possibility thereof.

67. 305 U. S. 434 (1939). *Cf.* Ficklen v. Shelby County Taxing District, 145 U. S. 1 (1892), distinguished by the Court as being a tax apportioned to the activities taxed, "all of which are intrastate." Query, were all the activities taxed in the Ficklen case intrastate? Such activities were *intrastate* as to the place where they were done, but *interstate* in the sense they were part of the interstate transaction. Query, does the above distinction indicate that extraterritoriality was a basis of the Gwin, White & Prince Court? See note 75, *infra.*

68. *Id.* at 439: "The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

69. *Id.* at 442.

70. *Id.* at 445.

71. *Id.* at 447.

72. *Id.* at 448.

73. *Id.* at 448.

74. *Id.* at 449.

of apportionment was a Congressional power, he warned the Court to "scrupulously observe its constitutional limitations. . . ."[75]

The *Gwin, White & Prince* case marked the climax of the Court's application of the "multiple burden" doctrine which, during this period, had clearly replaced the "immunity doctrine" advanced by the older cases. Although its rationale was faulty, the "multiple burden" doctrine was a distinct liberalization of such dogmatic pronunciations as those of the *Robbins* case.[76] Once this liberalization had begun, its extension to eradicate the irrational doctrines that hindered its growth was inevitable.

One of the greatest forward steps taken by the Court in this process was in its affirmance by memorandum[77] of the decision of the Supreme Court of Alabama in *Graybar Electric Co. v. Curry.*[78] A company with Alabama offices was required to pay a license tax of two per cent of the gross receipts of its sales, although part of the goods sold were in response to local orders which were in turn ordered from out-of-state companies and shipped directly to the purchaser. It is unfortunate that the Court felt the facts so clear or the decision so unimportant that there was no necessity for explaining the affirmance in detail. The facts permit of no other conclusion than that a technically interstate sale may be the subject of a state tax. The case, on its facts, is clearly *contra* to the "immunity" principle established for an interstate sale by *Robbins v. Shelby County Taxing District,* and the *dictum* of *Sonneborn Bros. v. Cureton.* The *Graybar Electric* case with the *Use Tax* cases forms a firm basis for the latest advancement, that of the Court in the *Berwind-White* case.

The memorandum opinion of the Court sustained the tax of the *Graybar Electric* case on the authority of *Banker Bros. v. Pennsylvania*[79] and *Wiloil Corporation v. Pennsylvania.*[80] The *Banker Bros.* case sustained a percentage tax on the sales of a retail dealer who took orders for automobiles and then purchased the cars from an out-of-state company. The cars were shipped to the dealer, who delivered them to the purchaser. Despite the taxpayer's assertion that the entire transaction amounted to one interstate sale with the dealer as agent for the

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75. *Id.* at 455. Justice Black in summarizing his doctrine, declared: "I would return to the rule that—except for state acts designed to impose discriminatory burdens on interstate commerce because it *is* interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.'"

The facts of the Gwin, White & Prince case permit of a rational explanation of the result which might be approved by a court impressed with Justice Black's approach. While the fruit sold in the instant case was in part shipped directly to the purchaser, more often it was consigned to the taxpayer at extra state points from which it was diverted to purchasers who bought the fruit while in transit, or where it was stored, outside the taxing state, pending sale. As to this fruit, the tax, which was purportedly on "business activities," was on activities outside the venue of the taxing state. But *cf.* American Mfg. Co. v. St. Louis, 250 U. S. 459 (1919).

76. Robbins v. Shelby County Taxing Dist., 120 U. S. 489 (1887).
77. 308 U. S. 513 (1939).
78. 238 Ala. 116, 189 So. 186 (1939).
79. 222 U. S. 210 (1911).
80. 294 U. S. 169 (1935).

manufacturer, the Court held that there were two separate sales. One of the sales, by the manufacturer to the dealer, was interstate, while the other, from the dealer to the purchaser, was local. The tax was upon the local sale. The Court felt that the purchaser did not contemplate an interstate sale, that it was immaterial to him where the dealer obtained the car.[81]

The *Wiloil* case sanctioned the imposition of a Pennsylvania tax on liquid fuels, levied on a seller whose agents took orders for the fuels in Pennsylvania. The orders were sent to Delaware to be filled, and the oil was shipped from Delaware to the Pennsylvania purchaser. Although the order blank specified, as to price, "f. o. b. Wilmington, Del., plus 3 cents tax," the Court held the interstate commerce was neither required nor contemplated and was merely incidental. It has been pointed out[82] that the *Wiloil* case would seem to indicate that in differentiating an interstate from an intrastate sale, the contemplation of the parties as to the point of shipment is immaterial, that whether or not a sale is interstate will depend on whether or not the contract of the parties *requires* an interstate transit. The *Graybar Electric* case goes even further in its modification of the contemplation test. In this case the contract between the parties expressly stipulated, "It is *agreed* that the material covered by this contract shall be manufactured at the plant . . . located in . . . Ohio and shipped in interstate movement from said plant to destination . . ."[83] This contract provision would apparently require an interstate shipment, yet the state court refused to prohibit the taxation of the sale, reasoning that the means by which and the place from which the goods were obtained were mere incidents of the transaction and did not change its status, that such interstate shipment was of no benefit to the purchaser as it did not change the sale price, and that the parties could not by contract make a sale interstate to procure its immunity.[84] The *Graybar Electric* case, then, holds that merely because a sale entails, contemplates, or requires an interstate shipment, does not prevent taxation of the sale by the buyer's state.

The second basis for the *Berwind-White* case was laid by the Court in the *Use Tax* cases.[85] In *Henneford v. Silas Mason Co.*,[86] the Court sustained the application of the Washington "Compensating Use Tax,"[87] as applied to machinery purchased at retail in other states. Justice Cardozo, speaking for the majority, adopted a philosophy of taxation which served as the basis for the reasoning of the other *Use Tax* cases and of the majority in the *Berwind-White* case. He states:

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81. 222 U. S. 210, 214 (1911); but *cf.* Spalding & Bros. v. Edwards, 262 U. S. 66 (1923).

82. Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 COL. L. REV. 49.

83. 238 Ala. 116, 189 So. 186, 188 (1939) (italics supplied).

84. *Id.* at 118, 189 So. at 190.

85. Comment (1939) 4 Mo. L. REV. 312.

86. 300 U. S. 577 (1937).

87. The tax was two per cent of the purchase price of any personal property purchased at retail. The taxing statute did not apply to the use of any article which had already been subjected to a use or sales tax equal to or in excess of the Washington tax, and provided for deductions if another use or sales tax of a smaller amount had been levied.

"The privilege of use is only one attribute, among many, of the bundle of privileges that make up property ownership. . . . A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."[88]

The state tax, he held, was not upon the operations of interstate commerce, but upon use, one attribute of ownership, and, since interstate commerce was at an end, and the tax was not measured or conditioned to hamper or discriminate against interstate commerce transactions, the tax was valid.

Although it would appear that the fact that exemptions were made by the taxing statute for other use or sales tax payments would prevent a multiple burden on the article of interstate commerce, and hence on the commerce itself, the Court did not fear any such possibility and did not assert the necessity of such a compensation for validity of the taxing statute.[89] Further, the Court felt that the danger of multiple burdens should be met when the multiple burdens arose.[90]

In *Felt & Tarrant Manufacturing Co. v. Gallagher*,[91] the Court sustained the California use tax which made no provision for allowance for other use or sales taxes. This decision, on its facts, would seem to further the conclusion that the risk of future multiple burdens was of no importance in the consideration of such a tax. In *Southern Pacific Co. v. Gallagher*[92] and *Pacific Telephone & Telegraph Co. v. Gallagher*,[93] the Court faced the narrower question of the validity of the use tax upon an article which was brought into the taxing state from outside the state and installed, usually for immediate use, in interstate commerce. The Court still found a taxable moment between the bringing in and that installation when the tax could be applied.[94]

From the *Robbins* case to the *Berwind-White* decision was a radical change in judicial attitude, but from the *Graybar Electric* case and the *Use Tax* cases to the *Berwind-White* decision was a mere step. Insofar as the operative effect of the taxes is concerned, a mere substitution of names would change the "privilege" or "license" tax of the *Graybar Electric* case, or the use tax of the *Silas Mason* case to the sales tax of the *Berwind-White* case. In each decision, the Court allowed a tax measured by the retail sales price to be levied by the buyer's state. In the *Silas Mason* case, the tax was levied upon the purchaser. In the *Berwind-White* case the taxing provision stipulated that the "tax shall be paid by the purchaser to the vendor" and, in turn, the vendor was authorized to collect the tax.[95]

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88. 300 U. S. 577, 582 (1937). *Cf.* Bromley v. McCaughn, 280 U. S. 124, 136-8 (1929).

89. *Id.* at 587: "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere."

90. *Ibid.* "If there are limits to that power (state taxing power), there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."

91. 306 U. S. 62 (1939).

92. 306 U. S. 167 (1939).

93. 306 U. S. 182 (1939).

94. The latter two cases are authority, as well, for the proposition of the Felt & Tarrant case, that no compensation need be made for other use or sales taxes.

95. 309 U. S. 33, 43 (1940).

It is true, as the dissent pointed out,[96] that the vendor is made liable as an insurer for the payment of the tax to the city,[97] still the designation of the purchaser as the primary taxpayer is clear. In the *Graybar Electric* case the seller is designated as the primary taxpayer;[98] still he is required under penalty to collect the tax from the consumer. In all three cases, therefore, the tax is a consumer's tax.

In the *Graybar Electric* and *Berwind-White* cases the tax is upon the sale, while in the *Silas Mason* case the tax is upon the use. Insofar as the operative effect of these two utilizations of property is concerned, two more similar sticks could not be found in Justice Cardozo's bundle of faggots.[99] "The difference between the two is a difference of words and a difference of an infinitesimal moment of time, between the second of first receiving and the second of first having received."[100] With able precedents laid, the great remaining question was the validity of a *sales* tax upon a transaction interstate in nature. The *Berwind-White* case answered that question.

Justice Stone, speaking for the majority in the *Berwind-White* case, sets forth a new and specific approach for the consideration of a gross receipts tax in a given situation. As guides for any decision he recommends that the Court consider:

1. The purpose of the commerce clause—to protect interstate commerce from discriminatory or destructive state action.
2. The purpose of the state taxing power, where interstate commerce must bear its just share of the state tax burden.
3. The necessity of judicial reconciliation of the competing demands.[101]

He points out that the mere fact that an incidental or consequential effect of a tax is an increase in the cost of doing the business does not relieve interstate commerce from the duty of paying its just share of the state taxing burden.[102] Some taxes, Justice Stone concedes, do impede or destroy interstate commerce.

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96. *Id.* at 60.
97. *Id.* at 42.
98. 238 Ala. 116, 189 So. 186, 189 (1939).
99. See the opinion of Cardozo, J., in Henneford v. Silas Mason Co., 300 U. S. 577, 582 (1937).
100. Powell. *supra* note 46, at 930. Hughes, C. J., dissenting in the Berwind-White case, 309 U. S. 33, 66 (1940), does not attempt to make any distinction between the operative effect of the two taxes. He asserts: "The fact that a use tax, sustained as a tax upon an attribute of property which is subject to the jurisdiction of the State, may have an incidental or indirect effect upon interstate commerce, and thus in the opinion of commentators may tend to discourage interstate transactions, is certainly no excuse for going further and upholding the action of States which, looking with a jealous eye upon the freedom of interstate commerce, attempt to lay a direct tax upon that commerce." Query, does not the Washington Compensating Use Tax recognize such an identity of effect by allowing a compensation for either a sales or use tax previously paid?
101. 309 U. S. 33, 49 (1940).
102. *Id.* at 46. This contention seems to be a realization of a fundamental economic doctrine, that any tax imposed at any time will affect the interstate transaction adversely. Thus the Court's citation of cases where a tax is levied on net income, on the interstate commerce instrumentality, on interstate property before the interstate movement or after its completion, on use or withdrawal for use, is appropriate. So long as any governmental agency levies any tax, it is clear that immunity of interstate commerce is a pure fiction.

The characteristic of these taxes is that they impose a burden which the intrastate commerce does not bear and thus place interstate commerce at such a disadvantage that if the tax were sustained the tax may easily result in harm of a national concern.[103] Stone finds this evil absent from the instant tax which he asserts does not aim at or discriminate against interstate commerce. He finds the tax one conditioned upon a local activity, delivery in New York, and thus he can discern no actual difference between this tax and the use or general property tax.

The dissent, citing the *Western Live Stock* and *Gwin, White & Prince* cases, advances the "multiple burden" doctrine as a basis for its opinion.[104] The majority opinion does not expressly repudiate this doctrine, but finds that analagous cases which assert the doctrine are distinguishable.[105] It is submitted that the dissenting opinion is sound in its assertion that on the facts the "multiple burden" doctrine is clearly applicable and that in this respect the facts, if not the words, of the majority deny the validity of that doctrine as asserted by preceding cases.[106]

The majority rejects the traditional distinction of the *Sonneborn* case between a tax laid on sales made without previous contract after the merchandise has crossed the state line and sales, the contracts for which contemplate or require shipment of the merchandise into the taxing state.[107] The reasoning of the Court is that there is no showing that the fact that a contract of sale is made before the interstate shipment, results in a greater burden on interstate commerce than if the contract or sale is negotiated after the goods have been shipped into the state.

Confronted with its greatest difficulty, that of distinguishing the doctrine and rationale of the *Robbins* case, the majority failed to press its new doctrine to its fullest measure and asserted that the rule of the *Robbins* case "has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."[108]

Such a distinction seems inadequate. It would seem that a court whose impelling motive is the approval of non-discriminatory state taxation should discredit

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103. *Id.* at 48.
104. *Id.* at 68.
105. *Id.* at 50: "The only challenge . . . is by reference to unconstitutional 'burdens' on interstate commerce made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind, laid in different circumstances from those with which we are now concerned."
106. Hughes, C. J., dissenting, agrees that the taxable event found by the majority, delivery in New York, is not taxable in any other state, but asserts that the argument misses the point. "The shipment, the transshipment and the delivery of the coal are but parts of a unitary interstate transaction. They are integral parts of an interstate sale. If, because of the delivery in New York, that State can tax the gross receipts from the sale, why cannot Pennsylvania by reason of the shipment of the coal in that State tax the gross receipts there?" *Id.* at 68. The argument is the same, the example almost identical, with that offered by Stone, J., writing the majority opinion in Gwin, White & Prince v. Henneford, 305 U. S. 434, 438 (1939).
107. 309 U. S. 33, 53 (1940).
108. *Id.* at 57.

a case which rejected discrimination as the test of validity.[109] Had the "immunity doctrine" of the *Robbins* case been expressly overruled, the *Berwind-White* case might have permitted of the generalization that a non-discriminatory state tax upon the gross receipts of a local corporation's sales would be valid. With the distinction made by the Court, there is still room for some doubt as to the accuracy of such an absolute assertion. The distinction made by the Court is the same used in the decision of the *Ficklen* case to distinguish the *Robbins* case. The distinctions are equally illogical.[110]

Chief Justice Hughes, speaking for the dissent states: "If the question now before us is controlled by precedent, the result would seem to be clear."[111] Despite majority assertions to the contrary[112] the statement seems to be accurate insofar as the previous approaches of the Court are concerned. The dissent's reasoning rests heavily upon the "multiple burden" doctrine[113] and upon the view that lack of discrimination will not preserve the validity of the tax.[114] Both of these reasons seem discredited by the majority opinion.

The *Berwind-White* case furnishes the states with a practicable taxing plan. While the seller's state may not impose a sales tax measured by the seller's gross receipts,[115] the buyer's state may tax the sale by the same measure. Two opposed lines of reasoning support two basically inconsistent doctrines which together form one uniform taxing pattern. What the result will be if the same reasoning is used in the entire field remains an open question. If the "immunity doctrine" approach of the *Robbins* case is used, neither state could impose a tax measured by the gross receipts from the sale. If the *Berwind-White* approach is used, either state could impose such a tax, and clearly an actual burden on interstate commerce would arise. Thus, a uniform rationale would impose the alternative of either two taxes or none at all—discrimination against interstate com-

109. 120 U. S. 489, 497 (1887); *Cf.* Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925).

110. See notes 39 and 40, *supra.* Compare Wagner v. Covington, 251 U. S. 95 (1919), where the Court held valid a flat fee imposed on a company bringing soft drinks into the taxing state on trucks and selling from these trucks to local buyers, with Sonneborn Bros. v. Cureton, 262 U. S. 506 (1923), where a percentage tax was sustained on the gross receipts from the sale of goods sold after their arrival in the taxing state. Query, since the priority in time of shipment or sale is not relevant to the test of the burden on interstate commerce, do these two cases cast doubt on the distinction of the Berwind-White case between a flat fee and a percentage tax? Query in the Wagner case as to the validity of the differentiation between "drummers" and "peddlers" to distinguish the Robbins case.

111. 309 U. S. 33, 63 (1940).

112. *Id.* at 50: ". . . unless we are now to reject the plain teaching of this line of sales tax decisions, extending back for more than seventy years . . . the present tax must be upheld."

113. *Id.* at 67.

114. *Ibid.*

115. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938); Gwin, White & Prince Co. v. Henneford, 305 U. S. 434 (1939).

merce or discrimination against local commerce. It is possible then that the answer may be sought in Congressional action, as Justice Black recommended.[116]

JOHN H. GUNN

DURESS: A DOUBLE CONCEPT

At common law "duress" was confined to duress by imprisonment, and duress *per minas*, or by threats. Duress *per minas* included only threats of injury to the person by loss of life, loss of liberty, loss of limb, or mayhem,[1] for it was said that only these threats, as distinguished from a threat to batter, or a threat to destroy one's goods, were sufficient to cause fear to a brave and courageous man.[2]

From this statement of the early common law doctrine we see that duress is composed of, or comprehends, two concepts. There is, first, the conduct of the party exercising the threats; second, the mental or emotional condition of the party upon whom the threats are exercised. In other words, duress consists of wrongful conduct by the duressor producing fear in the duressee, so that the latter is not capable of giving his free assent.[3]

It is sometimes said that the reason why an instrument obtained by duress may be avoided is that the party upon whom the duress has been exercised has been deprived of his capacity to assent, and that, therefore, the instrument which he has signed is not in fact his contract.[4] It is doubtless true in some cases that duress may completely prevent the mutual assent necessary for the formation of a contract. Thus, if a man by force compels another to go through certain manifestations of assent, as by taking his hand and forcibly guiding it, there is no real expression of mutual assent for the act is not that of him whose hand is guided.[5] If an instrument is obtained by duress such as this, there is a lack of mutual assent in fact, and such instrument is void and nugatory.[6] But in the normal case in which duress is exercised, while there is an

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116. Dissenting in Gwin, White & Prince v. Henneford, 305 U. S. 434, 448 (1939). Such Congressional action is discussed in Comment (1940) 38 MICH. L. REV. 1292, 1308.

1. 1 BL. COMM. *95; *In re* Nightingale's Estate, 182 S. C. 527, 189 S. E. 890 (1936); 5 WILLISTON, CONTRACTS (1937) § 1601; Notes (1938) 22 MINN. L. REV. 891, (1932) 7 WASH. L. REV. 248.

2. 1 BL. COMM. *95; *In re* Nightingale's Estate, 182 S. C. 527, 189 S. E. 890 (1936).

3. Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495 (1900); Williamson, Halsell, Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807 (1908); Amer. Nat. Bank of Lake Crystal v. Helling, 161 Minn. 504, 202 N. W. 20 (1925); RESTATEMENT, CONTRACTS (1932) § 492.

4. See Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596 (1887); 5 WILLISTON, CONTRACTS (1937) § 1627 A.

5. See McCoy v. McMahon Const. Co., 216 S. W. 770 (Mo. 1919); 5 WILLISTON, CONTRACTS (1937) § 1624.

6. See McCoy v. McMahon Const. Co., 216 S. W. 770 (Mo. 1919).

actual expression of assent to the transaction in question, the courts regard it as inequitable to permit the enforcement of the contract in view of the way in which this assent was obtained,[7] and it is with respect to this type of duress that this note is primarily concerned. Duress of this latter type, in which there is an actual expression of mutual assent, does not make the contract void, but voidable only, and subject to ratification.[8]

The interest of the early common law was directed primarily at the conduct of the duressor. In each case the question was this: Would these acts cause a degree of fear as would subvert the will of a brave and courageous man? To be sure, the effect of the acts upon the wronged party was necessarily considered, but the emphasis was placed upon the acts themselves.[9]

As time passed, a two-fold development in the law took place. First, the acts which would constitute duress were increased in number. Mayhem, for instance, was no longer a condition precedent, and was recognized that a threat to injure a man's wife, child, or other close relative, was as much an act of duress as was a threat to injure the man himself.[10] Certain property interests, also, were included, and a threat to destroy or wrongfully withhold one's property was held to be an act sufficient to constitute duress.[11]

There was, in addition, a second development, relating to the resisting power of the wronged person. Originally his resisting power was required to be that

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7. Fairbanks v. Snow, 145 Mass. 153, 154, 13 N. E. 596, 598 (1887): "Again the ground upon which a contract is voidable for duress . . . is that . . . the party has been subjected to an improper motive for action."; Randolph Co. v. Lewis, 196 N. C. 51, 144 S. E. 545 (1928); RESTATEMENT, CONTRACTS (1932) § 492, Comment a; 5 WILLISTON, CONTRACTS (1937) § 1624; Ames, *Specialty Contracts and Equitable Defenses* (1895) 9 HARV. L. REV. 49, 58: "Duress was, therefore, never regarded as negativing the legal execution of the obligation."; Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 358 (recovery was allowed by way of restitution on equitable principles to prevent unjust enrichment).

If it is true that an instrument obtained by duress is bad because of the lack of mutual assent, could such an instrument under seal be avoided?

As to the effect of duress on contracts under seal, see Ames, *Specialty Contracts and Equitable Defenses* (1895) 9 HARV. L. REV. 49, 57: "As far back as Bracton's time, at least, one who had duly signed and sealed an obligation, and could not therefore plead *non est factum*, might still defeat an action by pleading affirmatively that he was induced to execute the specialty by duress practiced upon him by the plaintiff."

By the weight of authority, the duressee has no action in tort against the duressor. Note, *Duress as a Tort* (1925) 39 HARV. L. REV. 108.

8. Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257 (1911); Barnette v. Wells Fargo Nevada Nat. Bank, 270 U. S. 438 (1925); Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596 (1887); Randolph Co. v. Lewis, 196 N. C. 51, 144 S. E. 545 (1928); RESTATEMENT, CONTRACTS (1932) § 499; 5 WILLISTON, CONTRACTS (1937) § 1626; Note (1925) 35 A. L. R. 866.

9. See Galusha v. Sherman, 105 Wis. 263, 276, 81 N. W. 495, 499 (1900).

10. Gray v. Freeman, 37 Tex. Civ. App. 556, 84 S. W. 1105 (1905); City National Bank v. Jusworm, 88 Wis. 188 (1894); Adams v. Irving Nat. Bank, 116 N. Y. 606 (1889).

11. Joannin v. Ogilive, 49 Minn. 564, 52 N. W. 217 (1892); Bailey v. Devine, 123 Ga. 653, 51 S. E. 603 (1905); Fenwick Shipping Co. v. Clarke Bros., 133 Ga. 43, 65 S. E. 140 (1909); Berger v. Bonnell Motor Co., 4 N. J. Misc. 589, 133 Atl. 778 (1926); 5 WILLISTON, CONTRACTS (1937) § 1617 (cases cited in note 2); Note (1931) 70 A. L. R. 711.

of a brave and courageous man,[12] a standard *objective* in nature. Gradually this standard was altered, first to the resisting power of a man of ordinary firmness,[13] and more recently to the resisting power of the particular plaintiff involved.[14] It was realized that the weak and the timid were precisely those most in need of protection,[15] and it seems proper to describe the present standard of resistence as one *subjective* in nature, since it concerns, primarily, the particular plaintiff alleging the duress and not a hypothetical bold and courageous man.

Throughout this two-fold development, however, and even under the *subjective* resisting power standard, it seems that the fundamental emphasis was on the acts or conduct of the duressor. The constant inquiry related to the *acts* performed, and the question was: Were these acts (whether acts of violence to the person or acts of destruction to his property) sufficient to subvert the will of the party alleging the duress (whether he be a brave man, a man of ordinary firmness, or this particular man)? This is not to say that there was a inquiry as to the state of mind of the duressee. There could be no duress as against a graven image. But the point is one of emphasis, and the emphasis was on the act.

The trend of the modern decisions, however, points to a shift in emphasis. In determining whether or not duress has been exercised, modern courts tend to emphasize the second of the two concepts of which duress is composed, namely, the mental or emotional condition of the duressee. Under this new emphasis the question asked by the courts may be phrased as follows: Was the free agency or will power of the duressee subverted or coerced by the conduct of the duressor? The courts are still looking at both conduct and state of mind but with an increasing concentration on the subjective element. This modern approach is well stated in the leading case of *Galusha v. Sherman*,[16] in which Marshall, J., says: ". . . the real foundation principle of duress . . . is that it is the condition of the mind of the wronged person at the time of the act sought to be avoided, not the means by which such condition was produced. . . ."[17]

That the tendency of recent decisions in many states has been to follow this new emphasis,[18] may be seen from a comparison of two cases which apply it.

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12. 1 BL. COMM. *95.
13. Wood v. Kansas City Home Telephone Co., 223 Mo. 537, 123 S. W. 6 (1909); Doscher v. Schroder, 105 N. J. Eq. 315, 147 Atl. 781 (1929).
14. Commonwealth v. Motta, 11 N. E. (2d) 428 (Mass. 1937) (conduct sufficient to overcome an ordinary person's will need not be shown, but only conduct overcoming mind and will of person in question); Bond State Bank v. Vaughn, 241 Ky. 524, 44 S. W. (2d) 527 (1931).
15. Parmentier v. Pater, 13 Ore. 121, 9 Pac. 59 (1885).
16. 105 Wis. 263, 81 N. W. 495 (1900).
17. 105 Wis. 263, 274, 81 N. W. 495, 498 (1900).
18. The Galush case is cited and quoted in Callendar Sav. Bank v. Loos, 142 Iowa 1, 120 N. W. 317 (1909); Samuels Shoe Co. v. Frensley, 151 Okla. 196, 3 P. (2d) 216 (1931); Robertson v. Shinn Groc. Co., 34 S. W. (2d) 367 (Tex. 1930). Also see, Nat. Enameling & Stamping Co. v. St. Louis, 328 Mo. 648, 40 S. W. (2d) 593 (1931): "'Duress' connotes the condition of mind of the wronged person at the time of the act sought to be avoided rather than the means by which such condition was procured."; Malmquist v. McChord, 179 Minn. 17, 228 N. W. 167 (1929); Western Paving Co. v. Sifers, 126 Kan. 460, 268 Pac. 803 (1928).

In *Williamson, Halsell, Frazier Co. v. Ackerman*,[19] the defendant's son, who was an employee of the plaintiff, embezzled from him the sum of $4,000. The plaintiff called upon the defendant and threatened to send his son to prison if the defendant father did not execute certain notes to the plaintiff, secured by a mortgage on the defendant's home, to secure the embezzled funds. The plaintiff carried with him at the time a warrant for the son's arrest, and a constable was waiting in an adjoining room. The defendant's sister was present and added her hysterical entreaties to the plaintiff's demands. After a two hour conference with the plaintiff, during which time the latter continued to threaten the son, the defendant signed the notes. When the plaintiff sued on these notes the court held that they were not binding on the defendant because of duress, saying: "Under the modern theory, duress is to be tested, not by the nature of the acts or threats, but rather by the state of mind of the victim induced by such acts and threats."[20]

In the case of *American National Bank of Lake Crystal v. Helling*,[21] the defendants' brother, the cashier in the plaintiff bank, embezzled certain funds from it. The officers of the bank stated to the defendants that they intended to inform the bank examiners of this conduct unless some kind of settlement were made, and that if the examiners were so informed, the brother would be sent to prison. At this time the mother of the defendants was very ill. The defendants agreed to pay $18,000 to the plaintiff to make good the fund embezzled by the brother. The agreement was not performed, and in an action brought thereon the defendants contended that they made the agreement not only to prevent their brother from going to prison, but also to save their mother from the shock of this disgrace. It was shown that the negotiations for the settlement had continued over a two week period, during which time the defendants had had the advice of their friends, one of whom was a banker, and of their counsel. The court held that no duress had been shown, saying in part, ". . . the question here is whether the evidence is sufficient to sustain a finding that the defendants were under such constraint that they were not in condition to make a valid contract. A careful examination of the record satisfies us that the facts will not justify a finding that the defendants were influenced or dominated by the representatives of the bank to such an extent that they lacked capacity to enter into a binding contract. They had ample time for reflection and did not act until after full consultation with their friends and counsel."[22]

In both of these cases the conduct of the duressor was the same: there was a threat to imprison the defendant's son or brother if the embezzled money was not returned. In the one case the court found from the facts that the defendant's will was coerced. In the other case the court found that it was not. It seems clear that, at least as far as these courts are concerned, duress consists fundamentally of the mental condition of the wronged party, whether or

19. 77 Kan. 502, 94 Pac. 807 (1908).
20. *Id.* at 505, 94 Pac. at 808.
21. 161 Minn. 504, 202 N. W. 20 (1925).
22. *Id.* at 512, 513, 202 N. W. at 23.

not his will was coerced or subverted, and that the acts or conduct of the duressor are merely matters of evidence from which this fact may be found.

The doctrine of duress is much like the doctrine of undue influence in the making of wills. Undue influence is said to be that influence which destroys the will of the testator, or substitutes another's volition for his own.[23] The loose language used by some of the courts in speaking of the modern doctrine of duress would indicate that duress, too, is solely a question of volition. But there are important differences between undue influence and the type of duress we are here considering.[24] A will executed under undue influence is void; it cannot be admitted to probate.[25] A contract executed under duress is voidable and subject to ratification.[26] Undue influence need not be exercised by the beneficiary of the will, nor with his knowledge and consent.[27] To set aside a contract because of duress, the duress must have been exercised by the promisee, or if by someone else, with the knowledge and consent of the promisee.[28] Since undue influence is solely a question of volition, it is immaterial whether the acts used to produce the influence were wrongful acts, in either the legal or ethical meaning of wrongful.[29] In duress the acts of the duressor must be wrongful.[30]

Just what acts will be called wrongful is not clear. A threat to use criminal prosecution for the purpose of private gain is wrongful because it is a perversion of the criminal process.[31] It was held to be wrongful for the plaintiff to induce the defendant to endorse a note by threatening to bring a civil action which would disclose forgery by the defendant's son, against whom the plaintiff had an existing valid claim, because such threat was in effect a threat to bring criminal prosecution.[32] However, the law provides creditors with certain

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23. Hayes v. Hayes, 242 Mo. 155, 145 S. W. 115 (1912); Davault v. Parks, 190 Ark. 370, 79 S. W. (2d) 68 (1935); *In re* Donovan's Estate, 114 Cal. App. 228, 299 Pac. 816 (1931); McCollister v. Showers, 216 Iowa 108, 248 N. W. 363 (1933); ATKINSON, WILLS (1937) 211.

24. See note 7, *supra.*

25. ATKINSON, WILLS (1937) 209.

26. See note 8, *supra.*

27. Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289 (1907); Johnson v. Samuels, 186 Ind. 56, 114 N. E. 977 (1917); Barr v. Sumner, 183 Ind. 402, 107 N. E. 675, 109 N. E. 193 (1915).

28. Herald v. Hardin, 95 Fla. 889, 116 So. 863 (1928); Carroll v. Fetty, 2 S. E. (2d) 521 (W. Va. 1939); Smith v. Commercial Bank, 77 Fla. 163, 81 So. 154 (1919); Randolph Co. v. Lewis, 196 N. C. 51, 144 S. E. 545 (1929).

29. O'Neall v. Farr, 1 Rich. 80 (S. C. 1844); Martin v. Martin, 267 Mass. 157, 166 N. E. 820 (1929); Keller v. Keller, 239 Pa. 467, 86 Atl. 1065 (1913) (excessive kindness, consideration, and attention may constitute undue influence.)

30. McCoy v. McMahon Const. Co., 216 S. W. 770 (Mo. 1919); Weiner v. Minor, 197 Atl. 691 (Conn. 1938); RESTATEMENT, CONTRACTS (1932) § 492, Comment g, § 493; 5 WILLISTON, CONTRACTS (1937) § 1606.

31. Though any member of the public may lawfully prosecute a known criminal, a threat even of well founded prosecution is improper if made for the purpose of private gain. Thompson v. Niggley, 53 Kan. 664, 35 Pac. 290 (1894); Hartford Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651 (1896); Note (1926) 39 HARV. L. REV. 393. This was the situation in Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495 (1900); Williamson, Halsell, Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807 (1908); American Nat. Bank v. Helling, 161 Minn. 504, 202 N. W. 20 (1925).

32. Mississippi Valley Trust Co. v. Begley, 298 Mo. 684, 252 S. W. 76 (1923).

means for the enforcement of their claims, and ordinarily it is not duress to threaten to take these means.[33] Thus, a debtor who paid a disputed claim for an amount in excess of that actually due in order to avoid attachment of his property could not recover the excess amount on the theory that it was paid under duress, in the absence of a showing that the creditor acted in bad faith in bringing his suit and ordering the officer to attach the property.[34] But, if the threat to use these lawful means is made with the consciousness that there is no real right of action and the purpose is coercion, a payment or contract induced thereby is voidable.[35]

In certain situations the threat to do a legal act or legally to refrain from acting may be wrongful, so as to render the transaction invalid because of duress, because the particular circumstance of the parties is such that they are not on an equal financial footing, and one of them is subjected to a loss of his entire capital investment or a substantial portion thereof. Here the wrongful conduct of the duressor is not his abuse of a legal process, but the conduct is wrongful because he has taken unfair and oppressive advantage of the duressee's financial and business situation. The contract is more than a harsh contract. It is a contract founded in extortion and oppression. These are the cases of so-called "economic duress," or "business compulsion."[36] Thus in *Harris v. Cary*,[37] the plaintiff, the defendant, and others organized a corporation for the purpose of buying mining land. The parties made an agreement by which the defendant and the others were to advance the money needed, and were to receive in return a proportion of the capital stock of the corporation. The plaintiff was to receive two-ninths of said capital stock in return for his services in locating and buying the land. After the plaintiff had worked for three years and had bought several hundred acres of land for the corporation, the defendant demanded that the plaintiff surrender to him one-half of his two-ninths interest in the stock, and threatened that if the plaintiff did not do so he would not advance any more money, but would allow the corporation to be sold out so that the plaintiff would then take nothing. The defendant at this time had three-fourths of the stock, and the control of the corporation. The plaintiff had little business experience, no money, a family to support, and was in debt. The court found, "that while in this state of fear and financial and mental distress, much against his will, he was forced to and did, for the purpose of having the

33. 5 WILLISTON, CONTRACTS (1937) § 1606.
34. Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co., 97 Conn. 129, 115 Atl. 629 (1921).
35. White v. McCoy Land Co., 229 Mo. App. 1019, 87 S. W. (2d) 672 (1935); Note (1936) 84 U. OF PA. L. REV. 659; Harper v. Murray, 184 Cal. 290, 193 Pac. 576 (1920).
36. National Enameling & Stamping Co. v. St. Louis, 328 Mo. 648, 40 S. W. (2d) 593 (1931); Olympia Brewing Co. v. State, 102 Wash. 494, 173 Pac. 430 (1918); Sunset Copper Co. v. Black, 115 Wash. 132, 196 Pac. 640 (1921); Johnson v. Townsend & Co., 161 Wash. 332, 296 Pac. 1046 (1931); Ferguson v. Associated Oil Co., 173 Wash. 672, 24 P. (2d) 82 (1933); Pacific Mutual Life Ins. Co. v. McCaskill, 170 So. 579 (Fla. 1936); Notes (1932) 79 A. L. R. 655, (1932) 7 WASH. L. REV. 248, (1934) 8 WASH. L. REV. 140.
37. 112 Va. 362, 71 S. E. 551 (1911).

debts paid and thereby saving himself from financial ruin, make and execute two agreements. . ."[38]

It could hardly be said that it was illegal for the defendant to refuse to advance any more money to the corporation. Yet, it was held that such refusal for the purpose of forcing the plaintiff to execute these agreements was a wrongful act, making the agreements invalid because procured by duress.

Likewise, in *Ramp Buildings Corp. v. Northwest Building Co.*,[39] the defendant was constructing a large commercial garage on money which he had borrowed from *E*, the mortgagee. The plaintiff, who was the holder of certain patent rights on garage construction, informed the defendant and *E* that the defendant was infringing on his patent rights, and threatened to sue the defendant and *E* for such infringement unless the defendant agreed to pay $3000 for a license to use the patents. Because of the plaintiff's threat, *E* refused to advance any more money to the defendant, who had no money himself with which to complete the garage. The defendant signed the license agreement and paid $1000 down. In a suit by the plaintiff for the $2000 balance the defendant demurred to the complaint, setting out the facts above, and also alleging that the patents were invalid. In the lower court the demurrer was overruled and the plaintiff obtained judgment, but in the higher court the demurrer was sustained and the case remanded for new trial, the court recognizing the modern doctrine of "business compulsion." The defendant obviously had executed the agreement under duress, since he had a chance of losing his whole investment.[40]

It may not be inaccurate to say that the acts and interests involved in duress are unquestionably being enlarged rather than restricted. In the recent case of *Carroll v. Fetty*,[41] the court seems to recognize what may be called a doctrine of "moral duress," in which the duressor's threat is to cause undue humiliation to the duressee, or to unduly lacerate his feelings, as distinguished from "economic duress" in which the threat is to injure the duressee's business or investments. In this case, the plaintiff's six year old child was killed by the negligence of the defendant. The undertaker refused to release the body of the child to the plaintiff for burial until he had been paid for his services. The defendant, knowing this, gave the plaintiff $800 for a full release of the plaintiff's claim against him. The plaintiff brought an action against the defendant for the wrongful death, to which the defendant pleaded the release. The court set aside the release on the ground of duress, indicating in its opinion that any indication of unconscionable conduct or overreaching by a party would be treated as wrongful compulsion.

This liberal attitude of the courts in construing oppression and overreaching by the duressor (which are acts wrongful in a moral sense as distinguished from

38. *Id* at 367, 71 S. E. at 553.
39. 164 Wash. 603, 4 P. (2d) 507 (1931). See also annotation on "business compulsion" with the report of this case in (1932) 79 A. L. R. 651.
40. Abuse of process was not involved in this case for it does not appear that plaintiff's threat to sue was made in bad faith.
41. 2 S. E. (2d) 521 (W. Va. 1939).

criminal or tortious acts) as acts sufficiently wrongful to constitute duress,[42] is in keeping with the growing policy of the law to protect the individual from injuries to his sensibilities.[43] Yet, however liberal a court may be in finding the acts of the duressor wrongful, to constitute duress the acts must be wrongful.[44] It is not enough that the will of the complaining party was coerced. His will must have been coerced by a "wrongful" act. It is clear, however, that the term "wrongful" is the subject of constant re-examination and re-interpretation and, as these cases show, is far from static in content.

Duress, then, is not merely a matter of the coercion of the will of the wronged party, nor is it merely a matter of wrongful conduct by the duressor. It is a double concept involving wrongful conduct by one, the effect of which is to destroy the free agency of the other.

LYNDON STURGIS

HOMESTEAD—EFFECT OF REMARRIAGE BY WIDOW

The examination of any problem concerning homestead must of necessity begin with a consideration of the nature of this right.[1] Homestead is entirely a statutory and constitutional creature and has no common law counterpart.[2] Its purpose is to secure to the family a home, regardless of financial condition, and thus provide a shelter beyond reach of creditors; it does not rest in any way upon equitable principles but is purely a policy peculiar to the democratic state.[3]

In Missouri, as in most states, there are two distinct types of homestead rights.[4] One is the exemption from claims of creditors created in the head of the house[5] (with which we are not concerned in this comment). The other is the homestead right descending to the widow and minor children upon the death of the head of the house.[6]

Two theories are advanced by the courts with reference to the nature of

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42. This position is taken in the RESTATEMENT, CONTRACTS (1932) § 492, Comment g, § 493, illustrations of Clause (e).

43. Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343; HARPER, TORTS (1933) § 268 (interest in freedom from unjustifiable litigation), § 277 (right to privacy); Brandies and Warren, *The Right to Privacy* (1890) 4 HARV. L. REV., 193.

44. See note 30, *supra.*

1. For a discussion of this right in Missouri see Dennis v. Gorman, 289 Mo. 1, 233 S. W. 50 (1921); (1914) 3 U. OF MO. BULL. L. SER. 33.

2. Adams v. Adams, 183 Mo. 396, 82 S. W. 66 (1904); Dennis v. Gorman, 289 Mo. 1, 233 S. W. 50 (1921); 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (3rd ed. 1923) § 94.

3. See Balance v. Gordon, 247 Mo. 119, 124, 152 S. W. 358, 359 (1912); (1916) 13 R. C. L. "Homestead" §§ 1, 2, and 5; Vance, *Homestead Exemption Laws* (1932) 7 ENCY. OF SOC. SCI. 441.

4. Hufschmidt v. Gross, 112 Mo. 649, 20 S. W. 679 (1892).

5. MO. REV. STAT. (1929) § 608.

6. *Id.* § 612.

both types of homestead rights. One is that these rights are exemptions—mere privileges of enjoyment of the property free of claims of creditors; the other, that they are estates in land.[7] With a few exceptions the Missouri courts have followed the latter view as regards the homestead right created in the widow and minor children.[8]

Even more consistent have been the Missouri courts in adherence to the rule of all jurisdictions that the law applicable is the one in force at the death of the head of the house.[9]

The first homestead law in Missouri was enacted in 1863,[10] and probably established only a period of exemption; but the next act in 1865,[11] as construed by the courts, created a fee in the widow subject only to a right of joint occupancy in the minor children, if any, during minority.[12] Thus, the effect was to take the homestead tract from under the operation of the general statutes of descent so that it descended to the heirs of the widow, upon her death, rather than to the heirs of the husband.[13]

To alter this interpretation an act amending this statute was passed in 1875,[14] which limited the widow's interest to her life, and further provided that, ". . . all the right, title and interest of the deceased . . . head of a family . . ., except the estate of the homestead thus continued, shall be subject to the laws relating to devise, descent, dower, partition and sale for the payment of debts against the estate of the deceased. . . ." After one case,[15] subsequently overruled, had held the widow had merely a right of occupancy under this statute, the courts uniformly adhered to the view that she had an estate for life, the minor children an estate for years until attainment of ma-

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7. (1916) 13 R. C. L. "Homestead" § 3.
8. 1 WOERNER, *op. cit. supra* note 2, § 94, n. 3.
9. Register v. Hensley, 70 Mo. 189 (1879); Davidson v. Davis, 86 Mo. 440 (1885); Burgess v. Bowles, 99 Mo. 543, 12 S. W. 341 (1889); Linville v. Hartley, 130 Mo. 252, 32 S. W. 652 (1895); Brewington v. Brewington, 211 Mo. 48, 109 S. W. 723 (1908); Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257 (1911); Balance v. Gordon, 247 Mo. 119, 152 S. W. 358 (1912); (1890) 6 L. R. A. 814; (1916) 13 R. C. L. "Homestead" § 121.
10. Mo. Laws 1862-63, p. 21.
11. Mo. GEN. STAT. (1866), c. 111, § 5.
12. Skouten v. Wood, 57 Mo. 380 (1874); Rogers v. Marsh, 73 Mo. 64 (1880); (1914) 3 U. OF MO. BULL. L. SER. 33.
13. Skouten v. Wood, 57 Mo. 380 (1874).
14. Mo. Laws 1875, p. 60, § 1.
15. Kaes v. Gross, 92 Mo. 647, 3 S. W. 840 (1887). That the difference in the two theories is fundamental and would result in far different solutions to the present problem and related ones is best illustrated by the assumptions of the court, nearly all of which have been decided oppositely, subsequently, under the *estate* theory: ". . . inasmuch as, in regard to a homestead, a widow, with a family, as in this case, cannot alienate the homestead; inasmuch as, between herself and her children, it is indivisible, and must so remain till the youngest child becomes of age; inasmuch as such homestead is not subject to the laws relating to devises; inasmuch as a widow, thus circumstanced, could not, if she would, by joining with her second husband, convey the homestead away; . . ." *Id.* at 657, 3 S. W. 843. *Quaere*: Would not the two theories also reach different results as regards problems of taxation, waste, or replevin of personalty severed from the land? What effect on the problem of sale of the reversion subject to the homestead raised in Poland v. Vesper, 67 Mo. 727 (1878); Broyles v. Cox, 153 Mo. 242, 54 S. W. 488 (1899)?

jority, and the heirs of the deceased husband a remainder[16] in fee, so that the land no longer passed to the heirs of the widow upon her death.[17] The courts were so imbued with the *estate* theory that they, seemingly overlooking the purpose of the statute,[18] even went so far as to hold that the widow and minor children did not lose the homestead right by removal from the land,[19] nor where the widow remarried and gained a new home.[20]

It was apparently to correct this construction of the statute that the legislature in 1895 amended the act of 1875 by striking out the above quoted words, which had resubjected the homestead site to the laws of descent, sale for payment of debts, etc., and inserting in their place, "that is to say, the children shall have the joint right of occupation with the widow, until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband; . . . "[21]

For the purpose of comparison the statutes of 1875 and 1895 are herein set out:

"If any such housekeeper or head of a family shall die leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow, and such homestead shall, upon the death of such housekeeper or head of a family, be limited to that period. But all the right, title and interest of

"If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow: that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall

16. The Missouri courts have consistently called this a "remainder in fee in the heirs," but it would seem to really be a reversion in the deceased husband which is not created in the heirs by virtue of the statute or by purchase under a will as would be true in case of a remainder, but passes to his heirs by descent. (1916) 13 R. C. L. "Homestead" § 137, p. 678; (1902) 56 L. R. A. 421.

17. Hufschmidt v. Gross, 112 Mo. 649, 20 S. W. 679 (1892); Wilson v. Johnson, 160 Mo. 507, 61 S. W. 189 (1901); West v. McMullen, 112 Mo. 405, 20 S. W. 628 (1892); Schowe v. Kallmeyer, 323 Mo. 899, 20 S. W. (2d) 26 (1929).

18. 1WOERNER, *op cit. supra* note 2, § 94, n. 3.

19. Hufschmidt v. Gross, 112 Mo. 649, 20 S. W. 679 (1892) (presumably if an exemption, it would have suspended or destroyed the right of occupancy).

20. West v. McMullen, 112 Mo. 405, 20 S. W. 628 (1892); Ailey v. Burnett, 134 Mo. 313, 33 S. W. 1122 (1896).

21. Mo. Laws 1895, p. 185.

the deceased housekeeper or head of a family in the premises, except the estate of the homestead thus continued, shall be subject to the laws relating to devise, descent, dower, participation and sale for the payment of debts against the estate of the deceased, and the probate court having jurisdiction of the estate of the deceased housekeeper or head of a family shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto."[22]

have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage *it shall pass to the heirs of the husband;* and the probate court having jurisdiction of the estate of the deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto."[23] (Italics mine.)

It will be noted that this new statute re-emphasizes the right of occupancy thus tending to restrict the homestead right to the *exemption* theory.[24] However, this was not the view adopted by the courts, which continued to adhere to the estate concept[25] in *Brewington v. Brewington,*[26] apparently failing to recognize that the amendment of 1895 could possibly have been intended to do more than add the condition of widowhood to the widow's homestead right.[27]

It seems, then, that the clause set forth in italics above in the statute of 1895 was intended to retain the purpose of the amendment of 1875: *viz.,* to insure descent of the tract to the heirs of the husband instead of the wife, as previously pointed out. Although no record of the debates upon acts before the legislature is kept, still by following the act of 1895 through the legislature[28] it will be noted that the amended act was originally introduced in and passed by the house of representatives in its final form except for the words, "or remarriage," which were inserted only later by the senate. A close comparison of the two statutes will demonstrate the significance of this fact.

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22. Mo. Laws 1875, p. 60; re-enacted Mo. REV. STAT. (1879) § 2693.
23. Mo. Laws 1895, p. 185, 186; re-enacted Mo. REV. STAT. (1899) § 3620.
24. 1 WOERNER, *op. cit. supra* note 2, § 94, n. 3.
25. First intimated in Gorman v. Hale, 109 Mo. App. 176, 82 S. W. 1110 (1904), but not shown which act was applied.
26. 211 Mo. 48, 109 S. W. 723 (1908).
27. Although the court purportedly examined the statute in its amended form after 1895, it flatly stated as settled law that "a life estate (determinable, as the statute now stands, on the remarriage of the widow) vests, . . . in his widow; and an estate for years (determinable as to each minor when he reached his legal majority) vests in his minor children," but cited in support four cases, all of which had been decided under the statute of 1875: Elstroth v. Young, 83 Mo. App. 253 (1900) (decided under the act of 1875, although the act of 1895 should have been applied); Hufschmidt v. Gross, 112 Mo. 649, 20 S. W. 679 (1892); West v. McMullen, 112 Mo. 405, 20 S. W. 628 (1892); Wilson v. Johnson, 160 Mo. 507, 61 S. W. 189 (1901). This view was subsequently clearly affirmed in McMichaels v. Reece, 194 Mo. App. 363, 190 S. W. 51 (1916).
28. House Bill # 124, 38 House Journal, pp. 36, 86, 129, 182, 244, 354, 1172; Senate Bill # 175, 38 Senate Journal, pp. 125, 153, 293, 317, 388, 442, 580, 759.

It will be noted that the part struck from the statute was that which was inserted by the amendment of 1875 placing the tract under the laws of descent after the termination of the homestead by the death of the widow and the children's attaining majority. It is also apparent that the wording of that amendment was none too clear. Now in comparison with the act of 1895, it appears that the only wording in the latter act which refers to descent at all is the clause, *"it shall pass to the heirs of the husband."* In view of the intent of the legislature as shown by the amendment of 1875, it would seem that this clause was a substitute for the wordy clause stricken from the statute by the act of 1895. Especially is this true in view of the fact that the words, *"or remarriage,"* were not in the act of 1895 as originally introduced. These words were later inserted by the senate as further limitations upon the widow's interest to correct the judicial constructions previously cited and had no reference to the clause in question which immediately followed. It seems the legislature intended that the word *"it"* in this clause refer to the reversionary interest in the husband and did not intend that it should modify only the preceding clause "upon her death or remarriage," but the entire sentence. That is, *"it"* had reference to the homestead mentioned in the first clause of the statute.

Thus stood the law when the supreme court decided the case of *Smith Bros. Land & Investment Co. v. Phillips.*[29] In this case, the widow had assigned her homestead and dower rights to the plaintiff and with the minor children abandoned the land. Shortly thereafter, as guardian for the minor children, the widow established that their homestead right was still existent in an action of ejectment[30] against the grantees and regained possession which she and one of the children retained until the action of the principal case was brought. Shortly after regaining possession the widow had remarried and admittedly extinguished her right of homestead in the assignees, the plaintiffs. The plaintiffs brought an action of ejectment, after attainment of majority by all the children, against the widow and the son still living on the land, claiming a right of possession through the widow's right of dower. The son pleaded the special statute of limitations as to proceedings for assignment of dower. The court held that the right to have dower admeasured had arisen upon the widow's remarriage[31] fourteen years prior to commencement of this action, and therefore the plaintiff was barred from his right as assignee to dower and quarantine. The court also stated that the entire homestead estate ceased upon the widow's remarriage and that thereafter the children were in possession by right of inheritance from their father.[32]

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29. 289 Mo. 579, 233 S. W. 413 (1921).
30. Phillips v. Presson, 172 Mo. 24, 72 S. W. 501 (1903).
31. This had already been determined in Jordan v. Rudluff, 264 Mo. 129, 174 S. W. 806 (1915).
32. Smith Bros. Land & Inv. Co. v. Phillips, 289 Mo. 579, 233 S. W. 413 (1921) (this conclusion was reached by the court's seizing upon the clause in the statute set forth in italics above and giving it too literal a construction without consideration in light of the rest of the statute; thus the purpose of this clause, as previously pointed out, was overlooked for one entirely foreign to the legislative intent).

Since the children had all attained majority, this case can hardly be said to be more than strong *dictum* for this conclusion. The importance of this case, however, lies in the fact that the court examined the act of 1895 at great length and asserted that the reason for that amendment was to prevent the last minor child's having sole possession of the homestead if predeceased by the widow or in the event of her remarriage, in which events his guardian would be the head of the family consisting of only the minor children.[33]

The court failed even to mention the *Brewington* case, nor was the construction of the acts of 1865 and 1875 considered. While the court used the language of the *estate* theory, it is difficult to see how an estate for years in the children during minority could be terminated by an act of the widow, unless it be said that the statute created an estate for years subject to defeasance by the death or remarriage of the widow. This latter construction had never been suggested prior to this case and it is hard to reconcile with the language of the statute.

Only five years later the supreme court in *Moore v. Mansfield*,[34] reaffirmed the *dictum* in the *Brewington* case, to the effect that the widow had a determinable life estate and the children each a determinable estate for years;[35] and while this would seem to overrule the *dictum*, that all the children, both adult and minor, took a fee upon remarriage of the widow,[36] set forth in the *Phillips* case, this latter case was unexplainably not mentioned by the court, which seems to have overlooked it entirely.

Moore v. Mansfield was an action to quiet title, have dower admeasured, and recover rents and profits. The husband, owner of the land, died leaving a wife and minor child (his only child), who was the plaintiff in this action. The widow remarried and then quit-claimed her interest to third parties, who went into possession and retained possession up to the commencement of this action. Plaintiff asked that title be decreed to be in him subject to the widow's dower interest which the assignees now owned. The trial court dismissed the count for rents and profits but otherwise found for the plaintiff. The supreme court held that the count for rents and profits should not have been dismissed, saying that plaintiff had had a homestead estate in the land which was not terminated by the widow's remarriage.[37] The court again used the language employed in the *Brewington* case[38] clearly denoting adherence to the *estate* theory, and relied mainly upon that case and the cases cited therein for this position.[39] Thus, again, the construction of the statute of 1875 was followed

33. *Id.* at 589, 233 S. W. at 416.
34. 286 S. W. 353 (Mo. 1926).
35. See note 27, *supra.*
36. See notes 32 and 33, *supra.*
37. It was already established that the party entitled to possession of a homestead is entitled to the rents and profits. Ailey v. Burnett, 134 Mo. 313, 33 S. W. 1122 (1896).
38. Brewington v. Brewington, 211 Mo. 48, 56, 109 S. W. 723, 726 (1908).
39. In addition two other cases were also cited: Gorman v. Hale, 109 Mo. App. 176, 82 S. W. 1110 (1904); McMichaels v. Reece, 194 Mo. App. 363, 190 S. W. 51 (1916).

without critical examination of the act of 1895, through subservience to the *dicta* of the previous cases. This *dicta*, as previously pointed out, will not withstand a close analysis.[40] Nor can this case be rationalized on the grounds that rents and profits could have been recovered in an action of ejectment by the son as being the owner in fee from the time of the widow's remarriage and thus reconciled with the *Phillips* case, for such damages are expressly limited by statute to the five years preceding the commencement of the action;[41] while in the *Mansfield* case, the court allowed such damages for a period of approximately fourteen years.

The statute was amended to its present form in 1907,[42] defining majority to be twenty-one years of age, authorizing the sale of the homestead for decedent's debts where his heirs were other than his children, but in no way eliminating the problem of construction here presented, although one case by *dictum* seemingly assumes that under this statute the minor children's homestead interest would continue until the youngest child reached twenty-one.[43]

In another case, *Maupin v. Longacre*,[44] the supreme court decreed title to be in a minor child from the time of the widow's remarriage and ordered an accounting from that date, but no mention was made of the problem of statutory construction involved, the court seemingly assuming that the minor child could claim title in fee as the only heir, although the widow had originally claimed a homestead right.[45]

It is submitted that, while the proper results may have been reached in the *Phillips* and *Mansfield* cases, neither case was correct in its analysis of the statute of 1895; that the legislature intended not to give an estate to the widow and minors, but to preserve an exemption for the benefit of the family, the conditions to enjoyment of which attached only to the individual's personal right and not to the duration of the homestead itself;[46] that is, it was not intended that the attainment of majority by the minors or the widow's death or remarriage should affect any but his or her personal right to enjoy the homestead.

This is best proved by the fact that the courts in determining the value of the widow's homestead right for comparison with the value of her dower right, under the statute relating to admeasurement of homestead and dower, [47] subtract the value of the minor children's homestead right.[48] This latter is calculated

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40. See note 27, *supra*.
41. Mo. REV. STAT. (1899) § 3065; re-enacted in Mo. REV. STAT. (1919) § 1827.
42. Mo. Laws 1907, p. 301. Apparently the amendment was intended to solve the problem of sale of the land subject to the homestead rights. (1914) 3 U. OF MO. BULL. L. SER. 33, n. 33, p. 38.
43. Dennis v. Gorman, 289 Mo. 1, 233 S. W. 50 (1921) (this case preceded the Philips case by a month and thus was not confronted with the conflict of the Phillips and Mansfield cases).
44. 315 Mo. 872, 288 S. W. 54 (1926).
45. This result can be explained on the grounds of merger, since the plaintiff was the only child and heir.
46. (1914) 3 U. OF MO. BULL. L. SER. 36.
47. Mo. REV. STAT. (1929) § 614 (in force since 1865).
48. Jordan v. Rudluff, 264 Mo. 129, 174 S. W. 806 (1915) (cited with approval in the Phillips case).

solely upon the length of time necessary for each child to attain majority and the possibility of earlier termination of the children's interests by remarriage of the widow is not considered.

It would seem, however, that if the Missouri courts are going to continue with the *estate* rather than the *exemption* theory, the position of the *Mansfield* case and others cited therein—that remarriage of the widow before the attainment of majority by all the children will not terminate the homestead estate, but give the minors sole possession until attaining majority is the better view, the one more compatible with the language of the statute in view of its history, the one best calculated to effectuate the purpose of the homestead right, and the one most likely to be adopted by the supreme court in the future; at least, it certainly represents what might be called the weight of the Missouri cases.

CHARLES G. YOUNG

PARTITION IN MISSOURI

The development of the law of partition, like other fields of law, has depended upon social and economic conditions and necessities. At early common law in England the ideas of tenure and primogeniture were uppermost and there was little room for the operation of partition. Only co-heiresses, called co-parceners, could compel partition by use of the writ *de partitione facienda.*[1] Additional forms of co-ownership were evolved at common law to which compulsory partition was not an incident. It was said that tenants by the entireties, tenants in common, and joint tenants might "make partition between them, and the partition is good enough; but they shall not be compelled to do this by the law."[2] Blackstone gave, as the reason for this rule, the fact that these estates were created by the act of the parties and any hardship arising out of the co-ownership was a result of their voluntary acts.[6]

In the light of changing social and economic factors it became apparent that co-ownership was often unsatisfactory and a burden, and that compulsory partition was needed. This need was recognized in England by the statute of Henry VIII,[4] giving to joint tenants and tenants in common of estates of inheritance the right to a compulsory division. But this partition was that of

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1. 2 CO. LITT. *241.
2. *Id.* §§ 290, 318. Early in the history of Roman law co-owners could enforce a division of the common property if the land admitted of easy division. If the subject of partition could not be easily divided, then the whole was given to one of the co-owners who compensated the others. The property was awarded to the highest bidder, and even a stranger might bid at the request of a co-owner who was unwilling, or unable, to bid for himself. These principles were accepted in Anglo-Saxon law only after a long and bitter struggle with feudal custom and practice. Note (1919) 67 U. OF PA. L. REV. 162, 164.
3. 2 BL. COMM. *185; FREEMAN, COTENANCY AND PARTITION (2d ed. 1886) § 421.
4. 31 HEN. VIII (1539); Note, FREEMAN, *op. cit. supra* note 3, § 421.

purely physical division and was often inadequate, even after the courts of Chancery assumed jurisdiction of partition.[5] This remedy of partition in kind was long conceded to be too technical, dilatory and inadequate, and in the Partition Act of 1868[6] it was declared that the court must order a sale at the request of the owners of a moiety in the property unless good reason was shown to the contrary; and the court may, in its discretion, order a sale at the request of any owner, if it appears that it will be beneficial by reason of the nature of the property, the number or disability of the parties, or other circumstances. Thus for the first time in England there was division, or partition, by means of sale.[7]

In the United States the law of partition is statutory, and the laws of the states vary greatly. However, all bear a certain resemblance to the English system. The inconvenience and annoyance of the lack of power to force partition by sale was more quickly felt in the United States than in England. And it was early recognized that public welfare, as well as personal gain, necessitated some adequate means of allowing co-owners to sever their joint or common interests.[8]

Before proceeding to a consideration of what interests may be divided by means of compulsory partition, it should be made clear that the essential condition precedent to a division by means of partition is that the land be held in cotenancy. Without cotenancy there can be no compulsory partition. This stems from the primary reason for the statutes of partition, *viz.*, to remove the difficulties, discomforts and injuries resulting from the common possession in cotenancies. It is essential that the plaintiff have title to an undivided interest in the lands which he seeks to have partitioned,[9] and the defendant's interest must also be an undivided one, rather than in severalty.[10] It should be noted in this connection that several persons may together own an entire thing without being cotenants thereof,[11] and in such case they are no more entitled to partition than if they were the owners of separate pieces of property.[12]

A widow with dower consummate cannot maintain an action for partition.[13] She has a right to force the heirs to set aside the prescribed portion for her use for life. She has no estate in the land before dower is assigned, so there is no cotenancy at that time. After dower is assigned she has an estate for

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5. Turner v. Morgan, 8 Ves. 143 (Ch. 1803); North v. Guinan, Beatty 342 (1829).
6. 31 & 32 VICT. c. 40 (1867-8).
7. For a more extensive history of partition see FREEMAN, *op. cit. supra* note 3, c. 19.
8. MO. REV. STAT. (1825) p. 609; 4 KENT'S COMM. *364.
9. Arnett v. Bailey, 60 Ala. 435 (1877).
10. Russell v. Beasley, 72 Ala. 190 (1882).
11. FREEMAN, *op. cit. supra* note 3, § 87. The owner in fee simple absolute may convey the coal rights to one, the sand and gravel rights to another, etc. All of these "co-owners" would own in severalty, and no one of them could maintain an action of partition against the others.
12. McConnel v. Kibbe, 43 Ill. 12 (1867).
13. White v. Summerville, 283 Mo. 268, 223 S. W. 101 (1920); FREEMAN, *op. cit. supra* note 3, §§ 108, 432, 456.

life in severalty, followed by a remainder in the heirs or devisees, and she is neither "tenant in common, joint tenant nor coparcener with the fee owners."[14] After the assignment of the widow's dower, the remaining two-thirds interest in fee may be partitioned in kind or sold, if owned by several heirs or devisees, and the remainder as to the one-third set aside may be partitioned in kind, or sold, subject to the life estate of the widow.[15] The homestead, with respect to partition, is similar to dower and it may not be included in partition, but after being set aside, the balance may be partitioned by the heirs or devisees.[16]

The problem is to determine when the owner of a present possessory interest in land, or of a present right to a future possession in land, ordinarily called a future interest, may bring an action to sever his interest from those of his co-owners. Under this problem are six basic fact situations which must be examined in connection with the Missouri statutes on partition.[17] A more complex case consists simply of the same basic types involving a greater number of parties, or of a combination of two or more of these basic types.

1. *A and B own undivided present interests in fee simple absolute*

There is little need for a discussion of this usual and most simple case for partition. *A* and *B*, both owning an undivided interest in fee and thus being in possession, or entitled to possession, may have partition in kind, or where such is impractical may force a sale of the land with division of the proceeds in proportion to the respective sizes of their shares.[18] The fact that there are executory limitations over as to some of the shares does not bar partition,[19]

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14. White v. Summerville, 283 Mo. 268, 223 S. W. 101 (1920).
15. Duncan v. Duncan, 324 Mo. 167, 23 S. W. (2d) 91 (1929).
16. Dalton v. Simpson, 270 Mo. 287, 193 S. W. 546 (1917); Hammons v. Hammons, 300 Mo. 144, 253 S. W. 1053 (1923).
17. Mo. Rev. Stat. (1929) § 1545; first enacted in its present form in Mo. Rev. Stat. (1865) p. 611. "In all cases where lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or co-parcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower," any person interested may ask "for the admeasurement and setting off of any dower interest therein, if any, and for the partition of the remainder, if the same can be done without great prejudice to the parties in interest; and if not, then for a sale of the premises, and a division of the proceeds thereof among all of the parties, according to their respective rights and interests."
18. Young v. Young, 307 Mo. 218, 270 S. W. 653 (1925); Contaldi v. Errichetti, 79 Conn. 273, 64 Atl. 211 (1906); Kinkead v. Maxwell, 75 Kan. 50, 88 Pac. 523 (1907); Ericson v. Martin, 144 Ky. 289, 138 S. W. 262 (1911); Deshong v. Deshong, 186 Pa. 227, 40 Atl. 402 (1898).
19. Buckner v. Buckner, 210 S. W. 887 (Mo. 1919). It was there said: ". . . children born in lawful wedlock . . . their heirs and assigns, are owners as tenants in common of the land described in the petition, the undivided whole of their title being subject to possible diminution by the birth of another such child or other children (of the class). Their possessory right to the entire tract as tenants in common is perfect and complete." ". . . all the present owners of the fee jointly stand with respect to their titles in the position of trustees" as to those persons who may later come into existence and take an interest by way of executory devise. "Those not in being were supposed to be represented by those upon whose title their expectancy was founded. This principle has been recognized and acted upon by the English courts for more than 100 years (Wills v. Slade, 6 Ves. Ch. 498; Gaskell v. Gaskell, 6 Sim. Ch. 643), and was followed and recognized in our own statute. R. S. 1909, §§ 2561-2564." Mo. Rev. Stat. (1929) § 1547, provides that an unborn person may

if the partition in kind is made subject to the executory interests, or, in case of sale, the executory interest is transferred from the land to the proceeds of the sale. The proceeds may be used to create a trust fund, or they may be invested in bonds, etc., the income to be given to the owners of the fee until such time as the executory interest becomes an estate in possession or entitled to possession. Or the proceeds may be given to the owners of the fee upon their giving bond to deliver the corpus to the holder of the executory interest upon the estate becoming one entitled to possession.

2. *A has a life estate, and B has a vested remainder, in the whole*

By the great weight of authority a life tenant of the entire estate may not have partition against the owner of the remainder.[20] "The only estates authorized by Section 2559, Revised Statutes 1909" (Mo. Rev. Stat. (1929) § 1545.) "to be partitioned are estates which are coterminous and not successive; cotenants of a life estate may have partition of their life estate which would not affect the remainder; or, remaindermen, tenants in common, may have a partition of the remainder subject to the life estate. But there is no authority for a partition between the life tenant and a remainderman."[21] Such a decision is not surprising, since the power to partition was brought into existence to avoid the hardships and inconveniences of common or joint possession. Here the parties having only successive interests are not generally under any inconvenience. It may be that a life tenant would prefer to own a smaller portion in fee. But is that a valid ground for granting him the power of partition? In the light of the language of the usual partition statute and the original purpose of them the answer would seem to be "no." If the life tenant purchased his life estate voluntarily he certainly should not be heard to complain. And if it came to him as a gift his position is little better. If the donor wished to create such estates the object of his beneficence should be bound by that intention.[22] A

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be bound by a decree in partition when he is represented by (1) a person of equal interest, or (2) by a guardian *ad litem.* Accord: Pitzer v. Morrison, 272 Ill. 291, 111 N. E. 1017 (1916).

20. Stockwell v. Stockwell, 262 Mo. 671, 172 S. W. 23 (1914); Gibson v. Gibson, 280 Mo. 519, 219 S. W. 561 (1920), here, however, the court relied heavily on Mo. Rev. Stat. (1909) § 2569 (now Mo. Rev. Stat. (1929) § 1557) which provides: "No partition or sale of lands, tenements or hereditaments, devised by any last will, shall be made under the provisions of this article, contrary to the intention of the testator, expressed in any such will": Carson v. Hecke, 282 Mo. 580, 222 S. W. 850 (1920); Gray v. Clement, 286 Mo. 100, 227 S. W. 111 (1920); Cobb v. Frink, 200 Ala. 191, 75 So. 939 (1917); Krieg v. Crawford, 59 Cal. App. 309, 210 Pac. 636 (1922); Smith v. Runnels, 97 Iowa 55, 65 N. W. 1002 (1896); Love v. Blauw, 61 Kan. 496, 59 Pac. 1059 (1900); Roche v. Waters, 72 Md. 264, 19 Atl. 535 (1890); Wood v. Bryant, 68 Miss. 198, 8 So. 518 (1890); Soules v. Silver, 118 Ore. 96, 245 Pac. 1069 (1926); Seiders v. Giles, 141 Pa. 93, 21 Atl. 514 (1891); Newell v. Willmarth, 30 R. I. 529, 76 Atl. 433 (1910); Jordan v. Jordan, 145 Tenn. 378, 239 S. W. 423 (1921).

21. Gray v. Clement, 286 Mo. 100, 107, 227 S. W. 111, 112 (1920).

22. Mo. Rev. Stat. (1929) § 1557, expressly provides that there can be no partition of lands, devised by will, contrary to the intention of the testator, expressed in the will.

partition decree at the instance of the life tenant does not divest the interest of the remainderman, and it is open to collateral attack.[23]

A fortiori the converse of the above is true, and the remainderman cannot institute proceedings against the life tenant.[24]

Not infrequently land is located next to a pest house, or is a residence in a smoky, noisy industrial district, etc., and thus produces meager rent and is incapable of beneficial use. In such a situation the life tenant may fail to realize any benefit from his interest in the land; there is injury to society at large by reason of the reduction in the amount of marketable land; and if the income and profit from the land are not sufficient to pay the taxes and necessary repairs, it is possible that the interests of all persons, both life tenant and remainderman, will be destroyed. In order to remedy such a situation Missouri passed a statute authorizing judicial sale of the property at the instance of the person having the possessory interest. "Any person or persons holding the estate or an interest in the estate, carrying the right of immediate use and enjoyment of such lands" may sue in equity for sale of the land upon the ground that the "life or other estate" of immediate enjoyment is burdensome and unprofitable and the rents and profits therefrom are not sufficient for taxes, repairs, etc., and that a greater income can be had from sale of the land and investment of the proceeds in United States, Missouri, municipal or school bonds. The statute expressly provides that the suit can be only at the instance of the person who is in possession or entitled to immediate possession,[25] and that such action can be maintained against a vested or contingent remainderman, or a person holding an executory interest "to commence or to vest in the future, either absolute, contingent or conditional."[26] This statute requires very little explanation, since the remedy it supplies is so specifically stated and bounded.

3. *A has an undivided one half in fee, B has an undivided one half for life, and C has an undivided one half in remainder*

There is cotenancy as to the present possession between *A* and *B*, and clearly either *A* or *B* may partition subject to *C's* remainder.[27] Such a result

23. Gray v. Clement, 286 Mo. 100, 227 S. W. 111 (1920); Stansbury v. Inglehart, 9 Mackey 134 (D. Col. 1891); Love v. Blauw, 61 Kan. 496, 59 Pac. 1059 (1900); Roche v. Waters, 72 Md. 264, 19 Atl. 535 (1890); Chickamauga Trust Co. v. Lonas, 139 Tenn. 228, 201 S. W. 777 (1917).

24. Carson v. Hecke, 282 Mo. 580, 222 S. W. 850 (1920); VanEvery v. McKay, 331 Mo. 355, 53 S. W. (2d) 873 (1932); Fies v. Rosser, 162 Ala. 504, 50 So. 287 (1909); Moore v. Shannon, 6 Mackey 157 (D. Col. 1887); Clark v. Richardson, 32 Iowa 399 (1871); Stout v. Dunning, 72 Ind. 343 (1880); Heintz v. Wilhelm, 151 Minn. 195, 186 N. W. 305 (1922); Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227 (1923).

25. Duncan v. Duncan, 324 Mo. 167, 23 S. W. (2d) 91 (1929).

26. Mo. REV. STAT. (1929) § 1546. See Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523 (1898); Bofil v. Fisher, 3 Rich. Eq. 1 (S. C. 1850), reaching the same result, under circumstances like those provided for in the Missouri statute, without benefit of a statute.

27. Carson v. Hecke, 282 Mo. 580, 222 S. W. 850 (1920); Gray v. Clement, 286 Mo. 100, 227 S. W. 111 (1920); Rupp v. Molitor, 320 Mo. 938, 9 S. W. (2d) 609 (1928).

logically follows from the same arguments that support partition between owners of undivided interests in fee. Between *A* and *C* there is potential cotenancy as to the remainder, and Missouri allows partition of the "remainders" subject to the life estate at the instance of either *A* or *C*.[28] The next question presented is whether *A* has a right to maintain an action for complete partition against both *B* and *C*. We have determined that the life estate may be partitioned at the instance of either *A* or *B*, and that the remainder may be partitioned at the instance of either *A* or *C*, thus by the two actions we may have a partition in kind, or by sale, of the entire estate. Why, then, should not the two actions be combined, and complete and permanent partition be allowed at the instance of *A*? Partition of all interests can be forced by *A* by indirection, and there would seem to be little reason why it should all be accomplished in one action. To require a new partition at the termination of the life estate of *B* involves additional expense on the part of *A*, and it will also prevent *A*, the owner in fee of the undivided one half, from making any permanent improvements on his portion, since that portion may be allotted him in the second partition. Generally the life tenant will not care whether the partition be permanent or not and since he can in no way be injured by permanent partition the advantages to *A* would seem to be of sufficient importance to tip the scales in favor of permanent partition. Should the land be incapable of partition in kind, and a sale become necessary, the only loss to the remainderman is the possibility of an increase in the value of the property between the time of the partition and the death of the life tenant, whereas the above mentioned advantages to *A* are certain and tangible. Once again the weight of convenience and necessity is in favor of permanent partition.[29]

As previously stated, an action for the partition of the life estate, subject to the remainder, can be maintained at the instance of *B*.[30] And in the discussion of problem two we determined that *B*, a life tenant, could not maintain an action of partition against *C*, the remainderman.[31] But should not *B* be allowed to maintain an action for complete partition of the estate against both *A* and *C*? Most states at early times declared that the life tenant could not have permanent partition, and such would seem to be the result in Missouri today.[32] However most courts today recognize the right of the life tenant to have partition

28. Hayes v. McReynolds, 144 Mo. 348, 46 S. W. 161 (1898); Flournoy v. Kirkman, 270 Mo. 1, 192 S. W. 462 (1917); Crowley v. Sutton, 209 S. W. 902 (Mo. 1919); Carson v. Hecke, 282 Mo. 580, 222 S. W. 850 (1920); Dennig v. Mispagel, 260 S. W. 72 (Mo. 1924); Virgin v. Kennedy, 326 Mo. 400, 32 S. W. (2d) 91 (1930).

29. Atkinson v. Brady, 114 Mo. 200, 21 S. W. 480 (1893); Hamby v. Hamby, 165 Ala. 171, 51 So. 732 (1910); Fitts v. Craddock, 144 Ala. 437, 39 So. 506 (1906); Tower v. Tower, 141 Ind. 223, 40 N. E. 747 (1894); Brevoort v. Brevoort, 70 N. Y. 136 (1877); Morgan v. Staley, 11 Ohio 389 (1842); Tieman v. Baker, 63 Tex. 641 (1885); Morris v. Morris, 45 Tex. Civ. App. 60, 99 S. W. 872 (1907). See Smith v. Andrew, 50 Ind. App. 602, 98 N. E. 734 (1912); Stricker v. Mott, 2 Paige 387 (N. Y. 1831).

30. See note 27, *supra*.

31. See note 20, *supra*.

32. White v. Summerville, 283 Mo. 268, 223 S. W. 101 (1920); Stevens v. Enders, 13 N. J. Law 271 (1833).

binding on the remainderman and the owner of the undivided one half in fee.[33] The reasons for permitting permanent partition at the instance of *A* have been pointed out, and those reasons are of equal force in an action at the instance of the life tenant, *B*, since in either case the interests of *A* must be considered. If the reasoning in two Missouri cases were followed, it would seem that the court could properly order partition and sale, with one half of the proceeds being set aside or invested for the benefit of *B* for his life upon his posting a bond to guarantee the delivery of the corpus to the remainderman at *B's* death, the other one half of the proceeds to be immediately given to *A*.[34] However, no Missouri case has applied this procedure to this situation. It would seem a desirable result in the case of partition by means of sale since the life tenant would lose much of the true value of his estate were he forced to sell the life estate alone, whereas the remainderman loses only the possibility of an increase in the value of the land between the time of partition and the death of the life tenant. The interests of the life tenant and of the owner of the undivided one-half in fee in complete and permanent partition would seem to overcome any arguments against such complete partition.

At one time Missouri allowed vested remaindermen to maintain partition against other vested remaindermen and the life tenant of the entire estate,[35] though the opinion said nothing about the partition being subject to or not affecting the right of the life tenant. This case was later overruled,[36] and today the remainderman's remedy is limited to an action to partition the remainder alone.[37] Many courts refuse to allow the owner of the remainder in an undivided share to compel a partition against the interests in possession.[38] Such a result is perfectly logical when you recall that the original purpose of the partition statutes was to remedy the difficulties and hardships of co-ownership in possession.

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33. Sparks v. Clay, 185 Mo. 393, 84 S. W. 40 (1904), *overruled by*, Gibson v. Gibson, 280 Mo. 519, 219 S. W. 561 (1920); Gayle v. Johnston, 80 Ala. 395 (1885); Letcher v. Allen, 180 Ala. 254, 60 So. 828 (1913); Hill v. Sangamon Loan & Trust Co., 302 Ill. 33, 134 N. E. 112 (1922); Tower v. Tower, 141 Ind. 223, 40 N. E. 747 (1894); Tolson v. Bryan, 130 Md. 338. 100 Atl. 366 (1917); Nitz v. Widman, 106 Neb. 736, 184 N. W. 172 (1921); Holmes v. Fulton, 193 Pa. 270, 44 Atl. 426 (1899).

34. Byars v. Howe, 311 Mo. 14, 276 S. W. 43 (1925); Rupp v. Molitor, 320 Mo. 938, 9 S. W. (2d) 609 (1928).

35. Preston v. Brant, 96 Mo. 552, 10 S. W. 78 (1888); followed in Doerner v. Doerner, 161 Mo. 399, 61 S. W. 801 (1901). This decision relied upon Reinders v. Koppelmann, 68 Mo. 482 (1878). But in this later case contingent remainders were involved and the suit was at the instance of the life tenant. So the reliance would seem to have been misplaced.

36. Gibson v. Gibson, 280 Mo. 519, 219 S. W. 561 (1920).

37. See note 28, *supra*.

38. Simmons v. MacAdaras, 6 Mo. App. 297 (1878); Schori v. Stephens, 62 Ind. 441 (1878); Harding v. Craft, 21 App. Div. 139, 47 N. Y. Supp. 450 (1897); Merritt v. Hughes, 36 W. Va. 356, 15 S. E. 56 (1892).

4. *A has an undivided one half in fee, B has a life estate in an undivided one half, and A has the remainder in fee in an undivided one half*

A, as the owner of the undivided share in fee in possession, has the power to compel partition for the duration of the life estate,[39] as has been previously pointed out. Then our question is: Should this partition in kind, or by sale, be permanent and complete? It would seem that the answer should certainly be "yes."[40] The only other person interested is the life tenant and he can in no way be injured by a permanent partition, since his life interest can be destroyed regardless of whether partition is permanent or not. If the land is incapable of partition in kind, the sale should include all of the interests in the land, since an individual sale of each interest would necessitate taking a loss in value.[41]

B, the owner of the life estate, should have the power to compel partition in kind or by sale. Clearly he would have this power if the owner of the undivided half in remainder were other than the person who also owns the undivided one half in fee.[42] Why, then, should it make any difference that *A* happens to own both of the interests? The same arguments that were advanced urging complete partition in kind at the instance of the owner in fee would apply to a suit at the instance of the life tenant, since in either case the interests of *A* should be given consideration and weight. Certainly if the partition is by means of sale it is to the life tenant's advantage to have complete partition, so that he will not be forced to sell his life interest at reduced valuation.

5. *A has an undivided one half for life, with the remainder as to that undivided one half in B. C has the other undivided one half for life, and the remainder to that undivided one half is in D*

This situation is very like the one discussed in problem two. It differs in that here there are two or more life tenants with undivided shares instead of but one, and there are two or more remaindermen instead of but one. Certainly the life tenants should have the right to partition in kind among themselves subject to the remainders, so that each may have exclusive possession of his share for life. And the cases allow such partition.[43] Such actual division should be adequate relief for the life tenant,[44] since all he is interested in is the

39. Doerner v. Doerner, 161 Mo. 399, 61 S. W. 801 (1901); Havey v. Kelleher, 36 App. Div. 201, 56 N. Y. Supp. 889 (1899); *cf.* Lindley v. de la Pole, 131 Wash. 657, 230 Pac. 851 (1924).

40. Atkinson v. Brady, 114 Mo. 200, 21 S. W. 480 (1893); Clements v. Faulk & Co., 181 Ala. 219, 61 So. 264 (1913).

41. Havey v. Kelleher, 36 App. Div. 201, 56 N. Y. Supp. 889 (1899).

42. See note 33, *supra*.

43. Carson v. Hecke, 282 Mo. 580, 222 S. W. 850 (1920); Gray v. Clement, 286 Mo. 100, 227 S. W. 111 (1920); Watkins v. Gilmore, 130 Ga. 797, 62 S. E. 32 (1908); Hawkins v. McDougal, 125 Ind. 597, 25 N. E. 807 (1890); Metcalfe v. Miller, 96 Mich. 459, 56 N. W. 16 (1893); Buckis v. Townsend, 100 N. J. Eq. 374, 136 Atl. 432 (1927); Judkins v. Judkins, 109 Mass. 181 (1872); Eisner v. Curiel, 2 App. Div. 522, 37 N. Y. Supp. 1119 (1896). As to the effect upon the remainderman, see King v. Theis, 272 Mo. 416, 199 S. W. 183 (1917).

44. Unless the persons owning the remainder to his undivided one-half are

exclusive possession for his life. So there exists no need for permanent partition, and such has often been denied.[45] However, should the land be incapable of partition in kind it will be seen that the life estates alone would have to be sold at reduced prices. And it has been said that this is sufficient reason to allow a partition by sale of all the interests, even though opposed by the owners of the future interests. It is true that between *A* and *C*, and *B* and *D* there is no cotenancy of the type of which we ordinarily speak. But note upon the death of either *A* or *C*, either *B* or *D* becomes the owner of an undivided one half in fee and thus the cotenant of the remaining life tenant (problem three). So in a sense there is a future cotenancy, and the argument for complete partition is stronger that in the case of the lone life tenant and remainderman.

6. *A has an undivided one half share in fee and an undivided one half share for life, and B has an undivided one half share in remainder*

This situation is similar to that in problem three, in which *A* had an undivided one half share in fee, *B* had an undivided one half share for life, and *C* had an undivided one half share in remainder. It will be recalled that in that situation most states allowed *A* to compel partition against all parties interested. Here, unless *A* has the same power, he will not feel free to improve or enjoy his undivided share in fee, since his heirs may not get the improved portion.[46] It is difficult to see why the fact that *A* also owns an undivided one half share for life should interfere with his right to full enjoyment of the other undivided one half share which he holds in fee. If *A* should sell his one half interest for life to one *X*, most states would allow *A* to have partition against *X* and *B*. Why then should *A* not be given the same right to directly partition against *B*, since he can achieve the desired result by conveying his life estate to *X* until after the partition? This is the view taken by a majority of the courts.[47] This result seems sound where partition in kind is sought, and even where a sale is necessary a permanent partition seems more expedient. Yet some courts have denied the owner of the entire possessory interest, and the undivided one half share in remainder, the right of partition against the owner of the other one half share in remainder.[48] These cases apparently reason that since A has the entire estate for life there is no cotenancy between him and *B*. *A* has the exclusive enjoyment of the whole for his life, and *B's* estate succeeds

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his heirs. This situation has been created in Missouri by MO. REV. STAT. (1929) § 3108, changing what would have been a fee tail at common law.

45. Traversy v. Bell, 195 Iowa 1243, 196 N. W. 439 (1923); Eversole v. Combs, 130 Ky. 82, 112 S. W. 1132 (1908); Burton v. Cahill, 192 N. C. 505, 135 S. E. 332 (1926); Ray v. Poole, 187 N. C. 749, 123 S. E. 5 (1924); see Jenkins v. Fahey, 73 N. Y. 355, 360 (1878).

46. FREEMAN, *op. cit. supra* note 3, §§ 509, 510, 511.

47. Clements v. Faulk & Co., 181 Ala. 219, 61 So. 264 (1913); Lynch v. Leurs, 30 Ind. 411 (1868); Shafer v. Covey, 90 Kan. 588, 135 Pac. 676 (1913); Weedon v. Power, 202 Ky. 542, 260 S. W. 385 (1924); Orsburn v. Orsburn, 196 Ky. 176, 244 S. W. 417 (1922); Lucy v. Kelly, 117 Va. 318, 84 S. E. 661 (1915).

48. Brown v. Brown, 67 W. Va. 251, 67 S. E. 596 (1910); Pabst Brewing Co. v. Melms, 105 Wis. 441, 81 N. W. 882 (1900).

that of *A*, it is not coterminous with it. Hence there can be no partition between *A* and *B*. Note that this result is reached by confusing this situation with the one in which there is a single life tenant and a single remainderman.

Generally the remainderman is not permitted to have partition against the life tenant and that is again true in this situation.[49] *B* is the potential cotenant with *A* of the "remainder" and under the Missouri statute remaindermen may partition their future interest subject to the life estate.[50] Therefore, Missouri logically should allow *B* to force partition of the "remainder," subject to the life estate, in this situation. The reason for the failure of some courts to do so may lie in the fact that the courts fail to recognize that *A's* interests could be also described as a life estate in the whole and a remainder in an undivided one half, rather than as an undivided one half in fee and an undivided one half for life.

7. *Any of the foregoing types with additional contingent remainders or executory interests*

In all prior discussion the word "remainder" has been used as referring to vested future interests. The next problem is to determine whether partition in kind, or by means of sale, is a matter of right when there are contingent remainders or executory interests involved. Missouri has three statutes which, when read in conjunction, indicate that contingent remainders or executory interests should be no bar to partition.[51] The decisions in Missouri seem to be in utter confusion on these questions,[52] and apparently "the last word has not been spoken concerning the partition" of contingent future interests.[53] Professor Hudson disapproved of the extension of the Missouri statutes to include them.

Let us first consider the case in which the owner of a possessory interest institutes partition, and the estates include contingent remainders or executory interests. One of the most simple cases is that in which *A* and *B* own the defeasible fee as cotenants, with executory interests in *X* and *Y*, or in persons not yet in existence. *A* or *B* may have partition in kind subject to the executory interests; or they may force a sale with the executory interests being transferred from the land to the proceeds of the sale.[54]

The next case to consider is the one in which *A* owns an undivided one-fourth in fee and the other three-fourths of the life estate, with contingent remainders, after the life estate, in *B*, *C* and *D*. It would seem that partition should be

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49. Schori v. Stephens, 62 Ind. 441 (1878); Wood v. Sugg, 91 N. C. 93 (1884); McCommas v. Curtis, 62 Tex. Civ. App. 227, 130 S. W. 594 (1910).
50. See note 28, *supra*.
51. Mo. REV. STAT. (1929) §§ 1545, 1547, 1551.
52. Hudson, *The Transfer and Partition of Remainders in Missouri* (1917) 14 U. OF MO. BULL. L. SER. 3, 23; Nelson, *Partition Where Life Estates and Remainders Are Involved* (1931) 42 U. OF MO. BULL. L. SER. 5, 9.
53. Hudson, *op cit. supra* note 52, at 29.
54. Buckner v. Buckner, 210 S. W. 887 (Mo. 1919). The concurring justices indicate that the contingent interests will be transferred to the proceeds, and that the trial court should in some way preserve the proceeds in order to safeguard the contingent interests. Downes v. Long, 79 Md. 382, 29 Atl. 827 (1894).

allowed here, and such was in effect done in the case of *Sparks v. Clay*.[55] *Sikemeier v. Galvin*[56] declared that a life tenant and one contingent remainderman could compel partition against the other remaindermen. But that case is weakened, and may be distinguished, by the fact that the will creating the interests provided for sale of the land "by a concurrence in the deed, as parties, of the ostensible heirs," and the fact that all of the "ostensible heirs" were parties to the suit. *Stockwell v. Stockwell*[57] and *Hill v. Hill*[58] disapproved of *Reinders v. Koppelmann, Sparks v. Clay* and *Sikemeier v. Galvin*, and *Gibson v. Gibson*[59] expressly overruled them insofar as they were in conflict with *Hill v. Hill*.[60] But since *Hill v. Hill* was based on violation of the expressed intention of the testator, just what was overruled is not clear. But it is evident that the court intended to state that an owner in fee of an undivided share, or a life tenant, should not have the power to compel partition against a contingent remainderman.[61] It is submitted that the owner in fee of the undivided share should be able to compel partition in kind, or by means of sale, against a life tenant and the contingent remaindermen. He could do so were the remainders vested,[62] then why should he be prevented from so doing simply because the remainders are contingent? The statute providing for sale against contingent remaindermen and executory devisees at the instance of the possessory owner, when the "life or other estate" of immediate enjoyment is burdensome or unprofitable,[63] indicates that remedies involving the sale of contingent remainders and executory interests are not contrary to the policy of our state if the contingent interests in the proceeds from the sale are protected in some manner by the court.[64] So it seems that the court would not be violating either the letter or the spirit of the general partition statute were it to force partition of contingent remainders at the instance of the owner of an undivided share in fee.

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55. 185 Mo. 393, 84 S. W. 40 (1904). In Reinders v. Koppelmann, the plaintiff had a life estate, and was also owner of a share in remainder; the other remainders were contingent. Partition was allowed, and the court held that contingent interests were no bar to partition. The court failed to note the possibility of merger of the plaintiff's interests, although there may be merger in such a case.

56. 124 Mo. 367, 27 S. W. 551 (1894).

57. 262 Mo. 671, 172 S. W. 23 (1914). Here *A*, the life tenant, and one of the contingent remaindermen asked for partition against the other contingent remaindermen. The persons holding the reversion, which existed until the contingent remainders vested, were not joined, so the case might have been decided on that point. However the court states that contingent remainders could not be partitioned.

58. 261 Mo. 55, 168 S. W. 1165 (1914). Here the facts were the same as in the Stockwell case, see note 57, *supra*, and the primary reason for the decision here was that the partition would be in violation of the testators expressed intention. And once again the statement that contingent remainders cannot be partitioned was more or less gratuitous.

59. 280 Mo. 519, 219 S. W. 561 (1920).

60. 261 Mo. 55, 168 S. W. 1165 (1914).

61. Except in the situation described in Mo. Rev. Stat. (1929) § 1546.

62. Atkinson v. Brady, 114 Mo. 200, 21 S. W. 480 (1893). See note 29, *supra*.

63. Mo. Rev. Stat. (1929) § 1546.

64. Byars v. Howe, 311 Mo. 14, 276 S. W. 43 (1925); concurring opinion in Buckner v. Buckner, 210 S. W. 887 (Mo. 1919).

Some states have statutes[65] whose terms are specifically broad enough to allow the owner of a freehold interest to enforce partition against owners of contingent remainders,[66] and shifting or springing executory interests.[67]

If *B* has a vested remainder can he maintain a suit for partition against *C* and *D*, contingent remaindermen, subject to the life estate? Clearly *B* could do so were *C* and *D* vested remaindermen,[68] and it is but a step further to allow him to enforce division, or sale, of contingent remainders. The Missouri statutes of partition are broad enough to include such partition, and, as previously stated, partition of contingent remainders is not contrary to the policy of Missouri. It may be argued that there should be no partition among the future interests, subject to the life estate, even as to vested remaindermen.[69] But if it is conceded that remaindermen should be allowed to partition vested future interests at the instance of a vested remainderman, then it is submitted that contingent remainders should be subject to the same power.

The contingent remainderman, or executory devisee, has no such interest as will support an action for partition by him against any of the interested parties.[70] He may never be entitled to possession, and he should not be permitted to waste the time of the court, cause the other parties trouble, expense and possible injury, when he might receive nothing by way of compensation were he able to maintain partition. The interests are clearly in favor of refusing him the right to maintain an action for either division or sale.

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65. D. C. CODE (1929) tit. 25, § 424. "Wherever one or more persons shall be entitled to an estate for life or years, or a base or qualified fee simple, or any other limited or conditional estate in lands, and any other person . . . shall be entitled to a remainder . . . vested or contingent, or an interest by way of executory devise . . . on application of any of the parties in interest the court may . . . decree a sale . . . of the property." See also the English Real Property Act of 1925 (15 Geo. V, c. 20).

66. McClure v. Crume, 141 Ky. 361, 132 S. W. 433 (1910); Sohier v. Mass. General Hospital, 3 Cush. 483 (Mass. 1849); Dawson v. Wood, 177 N. C. 158, 98 S. E. 459 (1919); Matter of Field, 131 N. Y. 184, 30 N. E. 48 (1892); Geary v. Butts, 84 W. Va. 348, 99 S. E. 492 (1919); Lueft v. Lueft, 129 Wis. 534, 109 N. W. 652 (1906).

67. Denson v. Denson, 125 Md. 357, 93 Atl. 981 (1915); *In re* Vail, 99 N. J. Eq. 598, 133 Atl. 866 (1926); Ebling v. Dreyer, 149 N. Y. 460, 44 N. E. 155 (1896); Clark v. Clark, 110 Ohio St. 644, 144 N. E. 743 (1924); Burlingham v. Vandevender, 47 W. Va. 804, 35 S. E. 835 (1900).

68. See note 28, *supra*.

69. Duke v. Allen, 198 Ky. 368, 248 S. W. 894 (1923).

70. Stockwell v. Stockwell, 262 Mo. 671, 172 S. W. 23 (1914); Ruddell v. Wren, 208 Ill. 508, 70 N. E. 751 (1904); Heininger v. Meissmer, 261 Ill. 105, 103 N. E. 565 (1913); Vinson v. Wise, 159 N. C. 653, 75 S. E. 732 (1912); Green v. Head, 54 Misc. 454, 104 N. Y. Supp. 383 (1907).