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Recent Cases

BANKRUPTCY—SUBSEQUENT PROMISE TO PAY DISCHARGED DEBT AS CREATING NEW OBLIGATION SUBJECT TO DISCHARGE IN LATER PROCEEDINGS

Shepherd v. McDonald[1]

The appellant, Shepherd, was indebted to the appellee, McDonald, upon notes held by her. This indebtedness was listed in bankruptcy proceedings instituted by Shepherd and as a result of which he was discharged October 21, 1931. On June 5, 1934, McDonald brought an action in the circuit court in Oregon to recover the amounts due upon the notes. Shepherd pleaded the discharge. The reply alleged a subsequent promise to pay. The verdict and judgment were for McDonald. On December 16, 1941, Shepherd filed a second petition in bankruptcy in which the only unsecured creditor listed was McDonald. McDonald objected to Shepherd's discharge from the judgment, contending that the judgment is the same obligation as the notes and that the debtor is not entitled to a second discharge from the same obligation. The referee sustained her contentions. The district court affirmed the order of the referee.[2] The court held that Shepherd, by his subsequent promise, waived the personal defense of the discharge; that the judgment is the same obligation as the notes; and that a second discharge from those obligations may not be had. The Ninth Circuit Court of Appeals held that the judgment was not obtained upon the notes, but upon the new promise, and therefore was a new and distinct obligation from which the bankrupt might be relieved.

Before consideration of the question whether a debtor may be twice relieved from the same obligation, it is necessary to determine the effect of the subsequent promise of the bankrupt. It is definitely settled that an express, unequivocal promise to pay gives the barred creditor a right of action,[3] but the courts are divided upon the legal operation of such a promise. One theory is that the original obligation is left in force, the promise operating as a waiver of the defense of the discharge;[4] the other that the moral obligation of the relieved debtor to pay furnishes the consideration for the new promise, and that the new promise is the cause of action.[5]

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1. 157 F. (2d) 467 (C. C. A. 9th, 1946).
2. *In re* Sheperd, 61 F. Supp. 948 (D. Ore. 1945).
3. 1 WILLISTON, CONTRACTS (rev. ed. 1938) § 158; 1 COLLIER, BANKRUPTCY (rev. ed. 1940) § 17.33.
4. Tubbs v. McCabe, 5 Harr. 327, 165 Atl. 336 (Del. 1933); Marshall v. Tracy, 74 Ill. 379 (1874); Way v. Sperry, 6 Cush. 238 (Mass. 1850); Badger v. Gilmore, 33 N. H. 361 (1856).
5. Zavelo v. Reeves, 227 U. S. 625 (1913); Craig v. Seitz, 63 Mich. 727, 30 N. W. 347 (1886); Fleming v. Lullman, 11 Mo. App. 104 (1881); Depuy v. Swart, 3 Wend. 136 (N. Y. 1829); Herrington v. Davitt, 220 N. Y. 162, 115 N. E. 476 (1917); Field's Estate, 2 Rawle 351 (Pa. 1830); Walbridge v. Harroon, 18 Vt. 448 (1846).

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A barred creditor was allowed to recover in *Trueman v. Fenton,* 1777.[6] It was stated that "the single question is whether it is possible for the bankrupt in part or for the whole to revive the old debt" and a comparison was made to cases under the statute of limitations and infants' ratification of their contracts. However, the action was upon the new promise (notes) and the court stated: "the debts were not extinguished in conscience"; "the moral obligation united to a new promise makes a new undertaking and agreement." Recovery in this case might have been regarded as exceptional because of the conduct of the debtor, which the court described as "grossly dishonest." However, it was not, and the case appears to have been accepted as the general rule only twenty-two years later.[7]

From this early decision with its two lines of reasoning, it was to be expected that two distinct theories would develop. In determining the effect of the subsequent promise, the decisions of the courts appear to have been guided by two factors. The first is the court's assumption regarding the effect of the discharge of the debtor. It is generally accepted that the discharge affords only a personal defense to the debtor and leaves the debt unimpaired.[8] In a large number of cases involving the present question, the court's first assumption is that the discharge extinguished or destroyed the original obligation.[9] However erroneous this may be, it requires the adoption of the theory of recovery upon the new promise. Second, the theory needed by the particular plaintiff for recovery has apparently had its influence upon the decisions. An action brought upon the new promise necessitated the adoption of the rule of recovery upon the new promise.[10] However, to aid those who pleaded upon the original promise, an exceptional rule of pleading was developed, and a reply of the new promise was not considered a departure.[11] Even this exceptional doctrine would not permit recovery in certain cases and in many of them the theory of waiver was adopted.[12] This factor did not control every decision of course, but was perhaps the difference between two theories which apparently have equal merit.

Later cases reflect the uncertainty of the courts as to the correct solution, the decisions mingling the two theories and seemingly being the repetition of a

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6. 2 Cowp. 544 (K. B. 1777).
7. Roberts v. Morgan, 2 Esp. 736 (1799).
8. *In re* Innis, 140 F. (2d) 479 (C. C. A. 7th, 1944); Helms v. Holmes, 129 F. (2d) 263 (C. C. A. 4th, 1942); *In re* Perkins, 3 F. Supp. 697 (N. D. N. Y. 1933); COLLIER, BANKRUPTCY (rev. ed. 1940) § 17.27.
9. Alper v. Republic Inv. Co., 82 F. (2d) 619 (App. D. C. 1936); Fleming v. Lullman, 11 Mo. App. 104 (1881); Depuy v. Swart, 3 Wend. 136 (N. Y. 1829); Kravitz v. Povlotsky, 3 A. (2d) 922 (Pa. 1939); Walbridge v. Harroon, 18 Vt. 488 (1846).
10. Trueman v. Fenton, 2 Cowp. 544 (K. B. 1777).
11. Craig v. Seitz, 63 Mich. 727, 30 N. W. 347 (1886); Donnell v. England, 345 Mo. 726, 137 S. W. (2d) 471 (1940); DeWalt v. Heeren, 50 N. D. 804, 197 N. W. 868 (1924); Dusenbury v. Hoyt, 53 N. Y. 521 (1873); Turner v. Chrisman, 20 Ohio 333 (1851).
12. Tubbs v. McCabe, 5 Harr. 327, 165 Atl. 336 (Del. 1933); Way v. Sperry, 6 Cush. 239 (Mass. 1850); Underwood v. Eastman, 18 N.H. 582 (1847).

formula which allows recovery to the barred creditor.[13] Neither theory is a satisfactory explanation of allowing recovery. It is certain that any consideration supplied by the obligation from which the debtor has been relieved is only moral consideration. It certainly would not support any undertaking other than to pay the original indebtedness.[14] The doctrine of moral consideration has fallen from favor and is generally abandoned by the courts.[15] As there would seem to be no particular merit in the morality of the debtor's obligation, this recognition of moral consideration should fall under the general condemnation of that doctrine.

The theory of waiver of the defense of the discharge is hardly more justifiable. Professor Williston sets forth three strong objections to recovery upon such a theory.[16] He further states that such rules of recovery were fictions employed by the courts "to find some way to hold liable on a new promise any person whose defense . . . though technically valid, had no substantial foundation in justice."[17] The Restatement of Contracts has recognized these fictions, and as a solution without employing them, has declared that the promise to pay the barred claim is enforceable, though made without consideration.[18]

In deciding the principle case, the district court relied upon the analogy of the prohibition of a discharge from debts listed in a prior proceeding in which the bankrupt failed to apply for the discharge (before the Chandler Act) or to pay the costs of the proceeding. The court stated that if this were the feeling of the courts toward a bankrupt who neglected to press his proceedings, a bankrupt who waived his right to relief in regard to a particular debt was forever barred in seeking further relief from that obligation. Such relief would be "an abuse of process and an imposition upon the court." The judges of the circuit court of appeals, while differing as to the effect of the subsequent promise, indicated they would allow the second discharge of the same obligation. A concurring opinion stated that the doctrine of waiver would prevent a second discharge of the same obligation.

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13. "Yet if recognizing the moral force of that obligation, he by his note (the second) expressly promised to do so pro tanto, that obligation was revived to the extent of the promise so made, and became a sufficient consideration to support the promise contained in said note." Wislizenus v. O'Fallon, 91 Mo. 184, 190 (1886). "Liability rests upon the new promise to pay, not the original note. The discharge took the enforceability from the original note which still evidenced the moral obligation and the new note revived the legal obligation." Stanek v. White, 172 Minn. 390, 215 N.W. 784 (1927).

14. See Spann v. Read Phosphate Co., 238 Fed. 338 (C.C.A. 4th, 1916); Badger v. Gilmore, 33 N.H. 361 (1856).

15. 1 WILLISTON, CONTRACTS (rev. ed. 1938) § 147. It is interesting to note that the exponent of moral consideration, Lord Mansfield, decided Trueman v. Fenton.

16. Lack of consideration for the waiver; that the promise, generally, is not in terms of a waiver of a defense, but a promise to pay; and that the original obligation is not the measure of recovery, but the subsequent promise is the measure. WILLISTON, CONTRACTS (rev. ed. 1938) § 203.

17. WILLISTON, CONTRACTS (rev. ed. 1938) § 201..

18. RESTATEMENT, CONTRACTS (1932) § 87.

If the theory of waiver of the defense be adopted, the obligation listed in the second proceedings is the same obligation which was involved in the first proceedings.[19] As the doctrine of *res judicata* is applicable to proceedings in bankruptcy,[20] the rights of the parties having been adjudicated in respect to that obligation, it would seem a necessary result that no second proceedings could be maintained upon the obligation.[21]

The bankruptcy act provides that a discharge shall release the debtor from all his proveable debts with certain exceptions, the present situation not being included in such exceptions.[22] The courts have announced that these exceptions shall be construed in favor of the bankrupt.[23] Therefore, if recovery is allowed upon the new promise supported by moral or no consideration, *prima facie* the debtor would be relieved from the debt.

However, the adoption of such theories ought not to foreclose consideration of the question of the second discharge. The applicable provision of the Bankruptcy Act has not prevented the courts from creating other exceptions by means of the doctrine of *res judicata*.[24] In bankruptcy proceedings the courts as a rule require debtors to be diligent in their quest for relief and their use of the relief obtained.[25] The privileged is not created from the air; it is the result of the deprivation of certain rights of creditors. The relief is obtained at no small expense to the government. That such relief is desirable, even necessary, in the normal situation is not doubted. The obligation in question, while resulting from a new promise, is solely dependent upon the original obligation for its existence. It should not be treated as the usual debt presented for discharge. For purposes of the second application it might be considered as the re-embodiment of the original obligation, the doctrine of *res judicata* thereby preventing relief from that debt. That is to say, having once availed himself of the privilege afforded at the

19. That a judgment is not a different obligation. Boynton v. Ball, 121 U.S. 457 (1887); *In re* Summer, 107 F. (2d) 396 (C.C.A. 2d, 1939).

20. Note (1946) 32 VA. L. REV. 642.

21. But see the principle case; "If the district court was correct in its contention that the judgment was the identical claim discharged in the first bankruptcy, then the doctrine of res judicata would require it to be held dischargeable in the second bankruptcy." Sheperd v. McDonald, 157 F. (2d) 467, 469 (C.C.A. 9th 1946); Note (1946) 46 COL. L. REV. 293.

22. 11 U.S.C. § 35 (1940).

23. 11 U.S.C.A. § 35, n. 9.

24. Note (1946) 32 VA. L. REV. 642.

25. Colwell v. Epstein, 142 F. (2d) 138, 139 (C.C.A. 1st, 1944) (failure to pay costs); *In re* Innis, 140 F. (2d) 479 (C.C.A. 7th, 1944) (failure to plead defense of discharge); Perlman v. 322 West 72nd St. Co., 127 F. (2d) 716 (C.C.A. 2d, 1942) (failure to pay costs); Helms v. Holmes, 129 F. (2d) 263 (C.C.A. 4th, 1942), 141 A.L.R. 1367 (failure to plead defense of discharge). In commenting upon Perlman v. 322 West 72nd St. Co., *supra,* the court in Colwell v. Epstein, *supra,* said: "The court stated that the burden is on the bankrupt to obtain the benefits of the act by his own action, and that where the first petition was dismissed for lack of prosecution on the part of the bankrupt, he must suffer the consequences of his failure to prosecute his cause, and the matter is *res judicata* as between him and the creditors."

expense of his creditors and of the state and voluntarily nullified his defense, the debtor perhaps should not obtain relief from an obligation existing solely because of an original obligation, which original obligation has already been adjudicated in a bankruptcy proceeding.

ALMON H. MAUS

INSURANCE—CONSTRUCTION OF WORDS "EVIDENCE OF INSURABILITY" IN CONVERSION CLAUSE OF ANNUITY POLICY

Rosenbloom v. New York Life Ins. Co.[1]

Defendant insurance company in 1938 issued to Jay R. Rosenbloom an annuity policy which contained the following provisions: "This policy is free of conditions as to residence, travel, occupation, and military or naval service . . . The annuitant may exchange this policy for a policy on the ordinary life . . . plan of insurance upon presentation at the home office of *evidence of insurability* satisfactory to the company." (Italics added) At that time, defendant did not insert war clauses in ordinary life insurance policies, but on the contrary specifically provided that they were "free of conditions as to residence, travel, occupation, and military or naval service." The annuitant at that time was thirteen years of age. Late in 1943, the annuitant, being of draft age and desiring to convert his annuity policy to one on the ordinary life plan of insurance, was told by defendant that the desired policy would contain a war clause. The annuitant refused to accept the policy offered with a war clause therein. Soon after, the annuitant entered naval service and was killed in a ship explosion while on foreign duty. The action is by the annuitant's father for specific performance of the contract to give the policy without a war clause and for payment of death benefits under the policy. *Held,* for defendant. (1) Defendant did not consider the annuitant's insurability when issuing the annuity policy and thus was entitled to consider it at the time of conversion. (2) The converted policy is a new contract and defendant is not obligated to carry any terms and benefits of the annuity contract into the new policy.

The court recognized that "insurability" by the weight of authority includes more than good health and an insurable interest, although some authority to the contrary can be found.[2] It has been held to include the following factors: the amount of additional insurance held with other companies;[3] the financial con-

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1. 65 F. Supp. 692 (W. D. Mo. 1946).

2. The cases are collected in (1946) 162 A.L.R. 668 and all involve reinstatement rather than conversion. There would seem to be no distinction as far as the meaning of the term "insurability" is concerned.

3. Greenberg v. Continental Casualty Co., 24 Cal. App. (2d) 506, 75 P. (2d) 644 (1938); Kahn v. Continental Casualty Co., 325 Ill. App. 1, 59 N.E. (2d) 524 (1945) *reversed on other grounds,* 391 Ill. 445, 63 N.E. (2d) 468 (1945).

dition and mental attitude of the insured toward suicide;[4] use of intoxicating liquors and marital relations;[5] aerial flights.[6]

The court relied solely on *Kirby v. Prudential Life Ins. Co.*[7] That decision, where the insured sought reinstatement which the company refused because of admittedly regular participation in aerial flights, rested expressly on the fact that the company had been told in the original application for the policy that the insured did not so engage in regular aerial flights.[8] It is distinguishable from the instant case in that questions were asked concerning aviation in the original application and the policy there contained no statement saying there were no conditions as to residence, travel, occupation, and military service as did the policy in suit.

The court distinguished *Sussex v. Aetna Life Ins. Co.*,[9] saying it was not in point. The basis for the court's distinction was that under Missouri decisions a converted or reinstated policy is a new contract, while under Ontario decisions such a policy is not a new contract but an extension of the old contract. This is immaterial since in both jurisdictions the right to convert or reinstate the policy is given by the original contract and the terms of that contract, which were fixed when the contract was made, must govern the exercise of that right.[10] The *Sussex* case would seem to be more in point than the *Kirby* case since the Sussex case not only involved military service but, as in the principal case, no questions concerning military service were asked in the original application and the policy contained a comparable statement that there were no conditions as to occupation, residence, travel, and military service.[11] This raises the real issue in the principal case which is the meaning of "insurability" and the effect the statement that "this policy is free of conditions as to residence, travel, occupation, and military or naval service" has on that meaning. The *Sussex* case is strong authority for the view that in such case an individual's "insurability" cannot be affected by military service.

The statement in the annuity policy that no conditions as to military service were attached and the fact that life insurance policies in 1938 carried the same statement are subject to two constructions as they affect the meaning of "insurability," (1) that the defendant considered military service as it affected an appli-

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4. Kallman v. Equitable Life Assur. Soc., 248 App. Div. 146, 288 N.Y. Supp. 1032 (1st Dep't 1936) *affirmed*, 272 N.Y. 648, 5 N.E. (2d) 375 (1937). (The origin of the phrase "evidence of insurability" is given here as statutory.)

5. Bankers Life Co. v. Bowie, 121 F. (2d) 779 (C.C.A. 10th, 1941).

6. Kirby v. Prudential Ins. Co., 191 S.W. (2d) 379 (Mo. App. 1945).

7. *Ibid.*

8. But *cf.* Kahn v. Continental Casualty Co., 391 Ill. 445, 63 N.E. (2d) 468 (1945) *reversing* 325 Ill. App. 1, 59 N.E. (2d) 524 (1945).

9. 38 Ont. L. Rep. 365, 33 D.L.R. 549 (1917).

10. 6 COUCH, INSURANCE (1930) § 1375 and cases cited.

11. This is the basis on which the court in the *Kirby* case distinguished the *Sussex* case. The court also pointed out that misconstruction of the *Sussex* case accounted for the small group of cases restricting "insurability" to good health and an insurable interest.

cant's insurability and merely indicated by the statement that that risk was covered by the policy, (2) that military service was regarded as having no effect on an applicant's insurability. Under the rule indicated by the court in the *Kirby* case, the first construction would allow the defendant to consider military service as it affected "insurability" for purposes of reinstating or converting policies. It is submitted that the first construction is unreasonable when viewed from the standpoint of a layman. Assuming the first construction to be reasonable, the statement is then ambiguous and the well-established rule that ambiguous words are construed against the writer should be invoked as it often is in the case of insurance contracts. Moreover, the *Sussex* case is clear authority for the adoption of the second construction.

ROBERT L. HAWKINS, JR.

INSURANCE—EXCEPTED RISKS—INJURIES RESULTING FROM WAR

Hooker v. New York Life Ins. Co.[1]

While on active duty as a member of the United States Marine Corps Reserve, the son of the plaintiff was killed in New Zealand on May 19, 1943. The death occurred during maneuvers when the deceased, acting as an "enemy" scout, was attempting to escape his captors and jumped into a clump of bushes which concealed the edge of a seventy-five foot cliff. The plaintiff brings this action to recover the double indemnity benefit in the policy issued on the life of the son by the defendant insurance company. The company resists payment of a larger amount than the face value of the policy on the grounds that the death was within an exception to the double indemnity clause, which provided that the double indemnity benefit should not be payable "if the insured's death resulted, directly or indirectly from . . . (d) war or any act incident thereto." A federal district court gave a judgment for the plaintiff for the amount of the double indemnity benefit, holding that the death of the insured was not within the stated exception to the double indemnity clause.

This case is one of a small group marking the renascence of a question which was the basis for much litigation following the first World War, with a seeming variety of conclusions.[2] The issue in each case has generally been formed by the words of the particular policy involved; the presence or absence of one word in the exception clause has often decided whether recovery is to be granted or denied. But the broad question in this group of cases is the extent to which an insurance company can be held liable for the benefits due from the death of a serviceman under a policy containing a clause excepting liability because of his status as a serviceman or the hazards incident thereto.

The validity of such exception clauses has become so well settled that the

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1. 66 F. Supp. 313 (N.D. Ill. 1946).
2. See 37 C.J. 546; (1942) 137 A.L.R. 1263 and cases cited therein.

point was not raised in the case at hand. Almost unanimously the courts have held them valid, generally over the objection that the clauses are against public policy, presumably because they would tend to reduce voluntary enlistments in the armed forces.[3]

As the court in the instant case points out, the purpose of exception clauses in life insurance policies is "to limit the area of risk assumed by the insurer, by excluding a type of hazard from which the risk of loss is not susceptible of actuarial prediction or is too great to be borne by the insurer for the premium charged."[4] Yet it is quite as apparent that the particular area excluded by the clause can only be properly delineated by construing the wording of the clause involved.[5] Thus when a court, in a case involving a clause excepting liability for death "while engaged in any military or naval service in time of war,"[7] begins with the premise that the company only intended to exclude the hazards peculiar to warfare,[6] it would appear that the most puzzling question of the case has been answered in the hypothesis on which the court based its reasoning.

Although the exception clause in the case under consideration includes the word "war", the facts created no necessity for the court to define what was embraced by that word.[7] Where the insured was a sailor killed in the Japanese attack of Pearl Harbor on December 7, 1941, the courts have divided upon the question of whether the death was within a clause excepting liability for deaths resulting from war.[8]

The usual and perhaps the only practicable classification of the exception clauses involved in these cases divides them into two groups. One type of clause would seem to make the mere status of the insured as a member of the armed forces the criterion for non-liability; the other type excepts liability for death

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3. Reid v. American Nat. Assur. Co., 204 Mo. App. 643, 218 S.W. 957 (1920): Long v. St. Joseph Life Ins. Co., 225 S.W. 106 (Mo. App. 1920), affirmed in 248 S.W. 923 (Mo. 1923).

4. Hooker v. New York Life Ins. Co., cited *supra* note 1.

5. (1942) 137 A.L.R. 1263 at 1269.

6. Long v. St. Joseph Life Ins. Co., cited *supra* note 3.

7. See comments (1920) 19 MICH. L. REV. 225, (1921) 7 VA. L. REV. 552 for definitions and discussion of "war."

8. West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E. (2d) 475 (1943), where recovery was denied on the ground that war did not exist until the formal declaration by Congress the next day. *Contra*: New York Life Ins. Co. v. Bennion, 158 F. (2d) 260 (C.C.A. 10th, 1946), where the court in a realistic opinion seriously questioned the reasoning that war with Japan did not exist on December 7, 1941, and held that the parties did not intend to contract in regard to formal war but in contemplation of "any type or kind of war." *See* Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E. (2d) 687 (1942), where recovery was denied for the death of a sailor lost in the sinking of the destroyer *U.S.S. Reuben James* by a submarine in the Atlantic on October 30, 1941, on the grounds that the death was a result of war, although the United States had not yet entered the war.

See also Vanderbilt v. Travelers Ins. Co., 112 Misc. 248, 184 N.Y.S. 54 (Sup. Ct. 1920); note (1921) 7 VA. L. REV. 552; comment (1920) 19 MICH. L. REV. 225.

only when it results from military or naval service. While the bare wording of the exception clauses generally supports such a distinction, in construing them the courts have not followed this line of cleavage with unanimity.

Thus in the broadest type of exception clause, relieving the company from liability for "death while in the service . . . in time of war," it appears that the company need only show the status of the insured as a serviceman to escape liability; and so the majority of courts have held.[9] But the same clause has been construed to mean that only death resulting from the peculiar hazards of military service was within the exception.[10]

A type of clause affording a reasonable opportunity for the use of the familiar rule of resolving ambiguities strictly against the insurance company is that creating non-liability for the death of the insured "while engaged in military or naval service in time of war." The inclusion of the word "engaged," the only substantial difference between this clause and the clause previously discussed, has been sufficient to convince the majority of the courts that this is a result clause rather than a status clause, applying only where the death of the insured was caused by hazards of a peculiarly military nature.[11] Other courts have failed to see this rather fine distinction built upon the use of the word "engaged" in the exception clause.[12]

The clause in the case under consideration is a clear example of the result type of exception clause; here non-liability exists only if the death of the insured was caused either directly or indirectly by war or any act incident thereto. What hazards this clause does or does not include is, of course, the question for decision. That the death of a soldier from disease while on a furlough is not included within a result clause is rather clear.[13] Non-liability has also been denied under such an exception clause when the insured soldier died in training from disease[14] or an accidental gunshot wound by a fellow soldier,[15] and when the death resulted from a motorcycle injury one hundred miles behind the battle front in Europe.[16]

By saying that the question for determination in the case at hand is the scope

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9. Miller v. Illinois Bankers Life Assn., 138 Ark. 442, 212 S.W. 310, 7 A.L.R. 378 (1919) is the leading case on this point.

10. Illinois Bankers Life Assn. v. Davaney, 102 Okla. 302, 226 P. 101 (1924), comment (1925) 23 MICH. L. REV. 418.

11. Benham v. American Central Life Ins. Co., 140 Ark. 612, 217 S.W. 462 (1919). The Missouri courts at first construed such clauses as status clauses. Reid v. American Nat. Assur. Co., cited *supra* note 3: Slaughter v. Protective League Life Ins. Co., 205 Mo. App. 352, 223 S.W. 819 (1920). Later Long v. St. Joseph Life Ins. Co., cited *supra* note 3, followed the majority opinion in holding that "engaged" clauses limited non-liability on a result basis.

12. Bradshaw v. Farmers' & Bankers' Life Ins. Co., 107 Kan. 681, 193 P. 332, 11 A.L.R. 1091 (1920).

13. Long v. St. Joseph Life Ins. Co., cited *supra* note 3, where the court, besides construing the exception clause to apply only to the hazards of war, relies upon a questionable analogy between a soldier on furlough and a civilian away from his business on vacation.

14. Benham v. American Cent. Life Ins. Co., cited *supra* note 11.

15. Malone v. State Life Ins. Co., 202 Mo. App. 499, 213 S.W. 877 (1919).

16. Kelly v. Fidelity Mut. Life Ins. Co., 169 Wis. 274, 172 N.W. 152, 4 A.L.R. 845 (1919).

to be given "acts incident to war," the court implicitly denies that the inclusion of the words "directly or indirectly" in the clause has any effect upon the limits of non-liability the clause creates. A different view was taken in an English case involving a similar exception clause.[17] There the death of the insured, a British Army officer, occurred when he was struck by a train while inspecting soldiers guarding a railroad line in England. The normal lighting facilities had been obscured in compliance with war-time regulations, and the death took place within an area which only military personnel were permitted to enter. In holding that the death was included by the exception clause, the court said that the words "directly or indirectly" contemplate a more remote link in the chain of causation than the proximate and immediate cause, and that the war can be said to have been the indirect cause of the death.

In *Eggena v. New York Life Ins. Co.*,[18] the only case in point involving an exception clause worded in precisely the same way as the case under discussion, the death of the insured soldier took place in a tank accident during training in the United States. The court in that case held that the death was within the exception clause, on the reasoning that it resulted from military training, that training is essential to the development of effective troops for later combat service, and, therefore, that the death was a result of an act incident to war. The least that could be said of a death under such circumstances, stated the court, is that it was indirectly caused by war.

Disagreeing with the *Eggena* case, the court in the case at hand stated that military training in time of war was not an incident of war within the meaning of the clause, on the apparent basis that military training exists in peacetime as well as during a war. That this conclusion springs inevitably from the premises is, it would seem, questionable from a purely logical standpoint. As an additional reason for the result, the court states that the insurer probably didn't intend to except hazards remote from combat areas since the bulk of our casualties resulted from enemy action. *Quaere,* whether the court would have so readily reached this conclusion if the case had been concerned with the death of an airplane pilot during training, where the rate of fatal accidents was commonly known to be extremely high.

The court, however, stressed the fact that it was not restricting the exception clause to include only death from enemy action, citing as an example of such narrow construction the Missouri case of *Redd v. American Cent. Life Ins. Co.*[19] In that case the cout, borrowing a dictionary definition, said that "active service," in the military sense, was action "before the enemy," "operations carried on in his presence," and that an exception clause relieving liability for deaths resulting from active service was limited to the defined situations.

The court would thus seem to be striving to find a basis for decision intermediate to the *Eggena* and *Redd* cases. The conclusion reached is that "the policy

17. Coxe v. Employers' Liability Ass. Corp. Ltd., 2 K.B. 629 (1916).
18. 18 N.W. (2d) 530 (Iowa 1945).
19. 200 Mo. App. 383, 207 S.W. 74 (1918). Comment (1918) 6 VA. L. REV. 64.

exception here includes, besides combat casualties, only such other deaths as result from activities in immediate support of operations against the enemy, or from enemy action not in combat, such as the sinking of a troop transport, or from other activities peculiar to war."[20] How much this conclusion expands the strict "death in action" criterion of the *Redd* case or restricts the apparently valid causation analysis of the *Eggena* case depends upon the construction given by a particular court to the apparently contradictory phrase "from enemy action not in combat" and the vague language of the last phrase, which merely defines the exception clause in its own terms. *Quaere* whether the logical reasoning of the *Eggena* case, notwithstanding the latitude it gives to the exception clause, should be abandoned in favor of the conclusion reached by this court.

GUY A. MAGRUDER, JR.

MASTER AND SERVANT—LIABILITY OF MASTER FOR NEGLIGENCE OF BORROWED SERVANT

Russell et al. v. Union Electric Co. of Missouri[1]

Action by Ralph V. Russell and another against Union Electric Company of Missouri to recover damages for destruction by fire of plaintiff's dwelling and contents thereof allegedly caused by defendant's negligence.

Plaintiff authorized the defendant to make changes in the wiring of plaintiff's dwelling which were necessary for the use of an electric range purchased by plaintiff from defendant. A few days after the range was purchased from defendant by Mr. Russell, George Hoefer, an employee of the County Electric and Gas Appliance Company, did the re-wiring of the plaintiff's residence. The negligence alleged was that Hoefer inadvertently drove staples through the insulation on the wire; removed them and drove them in properly; that because of thiis negligent installation a "short" resulted which ignited the surface of the conducting wire and caused the damage complained of. The plaintiff contended that the defendant was liable for the damage caused by the negligence of its servant. The defendant contended it was not liable to plaintiff because Hoefer, who made the installation, was not the servant of the defendant.

The court concluded, as to the acts in question, that Hoefer was acting as the servant of the defendant who was liable for the negligence of such servant.

An employee in the general service of another may be transferred with his general employer's consent for some special purpose so as to become, as to that service, the employee of another if the latter has exclusive control over his work.[2]

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20. Hooker v. New York Life Ins. Co., cited *supra* note 1, *loc. cit.* 318.

1. 191 S.W. (2d) 278 (Mo. App. 1945).

2. Ellegood v. Brashear Freight Lines, Inc., 236 Mo. App. 971, 162 S.W. (2d) 628 (1942); Clayton v. Wells, 324 Mo. 1176, 26 S.W. (2d) 939 (1930); Maher v. Donk Bros. Coal & Coke Co., 323 Mo. 799, 20 S.W. (2d) 888 (1929); Karguth v. Donk Bros. Coal & Coke Co., 229 Mo. 580, 253 S.W. 367 (1923); Standard Oil Co. v. Anderson, 212 U.S. 220, 29 Sup. Ct. 252 (1909); Barlow v. Shawnee Investment Co., 229 Mo. App. 51, 48 S.W. (2d) 35 (1932); Simmons v. Kansas City Jockey Club, 334 Mo. 99, 66 S.W. (2d) 119 (1933).

Where the original master loans his servant to another employer and surrenders full control of the servant in the performance of the work, such employer is not liable for the negligence of the servant in the performance of the work of the borrowing employer.[3] The test of liability for the acts of the borrowed or loaned employee is whether in the particular service in which the servant is engaged or which he is requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is hired.[4] It is not so much the actual exercise of control but whether or not the right to exercise such control existed.[5] If the temporary employer has the right to exercise such control over the conduct of the employee as would make the employee his servant were it not for his general employment, the employee, as to such act, becomes the servant of the temporary employer.[6] The control of the employee is the right to order and direct the employee's physical activities in doing the work.[7]

The important question is not whether he remains the employee of the general employer as to matters generally, but whether, as to the act in question, he is acting in the business and under the direction of one or the other; whether he is to be employed in the business of and subject to the direction of the temporary employer as to the details of such act.[8]

There seems to be no dissent from these general principles; but as so frequently happens, the difficulty here encountered is that of applying the law to the facts. Several factors would indicate that Hoefer did not become subject to defendant's control and direction. Hoefer testified he was not an employee of defendant; that he was not paid by it; that he did the re-wiring at plaintiff's residence upon the receipt of a work-order from his employer, the County Electric and Gas Appliance Co.; that no one from defendant company told Hoefer to do the work; that no one from defendant company was present while the re-wiring was being done; that he was furnished with a "check-list" as a directive for doing the work according to instructions contained therein. However, Hoefer testified further that

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3. McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S.W. (2d) 67, 136 A.L.R. 516 (1941).

4. Standard Oil Co. v. Anderson, 212 U.S. 215, 29 Sup Ct. 252 (1909).

5. O'Brien v. Rindskopf, 334 Mo. 1233, 70 S.W. (2d) 1085 (1934); State *ex rel* Chapman v. Shain, 347 Mo. 308, 147 S.W. (2d) 457, 462 (1941); Roman v. Hendricks, 80 S.W. (2d) 907 (1935); Sargent Paint Co. v. Petrovitsky, 71 Ind. App. 353, 124 N.E. 881, 883 (1919).

6. RESTATEMENT, AGENCY, Vol. 1, (1933 § 227, comment d.

7. Vert v. Metropolitan Life Insurance Co. 342 Mo. 629, 637, 117 S.W. (2d) 252 (1938). "Clearly our decisions have made this right of control, or direction, of the physical activities in performing a service, the essential test to determine either who is the master of a particular servant as to any questioned act, or whether the relationship is that of servant or independent contractor. Some courts have also emphasized the test of whose business is being done," *i.e.* in whose business was the servant engaged. 348 Mo. 341, 350, 153 S.W. (2d) 67, 71 (1941), *supra* note 3.

8. Smith, *Scope of the Business: The Borrowed Servant Problem* (1940) 38 MICH. LAW REV. 1222.

he "sent it out," (*i.e.*, the check-list) to show the defendant that the work had been done according to its instructions.

Mr. Russell, plaintiff, testified that he did not employ Hoefer, nor Hoefer's general employer, to do the wiring, that he did not discuss any transaction relating to the range with anybody except defendant's representative who sold him the range; that all payments were made by him to the defendant, Union Electric Company. It further appeared in evidence that defendant paid the County Electric and Gas Appliance Company for the electric wiring installation done by Hoefer, that the defendant had its inspector check over all the wiring; and that before the wiring was paid for the Fire Prevention Bureau inspected it and made its report to the defendant.

The act causing the injury was solely one of alleged negligent installation of the electric wiring. Installation, as between plaintiff and defendant, was the task of the defendant (an essential element in the contract it had entered into with the plaintiff), and it was likewise work within the normal scope of defendant's business.

In relation to the defendant there were two ways in which the County Electric and Gas Appliance Co. might use their employee, Hoefer. They could contract to do the work, and, the end being prescribed, *i.e.*, the installation of the wiring, the means of doing it may be left to the contractor; or they may contract in a different manner, and, the County Electric and Gas Appliance Co. not doing the work itself, may place its servant, Hoefer, under the control of another, *i.e.*, may lend such servant—and in that case not retain control over the work. "Control" would not then be taken as the test; rather it would be—whether the servant or only the use and benefit of his work was transferred.[9] On the whole it does not seem the parties contemplated their agreement should involve any transference of servants, as contrasted with transference of service.

JOHN E. MILLS

REAL PROPERTY—CONTINGENT REMAINDERS—ALIENABILITY

Grimes v. Rush[1]

Conveyance was made to a tenant for life, "and then to the heirs of her body." Under our fee tail statute[2] this created a life tenancy and contingent remainders in the children. The life tenant conveyed her interest to the defendant, and her children purported to convey their interests to the defendant by quitclaim deeds. The life tenant's children survived her and sought to eject the defendant, contending that the quitclaim deeds were ineffective to convey their interests, and therefore they owned the land in fee. Plaintiffs further asserted that quitclaim deeds could not convey their after-acquired titles on the theory of estoppel by deed and therefore the deeds were without any effect whatsoever. The Supreme

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9. Century Insurance Co., Ltd., v. Northern Ireland Road Transport Board. House of Lords (1942) A.C. 509.

1. Mo. 197 S.W. (2d) 310 (Mo. 1946).

2. MO. REV. STAT. (1939) § 3498.

Court, in an able opinion by Bohling, C., affirmed judgment for the defendant, stating that under our basic conveyancing statute[3] contingent remainders are freely alienable, being interests in land; and contingent remaindermen take by purchase, so that their title was not after-acquired.

At common law contingent remainders could not be transferred by grant.[4] The development of the Missouri law on this subject from 1865 to 1917 has been traced by Professor Hudson.[5] Prior to 1865 contingent remainders were probably alienable in Missouri only as at common law, *i.e.*, by release operating by way of extinguishment and by some method of conveyance which would create an estoppel; but it seems that the supreme court was not called on to decide the question and it is practically impossible that a case should now arise which would raise the issue. *Godman v. Simmons*,[6] the leading case on this problem, arose under the statute of 1865 and the court was undoubtedly applying the statute, although it professed to be acting independently of it. Land had been conveyed to A for life, remainder to her bodily heirs. A's children conveyed their interests, one deed purporting to pass the fee simple, one purporting to pass all interests "whether prospective, vested or contingent," and one deed being in the ordinary language of a quitclaim. The deeds were held effective to transfer the interests of the children. No special attention was given by the court to the question whether a contingent remainder could be conveyed when the person to take is not certain, although it was raised by counsel. Since the case was treated as one of an estate tail, this question may have been deemed less significant by the court because the nature of a remainder under the estate tail statute had not been determined.[7] The dictum in *Sikemeier v. Galvin*[8] seems to approve the same result where no estate tail was involved. *Brown v. Fulkerson*[9] was a further extension; land was devised to C and the heirs of her body with a gift over if she died without such heirs. Upon C's death without heirs of her body, it was held that the deeds of C's nieces and nephews, executed before C's death, had effectively conveyed their interests although the uncertainty as to the persons to take was greater than in *Godman v. Simmons*. In *Finley v. Babb*[10]

3. Mo. REV. STAT. (1939) § 3401, from General Statutes of 1865, c. 109, § 1. "Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

4. 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 341; 3 SIMES, FUTURE INTERESTS (1939) § 708.

5. Hudson, *Transfer and Partition of Remainders in Missouri* (1917) 14 U. OF MO. BULL., LAW SERIES 14. Because this article is now out of print, a portion of the article is briefed in this note.

6. 113 Mo. 122, 20 S.W. 972 (1892).

7. Whatever doubt remained as to the nature of the statutory remainder in an estate tail seems to have been resolved in the recent case of *Mattingly v. Washburn*, 196 S.W. (2d) 624 (Mo. 1946), another excellent opinion written by Bohling, C., and it is now clear that a contingent remainder is created, rather than a vested remainder subject to partial or complete divestment.

8. 124 Mo. 367, 27 S.W. 551 (1894).

9. 125 Mo. 400, 28 S.W. 632 (1894).

10. 173 Mo. 257, 73 S.W. 180 (1903).

where the remainder was in the heirs of the life tenant, it was held that it was conveyed by a deed executed by a son before the death of the life tenant. In *Clark v. Sires*,[11] *Parrish v. Treadway*[12] and *Summet v. City Realty Co.*,[13] the remainder was in the life tenant's heirs of the body, with the same result.

Professor Hudson points out that the courts have often made a distinction between those contingencies which affect the person, and those which affect the completeness of title which is conferred on an ascertained person. While the Missouri courts had not expressly repudiated the distinction between contingent remainders, his conclusion was that it would not be respected, stating:

> "It is probably safe to say that any contingent remainder may be aliened by deed under the statute, whether the object of the gift or limitation of the remainder be or not be ascertained."

The cases decided since the writing of that article (written in 1917) appear to confirm that belief.

In *Bopst v. Williams*[14] land was devised to C for life, and at her death was to go to her bodily heirs. C was appointed guardian of her only son, a minor, and the court stated that a conveyance of the son's interest by C was valid, when the sale was made under a statute authorizing sale of a non-resident minor's "real estate." Again, no special attention was given to the fact that the contingency was one affecting the person to take. Since the case was reversed because of fraud, it can be regarded only as strong dictum as to the alienability of contingent remainders. *Donaldson v. Donaldson*[15] was another case wherein deeds executed by contingent remaindermen prior to the death of the life tenant were held to have effectually conveyed their interests. In *Bock v. Whelan*[16] a bankrupt had held an interest which the court assumed was a contingent remainder, although the facts of his taking were not set out. The court there held that the contingent remainder was within the meaning of the term "real estate" so as to pass his interest to the trustee under the Bankruptcy Law, and the trustee's interest therefore must be determined and protected on partition of the land.

Since the persons who would take the land upon the death of the life tenant in the principal case were unascertained, the children held what Fearne called contingent remainders of the fourth class.[17] The court called special attention to this fact. It is submitted that by squarely holding that these interests are transferrable by quitclaim as well as warranty deeds, the supreme court has repudiated any distinction between contingent remainders with respect to their alienability, and

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11. 193 Mo. 502, 92 S.W. 224 (1905).
12. 267 Mo. 91, 183 S.W. 580 (1915).
13. 208 Mo. 501, 106 S.W. 614 (1907).
14. 287 Mo. 317, 229 S.W. 796 (1921).
15. 311 Mo. 208, 278 S.W. 686 (1925).
16. 30 S.W. (2d) 607 (1930).
17. 1 FEARNE on CONTINGENT REMAINDERS (10th ed. by Butler, 1844) 5. The other three classes as set out in this work involve situations in which the person to take is ascertained. Contingent remainders of the fourth class then make up one of the two types into which courts often divide these interests.

they are freely alienable in Missouri whatever the contingency upon which they are to vest.

The holding in the principal case is sound from a legal point of view. Section 3401 of the Missouri Revised Statutes (1939) is sufficient authority for the decision, and the holding is the logical culmination of a long line of earlier Missouri decisions. Further, the decision is desirable from the point of view of public policy, in making interests in property more freely alienable. The court is to be commended for declining to follow a technical common law rule which had served no functional purpose for some five hundred years. It is hoped that if the question arises the court will hold that Section 3401 permits the free alienability of possibilities of reverter and rights of entry for condition broken.

J. KEITH GIBSON

REAL PROPERTY—RESTRAINTS ON ALIENATION—RACIAL RESTRICTIONS

Swain v. Maxwell[1]

Kraemer v. Shelley[2]

Two recent decisions by the Missouri Supreme Court reaffirm the validity in this state of provisions in a deed or contract restricting property from transfer to or occupancy by negroes. In *Swain v. Maxwell* owners of all but three of the parcels of land in a Kansas City block mutually agreed in writing, for themselves and their successors in title, that none of the land should be conveyed to or occupied by negroes; that the agreement might be enforced by injunction or any other remedy; and that the restrictions imposed should remain in force for a period of fifteen years and be automatically renewed for a like term unless terminated by the parties. One of the signers conveyed the premises in question to Maxwell, a white person, who conveyed them to colored persons. Plaintiffs, parties to the agreement either originally or as successors in title, sued to cancel the deed to colored grantees; to enjoin them from occupying the premises; and to enjoin Maxwell from conveying or renting to colored persons. The supreme court affirmed a decree granting the relief sought.

The facts in *Kraemer v. Shelley* were substantially the same, except that occupancy alone was prohibited. In 1911 owners of forty-seven of fifty-seven parcels of land in certain blocks in St. Louis executed and recorded an agreement providing that none of the property should be occupied by non-Caucasians for a term of fifty years. It was provided that the restriction, which was to "run with the title" in favor of the original parties and their successors in ownership, should be enforceable by suit to enjoin use and occupancy and to "forfeit the title." The parcel involved, one of those covered by the agreement, was purchased in the name of a straw party and transferred to negro defendants who occupied the premises. Plaintiffs, owners of another parcel covered by the agreement, sought an injunction against

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1. 196 S.W. (2d) 780 (Mo. 1946).
2. 198 S.W. (2d) 679 (Mo. 1946).

defendants' occupancy and asked that they be divested of title. On appeal the supreme court held that plaintiffs were entitled to such relief.

The various jurisdictions are sharply divided as to the validity of restrictions in a deed or property owners' agreement against *transfer* of land to persons of a particular racial or social group.[3] Many courts refuse to sustain them, usually on the ground that they violate the rule against restraints on alienation.[4] Missouri decisions, however, following the rule laid down nearly thirty years ago in the leading case of *Koehler v. Rowland*,[5] have consistently upheld such restrictions.[6] This is true even where enforcement involves a forfeiture.[7] On the other hand, probably all jurisdictions recognize the validity of provisions against *use* or *occupancy*.[8] Technically such restrictions are not restraints on alienation, though practically restraints on use and restraints on alienation attain the same end, viz., non-occupancy by the excluded group.

Where private racial segregation has been sustained on principles of real pro-

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3. The conflicting decisions are collected in Notes (1920) 9 A.L.R. 120, (1925) 38 A.L.R. 1185, (1926) 42 A.L.R. 1273, (1930) 66 A.L.R. 531, (1936) 114 A.L.R. 1237, (1946) 162 A.L.R. 180, which deal with the various aspects of the problem. See also 2 SIMES, FUTURE INTERESTS (1936) § 459; 5 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1345; Bruce, *Racial Zoning by Private Contract* (1927) 21 ILL. L. REV. 704; Martin, *Segregation of Residences of Negroes* (1934) 32 MICH. L. REV. 721; Notes (1933) 10 N.Y.U.L.Q. REV. 381, (1929) 3 CIN. L. REV. 323.

The language of the RESTATEMENT OF PROPERTY (§ 406, comment) is interesting: "In states where the social conditions render desirable the exclusion of the racial or social group . . . , the restraint is reasonable and hence valid if the area involved is one reasonably appropriate for such exclusion and the enforcement of the restraint will tend to bring about such exclusion . . . The avoidance of unpleasant racial and social relations and the stabilization of the value of the land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation.

". . . the most important factor in solving this problem is the public opinion of the state where the land is located."

Indicative of public policy are constitutional and statutory provisions relating to race segregation. For example, Art. IX of the Missouri Constitution of 1945 provides for separate public schools for white and colored children.

4. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925); White v. White, 108 W. Va. 128, 150 S.E. 531 (1929).

5. 275 Mo. 573, 205 S.W. 217 (1918). This was the first case on the question in a common-law jurisdiction.

6. Porter v. Pryor, 164 S.W. (2d) 353 (Mo. 1942); Porter v. Johnson, 232 Mo. App. 1150, 115 S.W. (2d) 529 (1938); GILL, MISSOURI TITLES (3d ed. 1931) § 186.

7. Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918). The Rule Against Perpetuities is generally held not applicable where title reverts to the grantor upon entry for breach of a condition subsequent. GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) §§ 299-311.

8. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Thornhill v. Herdt, 130 S.W. (2d) 175 (Mo. App. 1939); A.L.R. Notes cited *supra* note 3; RESTATEMENT, PROPERTY (1944) § 406, comment m; 2 SIMES, FUTURE INTERESTS (1936) § 460; 5 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1345.

perty law, questions of public policy and constitutionality have been raised. The courts hold that such restrictions are not opposed to public policy, although there is usually little consideration of the social factors involved.[9] And in general, covenants or agreements restricting alienation to or use by persons of a particular racial or social group have been held not violative of the Fourteenth Amendment and other constitutional provisions designed to prevent discrimination, which are construed as applying only to state and not to individual action.[10] However, as an increasing number of cases come before the courts, against a background of national concern over housing problems, these objections are receiving growing support from writers.[11] In this connection, it is significant that racial residential segregation by legislative action has consistently been held unconstitutional.[12]

Certain collateral matters are frequently made the basis of attack upon restrictions against transfer or occupancy. Where conditions have changed so radically as to defeat the purpose of the stipulation, it will not be enforced.[13] And if it appears, considering the language of the agreement and the surrounding circumstances, that it was the intention of the parties that *all* the property owners in the district should join in the agreement before it would become binding, failure of some owners to sign will render the restrictions ineffective.[14] But in the absence of such intention, the practical result of the failure of some of the owners in a district to join such an agreement does not . . . affect the agreement's validity but affects its enforcement,"[15] because the purpose of the plan may thus fall short of achievement.

WILLIAM A. BETZ

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9. Mays v. Burgess, 79 App. D.C. 343, 147 F. (2d) 869 (1945); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); A.L.R. Notes cited *supra* note 3; Martin, *supra* note 3, at p. 741.

10. Corrigan v. Buckley, 271 U.S. 323, 46 Sup. Ct. 521 (1926); Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918). *Contra*: Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D. Cal. 1892). See also Note (1946) 162 A.L.R. 180; WILLIS, CONSTITUTIONAL LAW (1936) p. 581; Bruce, *supra* note 3; Martin, *supra* note 3.

11. Kahen, *Validity of Anti-Negro Restrictive Covenants* (1945) 12 U. CHI. L. REV. 198; McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* (1945) 33 CALIF. L. REV. 5; Siegel, *Real Property Law and Mass Housing Needs* (1947) 12 LAW & CONTEMP. PROB. 30; Note, *Judicial Enforcement of Restrictive Covenants Against Negroes* (1946) 40 ILL. L. REV. 432. And see Edgerton, J., dissenting in Mays v. Burgess, 147 F. (2d) 869, 873 (App. D.C. 1944).

12. Buchanan v. Warley, 245 U.S. 60, 38 Sup. Ct. 16 (1917); WILLIS, *supra* note 10, at p. 582; Martin, *supra* note 3, at p. 726.

13. Pickel v. McCawley, 329 Mo. 166, 44 S.W. (2d) 857 (1931); Note (1946) 162 A.L.R. 180, 187; RESTATEMENT, PROPERTY (1944) § 406, comment n; 5 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1345.

14. Thornhill v. Herdt, 130 S.W. (2d) 175 (Mo. App. 1939); Note (1946) 162 A.L.R. 180, 191.

15. Douglas, J., in Kraemer v. Shelley, 198 S.W. (2d) 679, 682 (Mo. 1946).

TAXATION—INCOME TAX—FAMILY PARTNERSHIPS

Commissioner of Internal Revenue v. Mauldin[1]

Petitioner, owner and proprietor of the Rock Hill Coca-Cola Bottling Works, executed a deed of gift transferring an undivided one-fourth interest in the property and assets of the business to his wife. The assets consisted of bottling machinery, other tangible property and the franchise which gave the company the exclusive right to bottle and sell Coca-Cola in York County, South Carolina. The franchise was personal to the petitioner. Shortly after the deed of gift was executed, petitioner, his wife and son entered into a partnership agreement providing for a continuation of the business as a partnership with profits and losses to be divided in accordance with the capital contributed. Subsequent to the partnership agreement, the contract right secured from the Coca-Cola Bottling Company was surrendered for the purpose of making a new contract. The new contract was made and signed by each member of the firm, as a partner. The wife, by the partnership agreement, was expressly excused from exercising any duties or contributing any services in connection with the management and operation of the business, but the right to do so was not denied her. The Commissioner of Internal Revenue determined that the wife was not in fact a partner and the income reported by her was properly taxable to the petitioner. This finding was upheld by the Tax Court,[2] five judges dissenting, and by the Circuit Court of Appeals,[3] one judge dissenting.

The question arises as to what is necessary in order to constitute a partnership, recognizable for federal income tax purposes, between husband and wife. Family partnerships are recognized by the Tax Court, but they are given careful scrutiny. However, the fact that the partnership was entered into for tax reduction purposes does not, for that reason alone, invalidate the partnership. The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes is recognized.[4] But income is considered taxable, regardless of its legal owner or recipient, to the person who enjoys the income economically or who controls the distribution of the income or the property producing it.[5]

Criteria commonly used to determine the validity or existence of partnerships are given little consideration when federal income tax questions are involved. The fact that the wife, under local property law, owns an interest in the business is not a controlling factor, and state recognition of the partnership is of no importance under recent decisions. A partnership invalid under state law may be a valid one for Federal Income Tax purposes.[6]

Many tests have been used in the past in determining the validity of family

1. 155 F. (2d) 666 (C.C.A. 4th, 1946).
2. 5 T.C. 743 (1945).
3. 155 F. (2d) 666 (C.C.A. 4th, 1946).
4. Comm'r v. Tower, 327 U.S. 280, 66 Sup. Ct. 532, 164 A.L.R. 1135 (1946). See notes and collection of cases (1946) 164 A.L.R. 1135.
5. Helvering v. Clifford, 309 U.S. 331, 60 Sup. Ct. 554 (1940). See note (1946) 164 A.L.R. 1135 at 1145.
6. Comm'r v. Tower, 327 U.S. 280, 66 Sup. Ct. 532, 164 A.L.R. 1135 (1946). See note and collection of cases (1946) 164 A.L.R. 1135 at 1145.

partnerships for tax purposes, but the test which now appears to be controlling was set forth by the United States Supreme Court in the leading case of *Commissioner of Internal Revenue v. Tower.*[7] The court in that case said that in order to create a valid partnership, recognizable for tax purposes, the following conditions must be met:

"If she (wife) either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things she may be a partner. . . ."

In the instant case it is conceded by the petitioner that the wife contributed nothing by way of services or control to the management of the business although she had the right to do so. The majority opinion found, at least by implication, that nothing was contributed by way of capital originating with the wife. In a vigorous opinion, the dissenting judge pointed out that while it was true that all tangible assets, such as machinery, vehicles, etc., originated with the husband, the exclusive right to bottle the product was obtained by a contract executed by all parties concerned with the Coco-Cola Bottling Company. This meant that each partner, including the wife, assumed burdensome and onerous obligations in order to secure the franchise. This franchise was found by the Tax Court to be the chief asset of the firm. It was the opinion of the dissenting judge that this franchise, being an exclusive right, amounted to a substantial contribution of capital in that the wife's responsibility on the contract originated with her and thus came within the rule of the *Tower* case.

A number of considerations should not be overlooked in determining the value of the wife's contribution by way of executing the "Bottler's Contract." In the original deed of gift she was assigned a one-fourth interest in the franchise secured by the petitioner from the Coca-Cola Bottling Company. Since she assumed no liability, she acquired, under the prevailing view of assignments of contract, no additional burdens from the assignment itself.[8] However, this franchise was surrendered and a new one substituted therefor. It is conceivable that the exclusive right to bottle the product would have been refused had not the wife been a party to the contract. She assumed an obligation, thus subjecting herself and her property to the possibility of liability for breach of contract, and received in return therefor the enjoyment of a portion of the fruits of the business. It would seem that when an individual assumes liabilities which result in the acquisition of assets vital to the existence of the business itself, he has rendered valuable services, or has contributed capital originating with himself.[9] LOUIS W. COWAN

7. *Ibid.*

8. 2 WILLISTON, CONTRACTS (1936) § 418A. For *contra* view see RESTATEMENT, CONTRACTS (1932) § 164(2).

9. Many problems such as the one arising in the instant case could be avoided by the adoption of a plan under which the income of both husband and wife would be taxed as a unit. A suggested solution is to require the husband and wife to file joint returns, but compute the tax as twice the tax on half the joint income, with the resulting total tax allocated to each in accordance with his contribution. See Altman, *Community Property; Avoiding Avoidance by Adoption in the Revenue Act* (1938) 16 TAX MAG. 138.

TAXATION—INCOME TAX—LOSSES—SALES AND PURCHASES BY HUSBAND AND WIFE THROUGH STOCK EXCHANGE

Commissioner of Internal Revenue v. Kohn[1]

Kohn and his wife had separate brokerage accounts with the same brokerage firm and each held stock in various corporations. In several transactions Kohn, for himself or as agent for his wife, had the broker sell through the New York Stock Exchange a specified number of shares of a particular stock. As to each sale, the broker was instructed to buy a like number of shares of the same stock for the non-selling spouse. Thus, as one sold stock the other purchased, both operating on the open market. The purchase date usually followed the sale date by one or two days; the purchase and sale prices varied slightly; neither Kohn nor his wife knew to whom they sold or from whom they bought, and neither buyer held the identical share certificates formerly held by the other. These transactions were for the sole purpose of establishing losses which could be used in computing net income for purposes of taxation under the Internal Revenue Code. In reversing the Tax Court, the circuit court held that deductions for losses arising from these sales of stock should be disallowed under Section 24(b) of the Internal Revenue Code.[2] Such transactions were indirect sales or exchanges of property between members of a family. The fact that the sales were made through the stock exchange does not change the character of the transfers.

In *Commissioner of Internal Revenue v. McWilliams*[3] the facts were substantially the same as in the *Kohn* case. There were, however, three persons involved, the husband, the wife, and the husband's mother; and each sale and purchase was completed on the same day. Here too the court held that, even though the transactions were carried on through the stock exchange, they were sales "indirectly between members of a family," and under the statute losses arising therefrom were not deductable in computing net income.

A contrary result had been reached in *Commissioner of Internal Revenue v. Ickelheimer*,[4] where the facts were slightly different. There W, the taxpayer, purchased bonds with a face value of $100,000 in 1935 and 1936. In 1937 H, her husband, acting pursuant to a power of attorney, sold them on the open market for about $14,000 so that W might take the loss in computing her income tax. The following day H, as one of three trustees of a trust set up by W's father, purchased similar bonds on the open market for the trust at a cost slightly higher than the sale price. The bonds were then placed in the safe custody account of the trust. The court there held that the loss on the sale was an allowable

1. 158 F. (2d) 32 (C.C.A. 4th, 1946).
2. Int. Rev. Code § 24(b) (1937) reads, "Losses disallowed—in computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property, directly or indirectly—
"(A) Between members of a family . . ."
3. 158 F.(2d) 637 (C.C.A. 6th, 1946).
4. 132 F. (2d) 660 (C.C.A. 2d, 1943).

deduction against the taxpayer's gross income for 1937. The sale on the open market was regarded as a completed transaction, the court stating that the transaction was clearly not within the letter of the statute, and since the purpose of the statute was only to disallow losses not "definitely at arms length" the loss occasioned by the sale was deductable. There was a vigorous dissent by Justice Learned Hand, however, in which he pointed out by way of analogy that the loss on any sale of stock or securities is disallowed under Section 118(a) of the Internal Revenue Code (the "wash sales" section), where the seller purchases "substantially identical" stocks or securities within thirty days of such sale. He then stated that read in the light of Congress's purpose, which was to ban deductions realized on losses sustained in any transaction between persons in certain specified relations, Section 24(b) should apply to this situation. The courts in both the *Kohn* and *McWilliams* cases approved the reasoning of this dissent.

The history of income taxation shows a determined probing on the part of the taxpayer to find a means of lowering his taxes and the resulting efforts of Congress to plug tax loop-holes.[5] One of the devices for tax avoidance most frequently used was the sale between members of the family.[6] The legislative history of this statute, enacted in 1937, evidences a belief on the part of Congress that the statute would effectually close this opportunity for tax avoidance.[7] But as has been pointed out elsewhere,[8] the construction given Section 24(b) by the court in the *Ichelheimer* case stresses form rather than substance and makes the section of little practical importance, since any persons within the specified relationships could avoid its effect by making the sale and purchase through the stock exchange.

It is submitted that the approach taken by the principal case and the *McWilliams* case more closely conforms with the purpose of the statute than that used in the majority opinion in the *Ichelheimer* case. Even though the purchaser does not acquire the identical shares sold, he acquires an identical interest in the same business in the case of shares of stock, or an identical claim against the same business in the case of bonds. Where buyer and seller are within one of the relationships set out in the statute, a sale and purchase made under circumstances similar to those in the principal case, although two transactions in form, are in fact one transaction. The unit (husband and wife, etc.) specified in the statute has not divested itself of the investment. In view of the purpose of Section 24(b) the term "indirectly" therein should be construed to cover this situation.

J. KEITH GIBSON

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5. Paul, *Background of the Revenue Act* (1937) 5 U. OF CHI. L. REV. 41; *Hearings before the Joint Committee on Tax Evasion and Avoidance*, 75th Cong., 1st Sess. (1937) 12.

6. See Comment (1939) 49 YALE L.J. 75.

7. *Preliminary Report of a Sub-committee on Ways and Means on Prevention of Tax Avoidance*, 73d Cong., 2d Sess. (1934) 15; *House Report* No. 704, 73d Cong., 2d Sess. (1934) 23.

8. (1942) 55 HARV. L. REV. 872.

TAXATION—REAL ESTATE—TIME WHEN TAX LIEN ATTACHES

St. Louis Provident Association v. Gruner[1]

Plaintiff, a tax exempt association, sought a declaratory judgment to determine the extent of its exemption from taxes payable in 1944 upon a lot purchased by it from a non-exempt vendor on February 26 of that year. Plaintiff contended, first, that it was not liable for any of the tax, arguing that the lien of the tax did not attach until the annual levy, which was subsequent to the sale of the land, and, secondly, that if this were not true, still the tax should be apportioned. The court held that the state's lien for the real estate tax attached as of June 1, 1943, the initial date of the assessment, and that there could be no apportionment, relying upon certain early Missouri decisions pertaining to liability of a vendor on his covenant against incumbrances.

In *Blossom v. Van Court*[2] the question in issue was whether the vendor was liable upon his covenant against incumbrances for taxes. the initial date of the assessment of which preceded the conveyance. The applicable statute[3] provided that the assessor should commence his assessment of property in the county on February 1, of each year. The court in that case construed the statute to mean that the tax was to be assessed against the person who was owner on February 1; and that the property was charged with the tax as an incumbrance on that date, although the amount of the tax was not ascertained until subsequently.

This case was followed in *McLaren v. Sheble*,[4] which was also an action upon the covenant against incumbrances. In the latter case the pertinent statute[5] provided that the initial day of the assessment should be the first Monday in September. The court stated in its opinion that the lien of the tax took effect by relation from that date.

Despite these early precedents, there has been some uncertainty as to the date of attachment of a tax lien in Missouri as a result of other cases concerning condemnation of real estate for public purposes. In *United States v. Certain Land in the City of St. Louis, Missouri*,[6] the City of St. Louis filed a claim for distribution to it as taxes of a portion of the fund paid into the court as compensation to owners whose property had been condemned. The federal district court held that a real estate tax in Missouri did not become a lien until the levy was made. Since the conveyance preceded the date of the levy of the 1940 tax the city could recover none of that tax. However, even though the conveyance was made after the levy of the 1939 tax, the recovery of the city was limited to a proportionate amount corresponding to that fraction of the year during which the property remained in private ownership. The applicable statutory provision[7] was distinguished from

1. 199 S.W. (2d) 409 (Mo. 1947).
2. 34 Mo. 390 (1864).
3. R.C. 1855, Chap. 134, § 18.
4. 45 Mo. 130 (1869).
5. Mo. Gen. Stat. (1865) Chap. 12, § 12.
6. 29 F. Supp. 92 (E.D. Mo. 1939).
7. MO. REV. STAT. (1929) § 9747.

those statutes in effect at earlier times. It was pointed out that in *Blossom v. Van Court* and *McLaren v. Sheble* the lien was imposed for all taxes "laid" upon the land.[8] The preceding statute had imposed a lien for all taxes "assessed."[9] The term "laid" had been construed to mean "assessed." Since the statute before the court for interpretation included neither of these terms that court felt that these two early cases were not in point.

In *United States v. Certain Land Situated in City of St. Louis, Missouri*[10] the court disallowed that part of the claim for taxes asserted by the City of St. Louis which related to the fraction of the year subsequent to condemnation by the United States. This result was reached despite the fact that the date of the levy preceded condemnation, so that there was no doubt as to the lien's having attached. The constitutional provision "No tax shall be imposed on lands the property of the United States, . . ."[11] was considered as compelling this conclusion. This case was reversed on appeal to the United States Circuit Court of Appeals.[12] The court stated in its opinion: "We think the court erred in holding that in the absence of some state law to the contrary, the lien for taxes might be split or apportioned. The rule is that absent some state law to the contrary, such lien must be paid in its entirety. . . .

"We are clear that under the statutes of Missouri, and the decisions of its appellate courts, tax liens in Missouri, may not be prorated or apportioned even though a tax-immune authority has acquired the property."

The following statement contained in the opinion evidently relates to the date of attachment of the tax lien: "The tax is not depedent on continued ownership but on ownership at the assessment date. As said by the Supreme Court of Missouri in *McLaren v. Sheble,* 45 Mo. 130, 'The true and equitable rule is for each party to pay the taxes assessed on account of the property owned by them respectively on the initial day of the assessment, in the absence of any stipulation to the contrary'."[13] Although the latter statement is unnecessary to the decision

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8. Mo. Rev. Stat. (1835) Art. V, § 1.
9. Territorial Laws, 1804-1824, Chap. 299, § 17.
10. 51 F. Supp. 80 (E.D. Mo. 1943).
11. Mo. Const. (1875) Art. XIV, § 1.
In support of the theory that property acquired for a governmental purpose becomes immune from taxes previously assessed and levied, the court cites Bannon v. Burnes, 39 Fed. 892 (W.D. Mo. 1889) and State *ex rel* Baumann, 348 Mo. 164, 153 S.W. (2d) 31 (1941). However, in Bannon v. Burnes there was a specific legislative enactment providing that the property should be exonerated from all taxes and assessments; and in State *ex rel* City of St. Louis v. Baumann the matter before the court was construction of a provision of the Jones-Munger Act making payment of outstanding taxes a condition precedent to the obtaining of a deed by the vendee at a tax sale.
12. Collector of Revenue within and for the City of St. Louis, Mo. v. Ford Motor Co., 158 F (2d) 354 (C.C.A. 8th, 1946).
13. Mo. Rev. Stat. (1939) § 10941 provides that real property shall be liable for taxes on such property and establishes a lien against such property for the taxes thereon. Section 10940 provides that every person owning property on the first day of June shall be liable for taxes thereon for the following year.

of the case, it nevertheless indicates the attitude of the court toward this matter.

In United States v. Certain Lands in Jackson County, Missouri[14] title to condemned realty vested in the federal government on April 9. The date of assessment was January 1. The ordinance levying the tax was enacted on April 15. The court held that under the law of Missouri the lien attached as of the date of assessment, and that there could be no apportionment. Hence Kansas City, Missouri, could recover the total amount of the tax from the fund paid into the court by the federal government as compensation for the condemned property.

The principal case does not discuss either the case of *United States v. Certain Land Situated in City of St. Louis, Missouri* or that of *United States v. Certain Lands in Jackson County, Missouri.* The court mentions that in *United States v. Certain Land in City of St. Louis, Missouri,* the decision was based mainly upon the case of *McAnally v. Drainage District,*[15] and it distinguishes the latter case by stating that the issue was whether the lien for assessments of a drainage district attached annually and not at what time during the year the lien attached. The Missouri Supreme Court did not concern itself with the absence of statutory provision that a lien should exist for taxes "laid" or "assessed." On the possibility of apportionment the court simply said that there can be no apportionment of a tax after attachment of the lien.

The principal case appears conclusively to have disposed of any doubt as to the rule in Missouri as to the date of attachment of a lien for real estate taxes. As pointed out by the court in *United States v. Certain Lands in Jackson County, Missouri,* the federal courts are required under the rule of *Erie R. Co. v. Tompkins*[16] to apply the law of Missouri as declared in decisions of its highest appellate tribunal.

Subsequent to the conveyance in the principal case the Constitution of 1945 was adopted in Missouri. One of its provisions is to the effect that a tax on property shall be payable during the fiscal or calendar year in which the property is assessed.[17] This constitutional provision should not have any effect on the attachment of the tax lien, however, except to shift the date from June 1 to January 1, for in *Blossom v. Van Court,* as well as in *United States v. Certain Lands in Jackson County, Missouri,* the tax was assessed and became payable within the same year.

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In State *ex rel* Hayes v. Snyder, 139 Mo. 549, 41 S.W. 216 (1897) it was held that no personal judgment can be recovered against a land owner for taxes against his land. Hence it would seem that Section 10940 must be construed as meaning that the land owned by any person on June 1 becomes subject to the lien of the real estate tax thereon, as of that date.

14. 69 F. Supp. 565 (W.D. Mo. 1947).

15. 325 Mo. 348, 28 S.W. (2d) 650 (1930).

16. 304 U.S. 64, 58 Sup. Ct. 817 (1938).

17. Mo. CONST. (1945) § 3. It has been held that the fiscal year covers the same period as the calendar year unless otherwise indicated in the pertinent statute. Union Trust and Savings Bank v. City of Sedalia, 300 Mo. 399, 254 S.W. 28 (1923); Dennig v. Swift and Co., 339 Mo. 604, 98 S.W. (2d) 659 (1936).

TORTS—LIABILITY OF HUSBAND FOR TORTS OF WIFE DURING COVERTURE—"HOME" AS A JOINT ENTERPRISE.

State ex rel. McCrary v. Bland[1]

Upon the appeal of an action by the plaintiff for injuries sustained by her while employed as a laundress in the home of the defendants, husband and wife, the court of appeals affirmed the lower circuit court judgment for the plaintiff, and based the defendant husband's liability upon its determination that the operation of a home by a husband and wife was such a "joint undertaking" as rendered the husband liable in damages for the wife's negligence in the operation thereof.[2] The negligence in this case constituted of allowing a mop handle to protrude across a basement stairway in a position which caused the plaintiff to trip and fall down those stairs, with consequent serious injuries. The case was transferred to the Missouri Supreme Court upon certiorari, and that court, in the opinion which is the subject of the present note, reversed the court of appeals upon this particular determination, with the result that the husband was found not to be liable for his wife's negligent act or omission.

The reasoning of the court is very succinctly stated by this paragraph of the opinion: "Under the common law as well as under the statutes a husband is bound to furnish reasonable support for his wife and minor children. So the maintaining of a home by a husband and wife is not the result of an agreement or contract between them. It is the result of their marital status, a duty the husband owes to his wife under the law. It therefore cannot be a joint adventure because a joint adventure can arise only by contract or agreement between the parties."[3]

The structure forming this forthright and effective disposition of the question rests upon two foundations: (1) the vexatious problem of joint adventure and joint enterprise; (2) the nature of the marital relation, and the consequent obligation upon the husband to maintain a home for his family. As to the first, the opinion regards the relationship of joint adventure as establishing the outer limit of vicarious liability of the husband for his wife's negligence, and then defines this relationship as one which can arise only by contract or agreement between the parties. The second regards the maintenance of a home as a duty imposed upon the husband not by contract or agreement of the parties, but by law. These

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1. 197 S.W. (2d) 669 (Mo. 1946).

2. The court of appeals decision, reported in 192 S.W. (2d) 431 (Mo. 1946), was the subject of a comment in (1946) 11 Mo. L. REV. 327. That comment dealt more fully with the background involved in this case, *i.e.*, the evolution of the common law liability of a husband for his wife's torts into the statutory non-liability for such, except in those cases where he would have been held accountable regardless of the marital relationship. The determination that the operation and maintenance of a home was a "joint adventure," or "joint enterprise," placed the instant case within this exception to the modern statutory rule. The opinion in the supreme court deals only with such determination by the court of appeals.

3. 197 S.W. (2d) 669, 673 (Mo. 1946).

two propositions premise the conclusion of the case—the operation of a home is not a joint adventure, and the husband is not liable for his wife's negligence therein.

The confusion of the terms "joint enterprise" and "joint adventure," and their respective meanings, is well nigh hopeless.[4] The distinction which it would seem that most of the decisions on the question fail to make, however, is between a contract theory of liability, upon the one hand, and a tort theory of liability, upon the other, the latter being based upon the idea of a vicarious responsibility, where, "by reason of some special relationship between the parties, joint liability is imposed as a matter of justice to insure compensation to the injured person."[5] Certainly, a relationship which was so close as to have its origin in a contract or agreement of the parties thereto would be more likely to have the requisite joint control and common purpose to fall within the scope of this vicarious liability than one not so definite in its existence. But does this category exhaust the possibilities, and limit the extent of liability under the tort theory as well as the contract theory? Do the two theories necessarily coincide in extent? The instant case so holds. And there is some authority to this effect.[6] The large majority of the cases cited in the opinion for this proposition, however, appear to be actions dealing with the contract, and not the tort theory.[7] On the other hand, there is considerable authority which recognizes the existence of relationships which impose vicarious liability upon the parties, even though they are not encompassed by the term "joint adventure" when it is defined as necessarily arising from a contract or agreement.[8] Most of this authority is found in the field of automobiles, where the negligence of the driver is imputed to a fellow passenger.[9] The bulk of these cases deals with the imputation of contributory negligence, so as to deny recovery to such passenger, rather than with imputing primary negligence, to render the passenger liable to a third party who has been injured in the course of the prosecution of the joint enterprise.[10] The theory also has been applied in other fields.[11] Quaere, then, as to the cutting off of this string of vicarious liability according to the measurements

4. *Id.* at 672, the opinion characterizes this confusion in another of its concise statements: "Most of our decisions make no distinction between a joint adventure and a joint enterprise."

5. HARPER, LAW OF TORTS (1938) 676.

6. Sommerfield v. Flury, 198 Wis. 163, 223 N.W. 408 (1929), which held that in the absence of a contract between the parties to an alleged joint adventure, such a relation could not exist so as to impute the contributory negligence of one to the other.

7. For instance, Tusant & Son Co. v. Chas. Weitz Sons, 195 Iowa 1386, 191 N.W. 884 (1923), which was a suit by one party to an alleged joint adventure against the other for an accounting of profits; Fletcher v. Fletcher, 206 Mich. 153, 172 N.W. 436 (1919), in which it was necessary to determine that a certain business relation was a co-partnership so as to make proper distribution of the assets upon the death of one of the parties thereto.

8. PROSSER, TORTS (1941) 492.

9. Lucey v. John Hope & Sons Engraving & Mfg. Co., 45 R.I. 103, 120 Atl. 62 (1923); Carpenter v. Campbell Automobile Co, 159 Iowa 52, 140 N.W. 225 (1913); Adams v. Swift, 172 Mass. 521, 52 N.E. 1068 (1899).

10. See notes (1929) 62 A.L.R. 440, (1933) 85 A.L.R. 630.

11. Cullinan v. Tetrault, 123 Me. 302, 122 Atl. 770 (1923).

of a contracts ruler, "joint adventure" rather than at some point as indicated by the appropriate torts scale.

Any doubt which may have arisen as to the disposition of the first propostiion appears to be allayed, however, insofar as its effect upon the result of the instant case is concerned, by the treating of the second matter, dealing of the nature of the marital relationship and its consequent duty upon the husband to provide a home for his spouse. It is here that the supreme court takes a position directly opposite to the decision of the court of appeals. The latter tribunal did not regard the factual differences between the ordinary and usual "joint undertaking," and the maintenance and operation of a home by a husband and wife, as sufficient to remove the home from the domain of vicarious liability. The former court feels that the contract of marriage, with its resulting social, moral, and legal duties, among which is that of the husband to furnish reasonable support for his wife and minor children, is not the equivalent of the ordinary legal contract or agreement, with its likewise attendant obligations.[12] The only apparent authority in point upon this phase of the case is *Mack v. Mackiewicz*[13] cited in support of the opinion. In view of this dearth of precedent, the supreme court seems to be well justified in its result. This justifiability is certainly not mitigated by the fact that the result leaves intact the protective pale around the family property held as a tenancy by the entirety and lends no support to the "family automobile doctrine" to which Missouri has denied its sanction.[14]

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12. Since this phase of the case was the primary subject of the comment discussing the court of appeals decision, cited *supra* note 2, it will not be examined fully here.

13. 9 N.J. Misc. 1219, 157 Atl. 117 (1931), where a husband was held to lack the requisite control to make him a party to a joint enterprise with his wife in her negligent sweeping of the attic of their home.

14. Since this case was decided in the lower court solely upon the "joint adventure" theory, and the appeal was upon this question only, no mention is made in the upper court's decision of possible alternative theories of recovery against the husband. Two such possibilities which were suggested in the comment upon the court of appeals opinion in (1946) 11 Mo. L. REV. 327, are: (1) regarding the wife as the agent of her husband in the performance of her domestic duties, and (2) regarding the husband and wife as joint employers of the servant and consequently as joint tort-feasors for the servant's negligent injury.