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## Recent Cases

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## Recent Cases

### ADMINISTRATION—SUIT FOR EXPENSE OF ADMINISTRATION—JURISDICTION OF CIRCUIT COURT

#### *Barnes v. Boatmen's National Bank of St. Louis*<sup>1</sup>

Appellee, a psychiatric expert, recovered a judgment for \$15,000 in the circuit court for services rendered in certain litigation before discovery of a will. It was directed by the circuit court that this judgment be certified to the probate court and there classified and paid as a cost of administering the testator's estate. The probate court then sustained a motion made by the executor to strike the judgment from the probate files on the ground that the circuit court had no jurisdiction to render it. This was reversed by the circuit court and on appeal to the supreme court the sole contention of the executor was that under Article VI, Section 34, Constitution of 1875,<sup>2</sup> creating and defining the jurisdiction of probate courts, the circuit court had no jurisdiction over the subject matter. It was held that while the Constitution of 1875 and statutes enacted under it gave the probate court jurisdiction, it was not made exclusive. The suit against the executor then could be brought directly in the circuit court, without its first being presented in the probate court.

The court's reasoning was as follows. It was admitted that the Constitution of 1875 did not expressly make the probate court's jurisdiction over claims against the executor exclusive. The question then was whether or not any statute had, and it was held that none had done so. Section 2100 (2), Mo. Rev. Stats., (1939),<sup>3</sup> in giving exclusive original jurisdiction to the circuit courts of some subject matter, by necessary converse implication indicates that such courts may have concurrent original jurisdiction of some causes with the probate courts. Section 655 (21), Mo. Rev. Stats. (1939)<sup>4</sup> enacted after acceptance of the Constitution of 1875, took jurisdiction away from the county courts, giving it to the probate courts, but no statute has taken any power from the circuit courts, so that whatever powers they had prior to the creation of the probate courts were retained. Statutes that authorize establishing in the circuit court those claims provable as demands in the probate

1. 199 S. W. 2d 917 (Mo. 1947).

2. The court did not decide or even consider whether the result would be the same under the Constitution of 1945, but there seems to be no material difference in their provisions on this point. See Article 6, § § 22 and 34, Constitution of 1875, and Article 5, § § 14, 16 and 17, Constitution of 1945.

3. "The circuit courts in the respective counties in which they may be held shall have power and jurisdiction as follows: . . . Second—Exclusive original jurisdiction in all civil cases which shall not be cognizable before the county courts, probate courts and justices of the peace, and not otherwise provided for by law."

4. "Whenever any duty proscribed by the provisions of any law of this state in relation to probate matters is required to be performed by the county court, the same shall be taken and construed to be required to be performed by the probate court."

court (present sections 183, 184, 188 and 208) do not limit those claims provable in circuit courts to the debts incurred by the decedent, but debts incurred by the executor after death of the decedent may also be presented. There is no line of demarcation between the "debts," "judgments," and classified "demands" mentioned in the foregoing sections, and the "charges" and "expenses of administration" mentioned in Sections 220 and 224. Either may be presented originally in the circuit court.

The specific point raised in this case is new to the supreme court of this state. The decision, however, seems amply supported by the statutes and by reason. The state, having jurisdiction over the subject matter, may grant that jurisdiction to whichever court it chooses. The question is, to which court has the power been given? By statute, clearly the suit could have been brought in the probate court.<sup>5</sup> It is likewise clear that from the probate order appeal could be perfected to the circuit court where the case would be heard, tried and determined "anew, without regarding any error, defect, or other imperfection in the proceeding of the probate court."<sup>6</sup> When the appeal was perfected the probate court's order would be vacated and the court would have no more authority in the premises. Now, under this decision, suit against the administrator may be brought in the circuit court directly, omitting the trial in probate court with subsequent appeal.

The result then is that a suit for expenses of administration may be brought in either court, dependent only upon the desire of the party bringing the action. Under our present probate system, since the probate court's order could be vacated and the cause tried anew in the circuit court, there seems no valid reason for denying the right to bring the suit there directly, so long as the statutes do not expressly declare that the probate court has exclusive original jurisdiction. However, it is supposed that in most instances it will be desirable to bring the action in probate court because of its speedier action, the lesser costs, and the relatively lesser amount of litigation usually pending.

The present case further points up the question of justification for a probate system that provides for a trial *de novo* on appeal from the probate court. The notion that an appeal from the probate court should result in a new trial has been discarded in several states as an inefficient and cumbersome method.<sup>7</sup> The Model Probate Code<sup>8</sup> provides for only a review of the trial, not a trial *de novo*, and numerous writers have also attacked the present system. A jury trial may be had in the probate court as well as in the circuit court.<sup>9</sup> The qualifications of the probate judge under the Constitution of 1875 were so low that there was a feeling that the appeal should result in a new trial. Under the Constitution of 1945, how-

5. MO. REV. STAT. § 189 (1939).

6. MO. REV. STAT. § 283, 291 (1939).

7. ALA. CODE, tit. 7, §§ 776, 775, 783, 784 (1940). FLA. STAT., §§ 61.01-61.07 (1941). See Simes and Basye, *Organization of the Probate Court in America*, 42 MICH. L. REV. 965 (1944), 43 MICH. L. REV. 113 (1944).

8. MODEL PROBATE CODE § 20 (g). See comment.

9. MO. REV. STAT. § 200 (1939).

ever, most probate judges have legal training, and in the near future they will all be lawyers, so that objection to a review rather than a new trial is nearly gone. If the probate court is to function properly, no practical purpose can be served by permitting a litigant to by-pass it at his whim.

J. KEITH GIBSON

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CONTRACTS—PROTECTION OF AN IDEA

*Schonwald v. F. Burkhardt Mfg. Co.*<sup>1</sup>

Plaintiff worked out a process for making laminated canvas shoe soles. He agreed to tell the defendant about it if the defendant would manufacture it exclusively for him. This the defendant agreed to do. As the agreement was finally worked out, the plaintiff was to receive a 10% commission on all such soles ordered through him, and he was to have the exclusive right to sell the soles. The agreement was never reduced to writing, though the plaintiff asked that it be. The plaintiff worked with the defendant's production manager for a period of six weeks to adapt the idea to manufacture. The idea was not new to the defendant, who had unsuccessfully tried to make a cloth sole for another company, using a lighter cloth and a different type glue. After securing large orders for the soles, the plaintiff was informed that his commission would be cut to 5%. He also heard that another leather salesman was selling the soles. About two months later, he was told that the two largest accounts he had secured were to be made house accounts, and that he would no longer receive a commission on them. The plaintiff was never authorized to make any more sales for the defendant, and was never again able to see the defendant's president. He brought an action for breach of contract and obtained a verdict for \$109,664.68. This was affirmed on appeal.

There is no property right in a mere abstract idea.<sup>2</sup> But if an idea is novel, original, lawful, and in concrete form, it becomes literary property and may be protected as such.<sup>3</sup> In the instant case, the plaintiff's idea was neither novel nor original. Therefore it could not be protected as literary property.

Can an idea which is neither novel nor original, and therefore not property, be protected by contract? Disclosure of an idea which is not new, original, or valuable

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1. 202 S. W. 2d 7 (Mo. 1947). For an excellent discussion of the general subject, see Logan, *The Legal Protection of Ideas*, 4 Mo. L. Rev. 239 (1938).

2. *Bowen v. Yankee Network*, 46 F. Supp. 62 (D. Mass. 1942); *Stone v. Liggett & Meyers Tobacco Co.*, 260 App. Div. 450, 23 N. Y. S. 2d 210 (1st Dep't 1940); 18 C. J. S., p. 143, Sec. 10e.

3. *Thompson v. Famous Players-Lasky Corp.*, 3 F. 2d 707 (N. D. Ga. 1925); *Liggett & Myers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N. E. 206 (1935); *Healey v. R. H. Macy & Co.*, 251 App. Div. 440, 297 N. Y. S. 165 (1st Dep't 1935), *aff'd* 277 N. Y. 681, 14 N. E. 2d 388 (1938); Logan, *supra* n. 1, at p. 259. With the statements in the above cases, compare *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56, 58 (1930), in which it was said "There may be literary property in a particular combination of ideas or in the form in which ideas are embodied. There can be none in the ideas." An allegation of novelty and concreteness is not enough; the idea must actually be novel and concrete. Plus Promotions, Inc., v. R. C. A. Mfg. Co., 49 F. Supp. 116 (S. D. N. Y. 1943).

has been held insufficient consideration for a contract.<sup>4</sup> These decisions, however, have been subject to criticism.<sup>5</sup> Dicta in other cases<sup>6</sup> and a few holdings<sup>7</sup> indicate that an idea which is not property may be protected by contract.

The first Missouri case on the subject is *Brunner v. Stix, Baer, and Fuller*.<sup>8</sup> There it was said that disclosure of a new and useful idea, or one thought to be useful, was sufficient consideration for the promise to pay for such disclosure. The court also stated specifically that the decision rested on a contract basis and not on a property basis.

The instant case follows the decision in the *Brunner* case. The court points out that the idea is in concrete form, was useful to the defendant, and from the standpoint of use, was new to the defendant. The decision is made easier by the service rendered by the plaintiff, the court saying, "Certainly, when we have the additional factor . . . of the use of the plaintiff's services (which covered a period of six weeks) in instructing defendant how to put this plan in operation . . . we have proper subject matter for protection by contract."<sup>9</sup> In the light of the *Brunner* case, this hardly seems necessary to the decision. If necessary, one might question whether it is a valid ground on which to put the decision, the services being of such short duration and the defendant's experience such that production problems probably could have been solved without the plaintiff's aid.

JOSEPH J. RUSSELL

4. *Masline v. New York, N. H. & H. R. Co.*, 95 Conn. 702, 112 Atl. 639 (1921); *Singer v. Karron*, 162 Misc. 809, 294 N. Y. Supp. 566 (Mun. Ct. 1937); *Shapiro v. Press Publishing Co.*, 235 App. Div. 698, 255 N. Y. Supp. 899 (2d Dep't 1938); *Soule v. Bon Ami Co.*, 201 App. Div. 794, 195 N. Y. Supp. 574 (2nd Dep't 1922), *aff'd* 235 N. Y. 609, 139 N. E. 754 (1923).

5. The *Masline* case is criticized in 19 MICH. L. REV. 874 (1921). The *Soule* case is criticized in 8 CORN. L. Q. 246 (1923).

6. *Lueddecke v. Chevrolet Motor Co.*, 70 F. 2d 345 (C.C.A. 8th 1934); *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 Atl. 436 (Ch. 1906) *aff'd* 75 N. J. Eq. 623, 73 Atl. 1118 (Ct. Err. & App. 1909); *Keller v. American Chain Co.*, 255 N. Y. 94, 174 N. E. 74 (1930); *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264, 30 N. E. 506 (1892) (affirming the decision rendered in 52 Hun. 161, 5 N. Y. Supp. 131 (Sup. Ct. 1889)).

7. *Elfenbein v. Luckenbach Terminals, Inc.*, 111 N. J. L. 67, 166 Alt. 91 (1933); *Alberts v. Remington-Rand, Inc.*, 175 Misc. 486, 23 N. Y. S. 2d 892 (Sup. Ct. 1940) (action on implied contract denied because idea not concrete, but action on express contract upheld); *High v. Trade Union Courier Publishing Corp.*, 69 N. Y. S. 2d 526 (Sup. Ct. 1946).

8. 352 Mo. 1225, 181 S. W. 2d 643 (1944). This case was relied on by both parties in the principal case, and was strongly relied on by the court in its decision. The plaintiff devised an employee's sales campaign and contest in order to secure new customers and charge accounts. The defendant agreed to use the plan and pay the amount found to be the reasonable value after the plan was tried. Despite its success, the defendant refused to pay for it, claiming there was no consideration for the promise to pay.

9. *Schonwald v. F. Burkhart Mfg. Co.*, *supra*, p. 13.

CONSTITUTIONAL LAW—RIGHT TO COUNSEL UNDER DUE PROCESS OF LAW CLAUSE  
OF THE FOURTEENTH AMENDMENT

*Foster v. Illinois*<sup>1</sup>

Petitioners were convicted in 1935 of burglary and larceny upon a plea of guilty. The record states that petitioners were advised of their rights of trial and the consequences of a plea of guilty but persisted in their respective pleas, which were then received. In 1946, petitioners proceeded by writ of error in the Supreme Court of Illinois to test the validity of sentences imposed, contending that the record failed to show compliance with the due process of law clause of the Fourteenth Amendment in that petitioners were not offered assistance of counsel. The Supreme Court of Illinois denied the writ.

On *certiorari* to the Supreme Court of the United States, the judgment was affirmed. The failure of the record to show an offer of counsel, standing by itself, with no other circumstances to indicate "that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement,"<sup>2</sup> does not violate "rights essential to a fair hearing"<sup>3</sup> under the due process clause of the Fourteenth Amendment.

The Sixth Amendment provides that, in federal courts, a defendant in a criminal prosecution has a right to the assistance of counsel.<sup>4</sup> However, the Supreme Court in *Powell v. Alabama*<sup>5</sup> first recognized that the right of assistance of counsel also falls within the requirements of due process of law as guaranteed by the Fourteenth Amendment and is thus applicable to prosecutions in state courts.<sup>6</sup> In that case the defendants were charged with rape, said to have occurred on March 25, 1931. The indictment was returned on March 31 and trial resulting in conviction occurred on April 6. The defendants were non-residents, had no friends or relatives within Alabama, were given no opportunity to obtain counsel, and no attorney was definitely designated to appear on their behalf until the day of the trial. In addition, defendants were young, illiterate, and surrounded by hostile sentiment. The Supreme Court, by Justice Sutherland, stated "that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary

1. 67 Sup. Ct. 1716 (1947).

2. *Id.* at 1718.

3. *Id.* at 1719.

4. "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Johnson v. Zerbst*, 304 U. S. 458 at 463 (1938).

5. 287 U. S. 45 (1932).

6. In *Twining v. New Jersey*, 211 U. S. 79 at 99 (1908), it is said that the personal rights enumerated by the first eight amendments may or may not fall under the due process clause of the Fourteenth Amendment, but if they do, it is not because of their enumeration, but because they are, by their nature, included in the concept of due process of law.

requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."<sup>7</sup> In *Palko v. Connecticut*,<sup>8</sup> Justice Cardozo stated that the decision in the *Powell* case "turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."<sup>9</sup> On the other hand, in *Grosjean v. American Press Co.*,<sup>10</sup> the court said ". . . in *Powell v. Alabama* . . . we concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."<sup>11</sup>

Ten years after the *Powell* case, in *Smith v. O'Grady*,<sup>12</sup> it was held that a conviction by which the due process clause was violated through a denial of counsel, could be collaterally attacked by means of a writ of *habeas corpus*.<sup>13</sup>

Then in 1942 what had come to be called the rule of *Powell v. Alabama* was considerably shaken. In *Betts v. Brady*,<sup>14</sup> the petitioner pleaded not guilty to a charge of robbery after his request for the assistance of counsel was denied, it being the practice to furnish counsel for indigent defendants only in prosecutions for murder and rape. He was convicted after a futile attempt at representing himself. Petitioner had been convicted of larceny some years before, was a person of ordinary intelligence but of very little education. Justice Roberts, speaking for the court, denied petitioner's writ of *habeas corpus* and refused to impose a rigid requirement that a state furnish counsel in every case. A review of the history of the problem indicated to him that it was a matter of legislative policy and not a fundamental right and that great difficulty would arise in distinguishing crimes of different magnitude were that to be taken into consideration.<sup>15</sup> Language such as that by Justice Cardozo in *Palko v. Connecticut*, quoted above, was freely referred to and the court concluded by saying that "while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."<sup>16</sup> A vigorous dissent by Justice Black contended that the right to counsel

7. *Powell v. Alabama*, 287 U. S. 45 at 71 (1932).

8. 302 U. S. 319 (1937).

9. *Id.* at 327.

10. 297 U. S. 233 (1936).

11. *Id.* at 243.

12. 312 U. S. 329 (1941).

13. *Williams v. Kaiser*, 323 U. S. 471 (1945) is an interesting case in this connection.

14. 316 U. S. 455 (1942).

15. Mr. Edward S. Corwin in his work, *THE CONSTITUTION AND WHAT IT MEANS TODAY*, at p. 189, n. 12, says "The result (in *Betts v. Brady*) may have been influenced in some measure by the known high character of the trial judge, who acted, as the state law permitted in the circumstances, without a jury."

16. *Betts v. Brady*, 316 U. S. 455 at 473 (1942).

is fundamental and could be extended to include serious non-capital offenses without difficulty.

In 1945, the fact that the crime charged was a capital offense played an important role in the companion case of *Williams v. Kaiser*<sup>17</sup> and *Tomkins v. Missouri*.<sup>18</sup> In the former, the petitioner, who was charged with armed robbery (a capital offense in Missouri), requested counsel but none was appointed. He then pleaded guilty, being incapable of making his own defense adequately. The Supreme Court held that such facts showed a denial of a "fundamental" constitutional right, with emphasis on the fact that the crime charged was a capital offense. Moreover, the court stated in a note appended to the decision that it was not alleged by the petitioner that he "was denied a fair trial, that he was ignorant, that he was innocent, or that the court was prejudiced. But it is not apparent how the addition of any such allegations to the petition would be relevant to petitioner's cause of action based on the constitutional right to counsel."<sup>19</sup> In *Tomkins v. Missouri*, the petitioner was accused of murder in the first degree, did not request counsel due to ignorance of his right to do so, did not have the assistance of counsel, pleaded guilty and was sentenced to life imprisonment. The court held no request was necessary, saying counsel "must be assigned to the accused if he is unable to employ one and is incapable adequately of making his own defense."<sup>20</sup> Emphasis was again laid on the crime charged having been a capital offense.<sup>21</sup>

These two cases seemingly showed a disposition on the part of the court to regard this right of counsel as a fundamental and thus absolute right, rather than as an ingredient of a fair trial, at least where capital offenses are involved.<sup>22</sup> Moreover, in *Rice v. Olson*,<sup>23</sup> decided the same term, the right to counsel was said to be a fundamental right in a case involving a non-capital offense, although the need for counsel due to a complex jurisdictional question was emphasized.

In 1946, the case of *Canizio v. New York*<sup>24</sup> presented the picture of a nineteen-year-old boy, indigent, poorly educated, orphaned, and ignorant of his right to counsel, who was indicted on May 25, 1931 for three offenses, robbery in the first degree, grand larceny in the second degree, and assault in the second degree.

17. 323 U. S. 471 (1945).

18. 323 U. S. 485 (1945).

19. *Williams v. Kaiser*, 323 U. S. 471 at 479 (1945).

20. *Tomkins v. Missouri*, 323 U. S. 485 at 487 (1945).

21. "The nature of the charge emphasizes the need for counsel. . . . And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses (of murder in the second degree and manslaughter) are not simple but ones over which skilled judges and practitioners have disagreements. The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify. . . ." *Id.* at 488.

22. "It has never been suggested until now that Madison would have done better to compress the Fourth and Sixth Amendments, as well as a large part of the Fifth, into the brief requirement of a 'fair trial.'" Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U. L. Q. 497 (1942).

23. 324 U. S. 786 (1945).

24. 327 U. S. 82 (1946).



Arraignment and a plea of not guilty followed the same day. On June 1, the plea of not guilty was withdrawn and a plea of guilty to first degree robbery entered, after which the prosecutor withdrew the other charges. On June 17, a notice of appearance of counsel was filed and on June 19, with counsel present, petitioner was sentenced. It was held that this constituted sufficient representation by counsel since counsel could have moved to withdraw the plea of guilty, which motion could have been granted, on the day of sentence. Justice Murphy dissented, saying the right to counsel would be meaningless unless counsel was available at every step of the proceeding.<sup>25</sup> Moreover, he said, the plea of guilty, had it been withdrawn, might have been used in evidence against the petitioner under New York law. A dissent by Justice Rutledge rested solely on the latter point.

In 1947 the court has indicated that the fair trial rule will be adhered to in determining whether a constitutional right is infringed by conviction of a crime in a state court without the assistance of counsel. This is so with regard to both capital and non-capital offenses.<sup>26</sup> Thus, no broad generality can be said to state the law. The result in a particular case appears to depend upon a number of circumstances, one or more of which must appear in order for the court to hold that the due process clause was violated by failure to furnish the defendant with counsel. These circumstances are: (1) the nature of the offense, (2) the age of the defendant, (3) the ability of the defendant to represent himself insofar as intelligence and education play a part, (4) the legal technicalities in defining the crime charged, (5) the ability of the defendant to procure counsel himself, (6) the opportunity given defendant to procure his own counsel.

A brief dissent was entered by Justice Black in the principal case saying this was a regrettable continuation of the view taken in *Betts v. Brady*. Justice Rutledge, in the other dissenting opinion, stated that the failure of the record to show an offer of counsel, plus the fact that Illinois law, in other than capital offenses, did not require such an offer, must lead to the conclusion that petitioner was deliberately denied such assistance and that without that assistance, a fair trial was impossible due to petitioner's poverty and ignorance and the complexities of the offenses charged. Justice Rutledge also made reference to the companion case of *Gayes v. New York*,<sup>27</sup> in which he also entered his dissent. The facts there showed that petitioner, on July 15, 1938, at the age of sixteen, was arraigned on an indictment for third degree burglary and petty larceny. He was asked if he desired counsel and said he did not, following which he pleaded guilty. After his release, petitioner, then nineteen years old, on October 14, 1941, pleaded guilty to a new charge of burglary in the third degree at which time he again was not assisted by counsel. His sentence was that of a second offender and he then attacked the validity of the first conviction and, through its alleged invalidity, the legality of his sentence as a second

25. Cf. *Hawk v. Olson*, 326 U. S. 271 (1945).

26. *De Meerleer v. Michigan*, 67 Sup. Ct. 596 (1947) (capital offense); *Foster v. Illinois*, 67 Sup. Ct. 1716 (1947) (non-capital offense—the principal case).

27. 67 Sup. Ct. 1711 (1947).

offender. This attack, under New York law, had to be by motion to vacate the judgment against him in the court in which he was convicted. His motion was denied and on certiorari to the Supreme Court of the United States, the judgment was affirmed. The court, by Justice Frankfurter, said the *Canizio* case controlled the decision, since an opportunity had existed to meet the legal implications of the plea before sentence was imposed, in that petitioner had full opportunity to contest any infirmity in the earlier sentence when the fact of that sentence was included in the second offender sentence. Justice Rutledge wrote a convincing dissenting opinion in which he decried such a doctrine of forfeitures and stated that the *Canizio* case had no relevance to this case on the facts or the law. The court's decision, he said, had the effect of inverting the state procedure, inasmuch as petitioner had followed the appropriate method for attacking his second sentence. It might also be pointed out that when petitioner, as the court said, accepted his second sentence without raising the question of the validity of his previous conviction, he did so without the benefit of counsel.

The decisions in the *Gayes* case and the principal case illustrate the diversity of opinion possible in what is regarded as a fair trial. They serve to point up very well Justice Black's protest in the principal case of the result produced by "this Court's day-to-day opinion of what kind of trial is fair and decent. . . ." <sup>28</sup> But if violation of due process by denial of the benefits of counsel is to depend on whether, overall, a fair trial was had, and it is argued (as it well can be) that a fair trial is well-nigh impossible without the assistance of counsel, it would seem that the court should be more demanding in its conception of fairness than it has appeared to be in the *Gayes*, *Canizio*, and principal case.

ROBERT L. HAWKINS, JR.

CONSTITUTIONAL LAW—VALIDITY OF STATE LAW PERMITTING COURT AND  
PROSECUTION TO COMMENT UPON FAILURE OF ACCUSED IN CRIMINAL  
CASE TO TESTIFY IN OWN BEHALF  
*Adamson v. People of California*<sup>1</sup>

Admiral Dewey Adamson, a citizen of the United States, was convicted, without recommendation for mercy, by a jury in a superior court of the State of California of murder in the first degree.<sup>2</sup> The sentence of death was affirmed by the supreme court of the state.<sup>3</sup> An appeal to the Supreme Court of the United States was granted.<sup>4</sup> The defendant did not take the stand in his own defense. The court

28. *Foster v. Illinois*, 67 Sup. Ct. 1716 at 1719 (1947).

1. 67 Sup. Ct. 1672 (1947).

2. The facts leading to the finding of Adamson guilty have been omitted from this note. The present note will only deal with the constitutional law questions involved as presented to the Supreme Court of the United States.

3. 27 Cal. 2d 478, 165 Pac. 2d 3 (1946).

4. Judicial Code § 237, 28 U. S. C. § 344 (1940). Authorizes appeal to the Supreme Court from the final judgment of a state when the validity of a state statute is questioned on the ground of its being repugnant to the Constitution of the United States. Has been held to cover a state constitutional provision.

and the prosecution commented on this fact to the jury, this being permissible under the state constitution<sup>5</sup> and penal code,<sup>6</sup> and it is upon these provisions that Adamson bases his contentions of unconstitutionality before the Supreme Court of the United States.

Adamson was also charged in the information with former convictions for burglary, larceny and robbery. He answered the information and admitted he had suffered the previous convictions. This barred allusion to these charges of convictions on the trial.<sup>7</sup> Thus Adamson, who was a repeated offender, was forced to choose between the risk of having his prior offenses disclosed to the jury or of having the attention of the jury drawn to the fact that he did not testify by comment from the court and prosecutor and it being told that it could draw harmful inferences from uncontradicted evidence that could only be denied or explained by the defendant.

Adamson urged "that the provision of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' is a fundamental national privilege or immunity protected against state abridgment by the Fourteenth Amendment or a privilege or immunity secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the Federal Bill of Rights."

Adamson also relied upon the due process of law clause of the Fourteenth Amendment to invalidate the provisions of the California law<sup>8</sup> permitting comment by court or prosecutor on failure to testify to the jury and allowing the jury or court to consider that fact), and "as applied (a) because comment on failure to testify is permitted, (b) because he was forced to forego testimony in person because of danger of disclosure of his past convictions through cross-examination and (c) because the presumption of innocence was infringed by the shifting of the burden of proof to him in permitting comment on his failure to testify."

5. CAL. CONST., Art. I, § 13: ". . . but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him maybe commented upon by the court and by the counsel, and may be considered by the court or the jury. . . ."

6. CAL. PENAL CODE, § 1323: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

Note: New Jersey, Connecticut, Ohio and Vermont have similar statutes. 8 WIGMORE, EVIDENCE, p. 413 (3d ed. 1940).

7. CAL. PENAL CODE, § 1025: ". . . In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." Note: California courts hold this section not to prohibit the prosecution from bringing out on cross-examination the fact that the defendant has been previously convicted. Such testimony to be used as impeachment. *People v. Adamson*, 27 Cal. 2d 478, 494, 165 P. 2d 3, 11 (1946); *People v. Braun*, 14 Cal. 2d 1, 6, 92 P. 2d 402 (1939).

8. See notes 5 and 6 *supra*.

The instructions and comments by the California court and prosecutor should be noted here before the majority opinion of Mr. Justice Reed and the dissenting opinion of Mr. Justice Black are considered. The trial court said "It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him . . . ; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses." The Supreme Court of California<sup>9</sup> held this instruction general but alright, and indicated that the jury should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.<sup>10</sup>

During the trial the prosecutor commented seven times in his oral argument on the fact of defendant's silence. During his closing argument it was said, "In conclusion, I am going to make this one statement to you: counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say under oath, 'I am not guilty?' Not one word from him, and not one word from a single witness. I leave the case in your hands." The California Supreme Court said that this was close to the borderline as it could be construed as a declaration that the jury should infer guilt solely from defendant's silence.

Mr. Justice Reed, speaking for the majority, upheld the constitutionality of the California statute.<sup>11</sup> In answer to defendant's first contention, the Fourteenth Amendment was held not to make effective the clause of the Fifth Amendment in question, *i.e.*, "no person shall be compelled in any criminal case to be a witness against himself," as a protection against state action. The court noted that "the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States," and held that as a matter of words, "this left a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship." With regard to the second contention

9. 27 Cal 2d 478, 165 P. 2d 3 (1946).

10. Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40, 58 (1932). If comment is allowed ". . . It should . . . be made as clear as the English language can make it that the burden of proof is always on the prosecution, that the accused is never obliged to testify, and that the only inference which may be properly drawn from a failure to testify is that which a competent person would naturally draw under all the circumstances."

11. Note that the court does not indicate what presumption of validity is given this state statute. It is probable that the doctrine of reasonable doubt was applied. Query, if this is correct under the statement of *Prince v. Massachusetts*, 321 U. S. 158, 173 (1944). There religious freedom was involved and Mr. Justice Murphy believed that the court was not aided by any strong presumption of validity of the statute. Should not the same rule apply as to personal rights?

it was held that the due process clause does not protect the accused's freedom from giving testimony by compulsion in state trials, and "for the state to require testimony by the accused is not necessarily a breach of a state's obligation to give a fair trial."

In a concurring opinion, Mr. Justice Frankfurter noted that "Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violated the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process.'"

This decision is a re-affirmance of the holding of *Twining v. New Jersey*<sup>12</sup> and shows the court reluctant to extend the doctrine pronounced in *Gitlow v. State of New York*, *Near v. State of Minnesota ex rel. Olson*, *DeJonge v. Oregon*, and *Hamilton v. Regents of the University of California*.<sup>13</sup> These latter cases indicated that the court would, under certain circumstances, hold that the Fourteenth Amendment operated to apply some of the first eight amendments to the states. The decision in the principal case shows that as yet the court is not ready to make a blanket holding that all the Bill of Rights limit state action.

Mr. Justice Black wrote the dissenting opinion,<sup>14</sup> to which was attached an Appendix setting forth the historical background<sup>15</sup> of the first section of the Four-

12. 211 U. S. 78 (1908). *Twining* was convicted of a high misdemeanor in deceiving a state bank examiner. A state statute allowed comment on failure to testify. The United States Supreme Court, speaking through Mr. Justice Moody, said the power to free defendants in state trials from self-incrimination was beyond the scope of the privileges and immunities clause of the Fourteenth Amendment and the due process clause does not protect the accused's freedom from giving testimony by compulsion in state trials.

13. *Gitlow* case, 268 U. S. 652 (1925); *Near* case, 283 U. S. 697 (1931); *De Jonge* case, 299 U. S. 353 (1937); *Hamilton* case, 293 U. S. 245 (1934). In the *Gitlow* case the Supreme Court, without argument, "assumed" that freedom of speech and of the press, which are protected by the First Amendment from abridgment by Congress, are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states. The *Near* case dealt with freedom of the press. In the *De Jonge* case the right of freedom of assembly was likewise protected. The *Hamilton* case dealt with religious liberty and freedom of teaching.

14. Mr. Justice Murphy wrote a short dissenting opinion in which Mr. Justice Rutledge concurred. Mr. Justice Douglas joined in with Mr. Justice Black.

15. The historical treatment by Mr. Justice Black only deals with the legislative origin of the first section of the Fourteenth Amendment. It contains direct quotations from the official committee reports of the Joint Committee on Reconstruction, as well as the debates in Congress taken from the congressional reports. A representative statement is one reported in the Senate debate on May 23, 1866, ". . . the first eight amendments . . . do not operate in the slightest degree as a restraint or a prohibition upon state legislation. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the states and compel them at all times to respect these great fundamental Guarantees . . ." *supra* note 1 at 1703.

teenth Amendment. The dissent contended that the Court should place itself as nearly as possible in the condition of the men who framed the Fourteenth Amendment, and the majority is accused of refusing to appraise the relevant historical evidence of the intended scope of the first section of the Fourteenth Amendment. Mr. Justice Black deplores the practice of allowing the current conception of fundamental rights, as held by the Court, to dictate which of the Bill of Rights shall be held to apply to the various states through the medium of the Fourteenth Amendment.

The dissent points up the fundamental differences in views between it and the majority opinion. Using a historical argument the dissent maintains that all of the Bill of Rights were meant to be made to apply to the states by the first section of the Fourteenth Amendment. The majority view shows how the Court has actually brought about the application of some of the Bill of Rights to the states, *i.e.*, by a piecemeal application according to the individual views of the particular court at a particular period of time. Thus freedom of speech and press, freedom of assembly, and freedom of religion have been considered "fundamental" to the extent that the Court, at that particular time, would be willing to hold them protected by the Fourteenth Amendment from crippling legislation by a state. Not so the right not to be compelled to be a witness against himself.

The dissenting opinion is ended with, "In my judgment the people of no nation can lose their liberty so long as the Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights at its point of departure in interpreting and enforcing that Bill of Rights. . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written constitution."

CHARLES B. FITZGERALD

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CORPORATIONS—DISREGARDING CORPORATE ENTITY TO DISCLOSE EVASION OF  
JUDGMENT OF OUSTER

*State on inf. McKittrick v. Koon*<sup>1</sup>

The Barry County Burial Association, organized by one W. Bradley, and the instant respondents, Mr. and Mrs. W. D. Koon, was granted a *pro forma* decree, as a benevolent corporation, in 1934, and, immediately thereafter, exercised its presumed franchise of writing and selling policies of funeral and burial insurance in Missouri. In 1940, however, the statute<sup>2</sup> under which the association had been

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1. 201 S. W. 2d 446 (Mo. 1947).  
2. MO. REV. STAT. § 5014 (1929).

formed, was declared unconstitutional and void,<sup>3</sup> and the attorney general filed an information in *quo warranto* against the association's creators, charging them with unlawfully exercising the aforementioned franchise and with purporting to be a corporation.<sup>4</sup> Upon request, the attorney general granted the respondents ninety days to return certain monies to the association's policy-holders, in exchange for respondents' promise to confess judgment of ouster, and, on Jan. 12, 1942, the supreme court entered final judgment, ousting the respondents from holding themselves out to be a corporation and from further usurping the franchise of writing and selling funeral and burial insurance in Missouri. However, unknown to informant and the court, the respondents and their daughter had duly incorporated the Barry County Burial Association under the laws of Arkansas in the interim; and, subsequent to the judgment of ouster, the records of their former ill-fated venture were transferred to the Arkansas association, new policies were issued in exchange for the old ones, and the identical business was conducted with renewed vigor. When knowledge of these facts came to informant, the respondents were proceeded against for contempt, the basic contention being that they had knowingly violated the judgment of ouster. The supreme court unanimously sustained this contention and adjudged the respondents guilty of criminal contempt. Speaking through Conkling, J., the court declared that the corporate entity of the Arkansas association would be disregarded in this proceeding, as it had been used as a means of perpetrating a fraud upon the court.<sup>5</sup>

This conclusion elicits consideration of a problem which has warranted much attention since the turn of the century, namely, under what circumstances a court of law or equity<sup>6</sup> will disregard the corporate fiction,<sup>7</sup> for it is conceded that the use of the entity privilege of separate capacities is at all times subject to limitations of an equitable nature.<sup>8</sup>

Perhaps the best statement of the basic considerations which this question evokes was tersely set forth by Sanborn, J., in a much quoted federal case as follows:<sup>9</sup>

"A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but when the notion

3. State *ex inf.* Williamson v. Black, 347 Mo. 19, 145 S. W. 2d 406 (1940). The court found that § 5014 violated Mo. CONST. Art. 10, § 21 (1875).

4. As the Association had been organized as a "benevolent corporation," *supra* note 2, the respondents had neglected to comply with Mo. REV. STAT. §§ 6003, 6004 (1939) which set out certain prerequisites for engaging in the business of insurance.

5. *Supra* note 1 at p. 455.

6. It is suggested in 10 MINN. L. REV. 598 (1926) that, originally, both courts and legal scholars contended that only a court of equity could reach the individuals behind the corporate entity.

7. 1 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (perm. ed. 1931); Wormser, *Piercing the Veil of Corporate Entity*, 12 COL. L. REV. 496 (1912); notes, 37 MICH. L. REV. 314 (1938); 36 YALE L. J. 254 (1926).

8. BALLANTINE, CORPORATIONS § 122 (Rev. ed. 1946).

9. United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 255 (E. D. Wisc. 1905).

of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Using this broad statement as a beacon light, the courts of this country have "pierced the corporate veil," or, abhorring such strong invective, have "drawn aside the corporate cloak" in instances where there has been an attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors,<sup>10</sup> where the corporate entity has been used to evade contracts,<sup>11</sup> where there has been a transfer of assets to or by a corporation to hinder, delay, or defraud creditors,<sup>12</sup> where the corporate entity has been employed to evade statutes,<sup>13</sup> etc. It will be readily seen that these situations fall smoothly within the scope of Judge Sanborn's broad declaration; in each instance, the purpose for which the corporation was formed was to abuse the privileges resulting from incorporation, and the creators were, therefore, rightly denied the shield of the corporate entity.

Applying this analysis to the *Koon* case, however, it is a little less than clear how the court reached its conclusion. The respondents had been ousted from selling funeral and burial insurance in Missouri solely because the statute under which they had incorporated was unconstitutional. Respondents had made a *bona fide* attempt to comply with Missouri's laws and had engaged in pursuits expressly permitted by the statute in question; if mistake there was at this point, it was a reasonable mistake caused by justifiable reliance in a statute duly enacted by this state's legislature.

After ouster, respondents then went into Arkansas and duly incorporated under the laws of that state. No law of Missouri was violated by the Arkansas corporation's engaging in selling funeral insurance in Missouri; in fact, the court plainly stated<sup>14</sup> that the question was not whether the Arkansas association was doing business in Missouri without a license or without complying with Missouri laws

10. *Dixie Coal Mining & Manufacturing Co. v. Williams*, 221 Ala. 331, 128 So. 799 (1930); *Mosher v. Salt River Valley Water Users' Association*, 39 Ariz. 567, 8 P. 2d 1077 (1932); *Shea v. Leonis*, 14 Cal. 2d 666, 96 P. 2d 332 (1939); *Biscayne Realty & Ins. Co. v. Ostend Realty Co.*, 109 Fla. 1, 148 So. 560 (1933); *Hanson v. Bradley*, 298 Mass. 371, 10 N.E. 2d 259 (1937); *Rogers-Elbert Co. v. Century Construction Co.*, 131 N. J. Eq. 67, 23 A. 2d 905 (1941).

11. *Yost v. Patrick*, 245 Ala. 275, 17 So. 2d 240 (1944); *Blank v. Olcovich Shoe Corp.*, 20 Cal. App. 2d 456, 67 P. 2d 376 (1937); *Dairy Co-operative Ass'n. v. Brandes Creamery*, 147 Ore. 488, 30 P. 2d 338 (1934); *Contra: Berry v. Old South Engraving Co.*, 283 Mass. 441, 186 N. E. 601 (1933).

12. *Sampsell v. Imperial Paper & Color Corp.*, 313 U. S. 215 (1941); *Sweet v. Watson's Nursery*, 33 Cal. App. 2d 699, 92 P. 2d 812 (1939); *Riesen v. Maryland Casualty Co.*, 153 Fla. 205, 14 So. 2d 197 (1943); *Central Motors & Supply Co. v. Brown*, 219 Minn. 467, 18 N. W. 2d 236 (1945); *Cohen v. Dwyer*, 133 N. J. Eq. 226, 31 A. 2d 764 (1943).

13. *Paymer v. Commissioner of Internal Revenue*, 150 F. 2d 334 (C.C.A. 2nd 1945); *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (E. D. Wis. 1905); *People v. Allen*, 47 Cal. App. 2d 735, 118 P. 2d 927 (1941); *People ex rel. Potter v. Michigan Bell Telephone Co.*, 246 Mich. 198, 224 N. W. 438 (1929); *In re Patterson*, 350 Pa. 601, 39 A. 2d 832 (1944).

14. *Supra* note 1 at p. 454.



respecting foreign corporations.<sup>15</sup> The respondents were only barred from exercising a franchise which had not been granted to them by a valid statute, but after the privilege of selling funeral insurance had been legally conferred upon them, whether by Arkansas or Missouri, it would seem that, logically, no violation of the judgment of ouster could follow. It was not claimed by the court that persons other than these particular respondents could not have incorporated under Arkansas law and thereafter have engaged in writing and selling funeral insurance in Missouri. The purpose of the respondents in thus incorporating was to embark in a legitimate enterprise, and there is extreme difficulty in finding any abuse of the corporate privileges.

Cases upon this precise point are few, but the language employed by courts in which this question has presented itself also would seem to point to an opposite result. In *Belding v. State*,<sup>16</sup> for example, the defendant had been practicing the profession of medicine without having obtained a license required by law or a certificate of qualification from the state board of medical examiners. The court decreed that the defendant be prohibited from practicing such profession, but, in a significant *dictum*, averred that this decree would not exclude the defendant from practicing medicine *after*<sup>17</sup> he had become legally qualified.

The issue next arose in a Texas Civil Appeals case.<sup>18</sup> In that case, a judgment of *quo warranto* had declared void all orders issued by a county school board with reference to annexing common school districts to an independent district, the orders not being issued in compliance with a particular statute. In subsequent proceedings, the court held that the judgment, although binding upon all parties affected thereby, did not deprive the county board of the right thereafter to proceed to create a new rural school district under authority of statute.

The case of *State ex inf. Gentry v. American Can Co.*,<sup>19</sup> decided by Missouri's Supreme Court, is also sufficiently close in point to bear careful consideration. There, a judgment of ouster and dissolution had been entered against a Missouri corporation for abuse of its corporate franchise. Immediately thereafter, a new corporation, bearing the same name, was duly organized under Missouri's laws, and the attorney general proceeded against its creators for contempt, alleging an attempt to defeat the ouster judgment. The supreme court tersely stated that after a judgment of ouster and dissolution had been rendered against a private corporation, it was a matter of indifference to the state that a new corporation, complying with

15. It is conceded that a foreign corporation which abuses its privileges and franchises within Missouri, or violates its laws, may be ousted in *quo warranto*. *State on inf. Taylor v. American Ins. Co.*, 200 S. W. 2d 1 (Mo. 1947); *State ex rel. Barrett v. First National Bank*, 297 Mo. 397, 249 S. W. 619 (1923); *State ex inf. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S. W. 645 (1903).

16. 214 Ala. 380, 107 So. 853 (1926).

17. Italics added.

18. *County Board of School Trustees of Hale County v. Mayfield Common School Dist.*, 140 S. W. 2d 956 (Tex. App. 1940).

19. 12 S. W. 2d 437 (Mo. 1929).

the general laws relating to the organization of corporations, had appropriated the name of the extinct corporation and was conducting a similar business.

Thus, these three cases would seem to be in accord upon the proposition that once the laws of a state have been complied with, the subsequent operation of a legitimate business will not be violative of a prior judgment of ouster, entered because statutory requirements had not been met. The facts of the *Koon* case would seem to present even a stronger argument for so holding, for, in the cases just referred to, the parties in question clearly were not complying with the law; in the principal case, on the other hand, the respondents had complied, to the letter, with the statute which then existed, and certainly could not have reasonably contemplated that it subsequently would be declared unconstitutional. Thus, the decision in the principal case would seem in direct conflict with the reasoning<sup>20</sup> of the cases just considered.

The holding of the *Koon* case, however, might be buttressed by *State Board of Funeral Directors and Embalmers v. Cooksey*.<sup>21</sup> In this case, the license of defendant, a funeral director, was revoked, and the court prohibited him from engaging, either directly or indirectly, in the business of funeral directing. The facts are not clear, but it seems that a corporation was thereafter formed under applicable statutes, and that the defendant was elected an officer. When the corporation engaged in funeral directing, the defendant was immediately cited for contempt, and the Florida court adjudged him guilty thereof, declaring that the corporation had been employed as a means of evading the restraining order.

However, as support for the *Koon* case, this decision is weakened by the fact that the defendant was not licensed as required by law to perform the duties of a funeral director, and, although not clear, there seems to have been some evidence that he had performed such services for the corporation. In the *Koon* case, however, the respondents had met all statutory requirements. They had duly incorporated the Arkansas association and were engaged in a profession which violated no law of Missouri. *Quaere*, therefore, whether in this case, the Missouri court was justified in disregarding the corporate entity.

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20. The language employed in *State ex inf. Williamson v. Black et al.*, 347 Mo. 19, 145 S. W. 2d 406 (1940), and *State v. Mutual Mortuary Association*, 166 Tenn. 260, 61 S. W. 2d 664 (1933), both "burial association" cases, would also seem to indicate that once the association's members had incorporated under the proper statute, the state would no longer be concerned. Both courts conceded that the association was subject to ouster, but suggested that the trial court allow reasonable time to permit re-incorporation under applicable statutes. *Accord*, *State ex rel. Troy v. Lumbermen's Clinic*, 186 Wash. 384, 58 P. 2d 812 (1936).

21. 21 So. 2d 542 (Fla. 1945).

CRIMINAL LAW—DISTINCTION BETWEEN LARCENY AND EMBEZZLEMENT IN  
INDICTMENT AND INFORMATION REMOVED BY STATUTE

*State v. Ward*<sup>1</sup>

In a prosecution for the theft of an automobile, the defendant, who had been charged by information with the larceny thereof, was convicted of embezzlement of the vehicle. The defendant had been left in charge of his employer's house and Ford pick-up truck, and he had taken the truck to Colorado and sold it. At the trial, the court directed the jury to find the defendant not guilty of larceny and submitted to them the question of embezzlement. The jury returned a verdict finding the defendant not guilty of larceny, and guilty of embezzlement. The defendant contended that the verdict was erroneous because it was not a general verdict in that it did not contain the words "as charged in the information" after the finding of guilty, and as a special verdict it was bad because it did not contain a finding of all the essential elements of the crime of embezzlement.

On appeal, the Supreme Court of Missouri held that under Section 4842, Missouri Revised Statutes, 1939, a person who had been charged with larceny, could be found guilty of embezzlement, where the proof was such as to warrant a conviction thereon, and consequently, if the verdict made reference to the information, it would be subject to attack for not being responsive to it, because the charge therein was larceny. They held that the verdict did what the statute authorized by finding the defendant not guilty of larceny and guilty of embezzlement, and that it was in form a general verdict specifically authorized by the statute.

For many years, the close relationship between the crimes of larceny and embezzlement has created a problem for the courts, and the distinction between the two has caused considerable controversy. The English courts early recognized the crime of larceny, but it was restricted to the case where there had been a direct overt taking of the goods from another's possession without his consent.<sup>2</sup> From time to time, cases would arise in which, because of the peculiar circumstances, the facts were such that the party charged could not be convicted, and with each new case, the courts were forced to be more liberal in their interpretation of the law, or Parliament would have to remedy the situation by statute. So it was that in 1473, in the "carriers" case,<sup>3</sup> the court took the view that although a carrier received the property lawfully from the owner, yet when he broke open the package the property immediately reverted to the "possession" of the consignor, and the removal of the merchandise then provided the technically necessary "trespass," and they held the defendant guilty of larceny. This extension of the law opened the door for the inclusion of many types of behavior which had previously been treated as relatively innocuous.<sup>4</sup>

1. 202 S. W. 2d 46 (Mo. 1947).

2. *Rex v. Raven*, Kelyng 24, 84 Eng. Rep. 1065 (1663); 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 498 (2d Ed. 1923).

3. *Carriers Case*, 2 East P. C. 697 (1473).

4. HALL, THEFT, LAW AND SOCIETY 4 (1935).

In 1529 it was definitely established that where a servant received property from his master and converted it, such was larceny, because the servant did not have possession thereof, but merely custody.<sup>5</sup> However, property received from a third person for the master was in the servant's possession, and he was therefore not guilty of a felony if he converted it.<sup>6</sup> Consequently, after 1529, one who converted goods entrusted to him by his master, or a bailee who broke open packages and then converted the contents, could be prosecuted for felony, but this still left a great area within which one could convert property rightfully belonging to another and be free from prosecution therefor. Except for a statute in 1541<sup>7</sup> dealing with cheating by false token, the law of theft remained unchanged until in the 18th century, when, due to the expanding economic enterprises in England, certain cases arose with which the law was unable to cope.

With the organization of the Bank of England in 1694, it became necessary for clerks to handle large sums of money, and as much of this money was presented to the clerks by third persons, a conversion thereof would not render the clerk liable in a criminal action. Consequently, in 1742, Parliament passed the first embezzlement statute.<sup>8</sup> However, these statutes were special in nature and it was not until 1799 that Parliament found it necessary to pass a general embezzlement statute.<sup>9</sup> By the means of the various statutes which were passed as the occasion arose, Parliament as well as the governing bodies in the United States, have supplemented the common law of larceny, until the conversion of property belonging to another, regardless of the factor of possession, is a crime.

However, even though the statutory developments today are sufficient to cover the entire field of criminal conversion, still in cases in which it is somewhat difficult to distinguish between larceny and embezzlement, many indictments have failed because they charged the defendant with the commission of one crime (*i.e.*, larceny), while the facts brought out at the trial showed that he was guilty of another offense (*i.e.*, embezzlement). To remedy this situation, the Missouri Legislature enacted a statute which made it possible to charge one with larceny, and then if the facts showed that the defendant did actually take the goods in such a manner as to con-

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5. 21 HEN. VIII, c. 7 (1529).

6. 1 Hale, P. C. 668 (1736).

7. 33 HEN. VIII, c. 1 (1541).

8. 15 GEO. II, c. 13, sec. 12 (1742). However this statute only related to embezzlement by officers and servants of the Bank of England. But later a similar statute was passed which applied to officers or servants of the South Sea Company, 24 GEO. II, c. 11, sec. 3 (1751). This was followed by a third such statute which covered the employees of the post office, 5 GEO. III, c. 25 (1765).

9. 39 GEO. III, c. 85 (1799). This statute was brought about when the courts found themselves unable to convict one Joseph Bazeley, a teller for a firm of bankers, who had converted a note for 100 pounds given him by a third person. *King v. Bazeley*, 2 Leach 835, 168 Eng. Rep. 517 (1799). Even this statute only applied to servants and clerks and when in 1812, one Walsh, a stock broker (agent), could not be convicted when he converted a large sum of money given him to invest, Parliament passed legislation to cover such cases in the future. 52 GEO. III, c. 63 (1812).

stitute embezzlement, to convict him of that offense.<sup>10</sup> This did away with the necessity of having a new trial, and the possibility of the defendant being acquitted at both trials, which might otherwise arise in such a situation.<sup>11</sup> The constitutionality of this statute was brought into question upon several occasions, and in 1898, the Supreme Court of Missouri, in *State v. Thompson*<sup>12</sup> decided that where a defendant was charged with larceny and the facts showed that he was guilty of embezzlement, the jury could so find under the statute in question, and that said statute did not violate the Constitution of Missouri,<sup>13</sup> because "as the crime of embezzlement was a lower grade of larceny, and as the punishment was the same, and as less proof was necessary in a prosecution for embezzlement than for larceny, and as the same kind of evidence was admissible and the same defenses available in both cases, the defendant was not deprived of any right guaranteed by the constitution." However, in 1901 the Supreme Court of Missouri decided in *State v. Burks*<sup>14</sup> that a statute allowing one charged with embezzlement to be convicted of larceny was in conflict with Article II, Section 22 of the Missouri Constitution

10. MO. REV. STATUTES, c. 50, § 15 (1855): "If, upon the trial of any person indicted for embezzlement, it shall be proved that he took the property in question, in any such manner as to amount, in law, to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall return as their verdict that such person is not guilty of embezzlement, but is guilty of larceny, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if, upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount, in law, to embezzlement, he shall not by reason thereof, be entitled to be acquitted, but the jury shall return as their verdict, that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement. . . ."

11. In *Commonwealth v. O'Mally*, 97 Mass. 584 (1867) the defendant was indicted of larceny and acquitted. He later was indicted of embezzlement on the same facts and convicted, but on appeal the conviction was set aside on the grounds that the offense was larceny. Note, 20 COL. L. REV. 318, 323 (1920): "No more unseemly spectacle can exist in a court of justice than that of a defendant admittedly guilty of some sort of theft (in the broad sense of the term) who must nevertheless, either go free or receive a new trial merely because the particular character of his theft has not been properly set forth in the indictment."

12. 144 Mo. 314, 322, 46 S. W. 191, 194 (1898).

13. Mo. CONST. Art. II, Sec. 22 (1875).

14. 159 Mo. 568, 60 S. W. 1100 (1901). The statute involved in that case was Mo. REV. STAT. § 3551 (1889), which was intended to make the crime of embezzlement punishable as if it were larceny, and the case did not pertain to the statute in question. However, the court did in the *Burks* case, overrule the case of *State v. Broderick*, 70 Mo. 622 (1879) which allowed a conviction of larceny on a charge of embezzlement as per the statute in question. The court seemed to think that under such a statute, the defendant was not given an opportunity to know the nature of the crime with which he was accused, because the crime of larceny was a crime of a higher grade, requiring additional proof (*i.e.*, that of trespass in the taking of the property involved). When the *Thompson* case and the *Burks* case are considered together, it seems difficult to understand how the defendant is any more deprived of his right to know the nature of the crime with which he is charged in one case than in the other.

(1875) in that it deprived him of the right to know with what crime he was charged. The court in the *Burks* case, held that if there was any doubt as to whether the offense was embezzlement or larceny, there should have been a separate count in the indictment for each offense. Because of the ruling in the *Burks* case, the legislature amended the statute in question to leave out the part stating that if the defendant was charged with embezzlement, he could be convicted of larceny,<sup>15</sup> and the courts have accepted the statute on the strength of the decision in *State v. Thompson*, as to its constitutionality.

In the recent case of *State v. Roussin*<sup>16</sup> the question arose whether the defendant, who while employed by the city of St. Louis converted money collected by his department, and who was charged with larceny, could be found guilty of embezzlement. The court reversed the conviction, stating that such a conviction under the general larceny statute could not stand where the evidence established an embezzlement only.<sup>17</sup> However, in that case, the lower court failed to instruct the jury that if they found the facts to constitute the crime of embezzlement, to find the defendant not guilty of larceny and guilty of embezzlement, but merely told them to find the defendant guilty of embezzlement. Consequently, the statute under discussion was not followed, and as it was established in the case of *State v. Rosefelt*,<sup>18</sup> that the verdict must be "guilty of embezzlement, and not guilty of larceny," and that a general verdict of guilty would not be sufficient,<sup>19</sup> the failure to follow the statute was fatal.

Thus Missouri, by this statute has taken a step in the direction of removing the difficulty of distinguishing between larceny and embezzlement, at least to the point of removing to some extent the danger of misnomer of the crime in the indictment or information. This has saved the state a great deal of time and money, in that prior to the statute, such defendants would have to be acquitted of the crime with which they were charged, and a new indictment or information would have been required. A great many states have taken steps to remove the danger of misnomer of the crime, but some states have gone even further and have attempted to merge the crimes of larceny, embezzlement and false pretenses into one crime. In New York, the legislature has passed a law consolidating all three of the crimes into one crime called larceny.<sup>20</sup> The state of California has enacted a Theft Statute,<sup>21</sup> in which theft is defined as including the crimes of larceny, embezzlement and obtaining property under false pretenses. And in Massachusetts, the statute of larceny covers larceny, embezzlement and obtaining property under false pretenses,

15. Mo. Laws 1919, Sec. 4901.

16. 189 S. W. 2d 983 (1945).

17. In *State v. Harmon*, 106 Mo. 635, 18 S. W. 128 (1891), the court stated that where the defendant was indicted of larceny the fact that the evidence showed embezzlement, would not authorize a conviction of larceny. The defendant was entitled to know the nature of the crime with which he was charged.

18. 184 S. W. 904 (Mo. App. 1916).

19. *Mo. v. Cornwall*, 88 Mo. App. 190 (1901).

20. N. Y. CONSOL. LAW, c. 40, § 1290 (1939).

21. PENAL CODE OF CALIF. § 484 (1941).

and an indictment need only set out facts sufficient to form any one of those crimes.<sup>22</sup> Another provision gives the defendant the right to demand a bill of particulars, thus keeping the statute within constitutional limits. However, in all these states, the courts have held that although the indictment need only charge the crime as consolidated, no elements of the former crimes have been changed, and in a trial for theft committed in any of the three ways, the same degree of proof is necessary as was required before the consolidation.<sup>23</sup> An indictment charging facts amounting to one of the common law crimes covered by the statute, must be sustained by proof of facts amounting to that specific crime and no other.<sup>24</sup>

Section 4842 of the Missouri Revised Statutes, 1939, makes the problem of distinguishing between larceny and embezzlement much easier, in so far as the verdict being responsive to the indictment or information is concerned, and has served its purpose of preventing the possible acquittal of defendants who have committed a crime, but must be set free because of the failure on the part of the prosecution to distinguish correctly between the crimes of larceny and embezzlement. The necessity of following the statute seems to be of the utmost importance, and unless the jury is properly instructed thereon, there is a good possibility of a reversal, as was the case in *State v. Roussin*. The trial court in the principal case averted such a reversal by following the instructions set out in the statute. However, the statute still will not solve the problem where the defendant is charged with embezzlement, and as it stands, the prosecution should, where there is any doubt at all whether the facts involved constitute larceny or embezzlement, either charge the defendant with larceny, or enter two separate counts covering both offenses. A statute similar to that in California, where the crimes of larceny, embezzlement, and obtaining property by false pretenses are consolidated into one offense, would make it possible for the prosecution to charge the defendant with theft, and to gain a conviction by showing the commission of any one of the three crimes thereunder. To be sure, it would still be necessary to prove the same elements necessary for a conviction today under one of the three crimes, but it would do away with the necessity of making sure that the crime charged against the defendant in the information was technically the same one which could be proved by the facts.

CLARENCE F. HOMAN

#### RES IPSA LOQUITUR—EFFECT OF PLEADING SPECIFIC NEGLIGENCE

*Maxie v. Gulf, M. & O. R. Co.*<sup>1</sup>

The plaintiff was employed by the defendant railroad company to rebuild and repair certain of the defendant's freight cars. While the plaintiff was so engaged and was stooping over to pick up a board, four heavy box car doors fell upon him

22. MASS. GEN. LAWS, c. 266, § 30; c. 277, §§ 40, 41 (1932).

23. *People v. Myers*, 206 Cal. 480, 275 Pac. 219 (1929).

24. *People v. Bremereur*, 101 Misc. 156, 166 N. Y. Supp. 801 (1917); *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325 (1887).

1. 202 S. W. 2d 904 (Mo. 1947).

crushing him to the ground. The plaintiff had neither seen nor been aware of the presence of the doors. Plaintiff's petition alleged general negligence of the defendant in operating his business followed by specific averments of negligence which caused the injury. The trial court submitted the case to the jury under the doctrine *res ipsa loquitur*. The defendant contended that the court should have sustained the motion to dismiss because "plaintiff failed to prove that the defendant was guilty of any negligence." On appeal the supreme court held that the plaintiff had pleaded specific negligence and said, "after pleading specific negligent acts and omissions, plaintiff further alleged that the 'foregoing' negligence was the proximate cause of his injury. By the specific allegations of his petition he was foreclosed from submitting his cause under the *res ipsa loquitur* doctrine." The court also explained "the rule is that 'one who pleads specific acts of negligence must prove such negligence or enough of such acts to justify a recovery, and a failure to do so bars him from a recovery. And this is true although he might have pleaded negligence generally and by an invocation of the doctrine *res ipsa loquitur* had a recovery upon making proper proof.'"<sup>2</sup> The evidence in the case was sufficient to make a case for the jury under the doctrine *res ipsa loquitur*,<sup>3</sup> but it was insufficient under the charge of negligence in the petition. The court then informed the plaintiff that he might amend his petition to take advantage of the doctrine in the next trial of the case.

Where a plaintiff has pleaded specific negligence without sufficient evidence to substantiate it but could have made a case under the doctrine *res ipsa loquitur*, the courts have achieved little harmony in their decisions. They have expressed four distinct views as to the position of a plaintiff who has so framed his petition.<sup>4</sup> These views are: (1) Pleading the particular cause of the injury does not waive the right to rely on the doctrine. (2) The right to rely on the doctrine is waived by pleading the particular cause of the injury. (3) The doctrine is applicable to prove the particular cause of the injury alleged. (4) Pleading the particular cause of the injury does not waive the right to rely on the doctrine if general negligence is also alleged.

Those jurisdictions in which the first view is followed hold that allegations of specific negligence are to be treated as mere surplusage, and failure to make them out does not preclude the defendant from using the doctrine *res ipsa loquitur*. The jurisdictions supporting this view express the idea that the plaintiff in an attempt to shed light on the cause of the accident should not be punished if he fails to make out his specific allegations.

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2. A comprehensive note dealing with what constitutes specific and general averments of negligence and indicating the difficulty of harmonizing the cases is found in 40 U. OF MO. BULL. L. SER. 41 (1928).

3. An exhaustive study of the procedural effect may be found in 3 Mo. L. REV. 173 (1938). Missouri court rulings on instructions which concern, burden of proof, going forward with the evidence, and rebuttable presumptions are competently discussed.

4. PROSSER, TORTS 307 (1941). An exhaustive annotation of the cases is found in 79 A. L. R. 48 (1932).



The second view is supported by cases in a number of jurisdictions among which is Missouri.<sup>5</sup> A plaintiff who pleads specific negligence is deprived of an advantage which would have been his had he pleaded general negligence only. In this situation the case must go to the jury in the same manner as any other negligence case, with the burden of proof on the plaintiff to show the defendant's negligent acts. Instructions which put the case on a *res ipsa loquitur* basis are erroneous and grounds for reversal as in the instant case. In laying down this principle the courts have indicated that a plaintiff, who is sufficiently aware of the facts surrounding his accident to state them in his petition, has no need for the aid of the doctrine as do those who are injured and have no knowledge of what transpired to cause their injury.

The third class of cases hold that a plaintiff who alleges specific acts of negligence is not deprived of the benefit of the doctrine, but the application of the doctrine is limited to the establishment of the particular acts of negligence alleged.<sup>6</sup> A few earlier Missouri cases seem to fall into this classification.<sup>7</sup> These cases conflict with later Missouri decisions which are listed under the second view. One of the earlier cases is *Ashton v. Saint Louis Transit Co.*,<sup>8</sup> where the plaintiff alleged certain specific acts of negligence, and the court stated that the evidence and likewise the right of recovery was confined to the specific acts charged, but the plaintiff, by showing the happening of the accident, made out a prima facie case and the burden shifted to the defendant to exculpate and absolve itself from presumptive and inferred negligence. The result of such specific averments of negligence is that the defendant need only show himself to be free from the negligence named by the plaintiff rather than from any negligence as is normally the practice in a *res ipsa loquitur* case.

The fourth group of cases resembles most closely those listed in the first group, for in these jurisdictions a plea of specific negligence will not waive the right to use the *res ipsa loquitur* doctrine if in addition there is made a general averment of negligence. An earlier Missouri case<sup>9</sup> supporting this theory has been overruled.

5. *MacDonald v. Metropolitan Street R. Co.*, 219 Mo. 468, 118 S. W. 78 (1909); *Pointer v. Mountain R. Constr. Co.*, 269 Mo. 104, 189 S. W. 805, L. R. A. 1917B, 1091 (1916); *Porter v. St. Joseph R. Light, Heat & P. Co.*, 311 Mo. 66, 277 S. W. 913 (1925); and other cases collected in 79 A. L. R. 51 (1932).

6. A well reasoned note supporting the advantages of this theory may be found in 40 U. OF MO. BULL. L. SER. 41 (1928).

7. *Gallagher v. Edison Illuminating Co.*, 72 Mo. App. 576 (1897); *Ashton v. Saint Louis Transit Co.*, 105 Mo. App. 226, 79 S. W. 999 (1904); *Sanders v. Carthage*, 9 S. W. 2d 813 (1928), reversed in 330 Mo. 844, 51 S. W. 2d 529 (1932).

8. *Supra*.

9. *Sanders v. Carthage*, *supra* note 7. The case was originally appealed to the Springfield Court of Appeals where a decision was handed down only to be later reversed by the same court. In the second decision the court admitted the confusion existing in such situations when it said, "It seems to us, on a reconsideration of the assignment based on plaintiff's instruction No. 7 (a *res ipsa loquitur* instruction) that the ruling in the Gannon case supports instruction No. 7. We shall not attempt to distinguish the case relied upon, and referred to *supra*, as supporting our former ruling as to instruction No. 7 and the cases relied on by plaintiffs and referred to above as supporting the contention that instruction No. 7 is, under

The law in Missouri today seems to have been firmly established in the final decision of *Sanders v. Carthage*<sup>10</sup> in which the supreme court held that a plaintiff cannot plead specific negligence and, on failure to prove it, rely on *res ipsa loquitur*. This holding is in accord with other Missouri cases in the second classification and has been supported by all subsequent cases dealing with the problem.<sup>11</sup> Likewise, proving specific negligence as well as pleading it will prevent a case from being submitted on the *res ipsa loquitur* theory.<sup>12</sup>

The instant case illustrates, however, that even though a plaintiff pleads too much it may not be a fatal error. The Missouri courts have been very liberal in permitting the amendment of petitions so that a technical error will not deprive the plaintiff of his rights. The cases<sup>13</sup> indicate that a plaintiff who has a trial court judgment reversed because of pleading on the wrong theory will be permitted within limits to amend his petition and plead on the correct theory when the case is retried.

JOHN S. DIVILBISS

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TORTS—LIBEL—A CHARGE OF COMMUNISM

*Spanel v. Pegler*<sup>1</sup>

Defendant, Pegler, in an article, stated that one Norvick was associated with Communists, and called attention to points of similarity between Norvick and the plaintiff, Spanel. He then quoted from an alleged political advertisement by plaintiff, and said, "A native of Russia and an admirer of the Soviet system might be pardoned in the error." The circuit court of appeals, on a motion to dismiss, held that the writing was reasonably susceptible of being understood as a charge that

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the pleadings, proper and correct. We do not believe the ruling in *May v. City of Hannibal*, 186 Mo. App. 602, 172 S. W. 471, and *Politowitz v. Citizens' Telephone Co.*, 115 Mo. App. 57, 90 S. W. 1031 can be harmonized with the ruling in *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L.R.A. 505. . . . And possibly the same may be true as to the ruling in *Grady v. Louisiana Light, Power and Traction Co.* (Mo. App.), 253 S. W. 202, and *Kidd v. Kansas City Light and Power Co.* (Mo. App.), 239 S. W. 584."

10. *Supra* note 7.

11. *Smith v. Terminal R. R. Ass'n. of St. Louis*, 160 S. W. 2d 476 (Mo. App. 1942); *Robinson v. Missouri-Kansas Texas R. Co.*, 123 S. W. 2d 624 (Mo. App. 1938); *Beny v. Kansas City Public Service Co.*, 343 Mo. 474, 121 S. W. 2d 825 (1938); *Taylor v. Missouri Natural Gas Co.*, 67 S. W. 2d 109 (Mo. App. 1933).

12. *Harding v. Kansas City Public Service Co.*, 188 S. W. 2d 60 (Mo. App. 1945); *Smith v. Terminal R. R. Ass'n. of St. Louis*, 160 S. W. 2d 476 (Mo. App. 1942); *Hughes v. East St. Louis City Lines*, 149 S. W. 2d 440 (Mo. App. 1941); *Lochmoeller v. Kiel*, 137 S. W. 2d 625 (Mo. App. 1940); *State ex rel. Reeves v. Shain*, 122 S. W. 2d 885 (Mo. 1938); *Cole v. Uhlmann Grain Co.*, 340 Mo. 277, 100 S. W. 2d 311 (1936); *Grimes c. R. Line Service, Inc.*, 337 Mo. 743, 85 S. W. 2d 767 (1935); *Watts v. Moussette*, 337 Mo. 743, 85 S. W. 2d 487 (1935); *Dugan v. St. Louis Public Service Co.*, 56 S. W. 2d 626 (Mo. App. 1933).

13. *Smith v. Terminal R. R. Ass'n. of St. Louis*, 160 S. W. 2d 476 (Mo. App. 1942); *Woodson v. Metropolitan St. Ry. Co.*, 224 Mo. 685, 123 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039 (1909).

1. 160 F. 2d 619 (C. C. A. 7th 1947).

the plaintiff was a Communist or Communist sympathizer; that such a charge was libelous *per se*; that, therefore, plaintiff had stated a cause of action.

The court was governed by an Illinois statute which defined libel as written words which "tend to expose plaintiff to public hatred, contempt, ridicule, aversion or disgrace, and to induce an evil opinion of him in the minds of right thinking persons."<sup>2</sup> This definition is merely a codification of the rule universally followed by common law courts.<sup>3</sup> It is easy to understand, but difficult to apply. Although as definite as possible in the absence of an actual listing of the charges which will constitute libel, it is indefinite enough that courts, when called upon for the first time to determine whether a particular charge will constitute libel, have shown a marked difference of opinion; and a particular court may be inconsistent. The question of whether a charge of Communism constitutes libel *per se* has proven to be no exception.<sup>4</sup> Two recent decisions, like the instant case, have clearly held it to be libelous *per se*.<sup>5</sup>

A review of cases involving charges which carry implications common to a charge of communism will prove the decision in the instant case to be inescapable. It has been held that to charge one with being an anarchist is libelous *per se*, because an anarchist is commonly understood to be devoted to the object of overthrowing the existing government by the use of force and the appropriation of private property in violation of law, and one having such object will be the subject of hatred,

2. ILL. REV. STAT. c. 38, § 402 (1945).

3. *Garriga v. Richfield*, 174 Misc. 315, 20 N. Y. 2d 544 (Sup. Ct. 1940): "Generally speaking, a written false statement which exposes one to public contempt, ridicule, hatred or disgrace, or induces an evil opinion of him in the minds of fair and right thinking men, is libelous *per se*." *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358 (1893): "Any printed publication that tends to bring a man into disrepute, ridicule, or contempt is libel, in a legal sense." See NEWELL, SLANDER AND LIBEL § 31 (3d ed. 1914) for numerous definitions.

4. *Toomey v. Jones*, 124 Okla. 167, 254 Pac. 736 (1926) (calling one a "Red" is capable of defamatory meaning and cannot be taken from the jury); *Hays v. American Defense Society*, 252 N. Y. 266, 169 N. E. 380 (1929) (implying that a charge of communism is libelous *per se*); *Garriga v. Richfield*, 174 Misc. 315, 20 N. Y. Supp. 2d 544 (Sup. Ct. 1940) (not libelous *per se* to publish that one is affiliated with the Communist Party); *Levy V. Gelber*, 175 Misc. 746, 25 N. Y. 2d 148 (Sup. Ct. 1941) (publication that plaintiff is a Communist is libelous *per se*). The courts are not in accord as to the meaning of "libelous *per se*." If "per se" means that allegation and proof of special damage is not necessary, as the term is used in the law of slander, then it would be redundancy, for such allegation and proof is never necessary in the case of libel, according to the orthodox view. *Sydney v. MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, 151 N. E. 209 (1926); RESTATEMENT, TORTS § 569 (1938). Many courts hold that a publication is libelous *per se* if proof of extrinsic facts are not necessary to establish its defamatory character. A few courts add to the confusion by holding that when a publication is not libelous *per se* by reason of the need for proof of extrinsic facts, then there must be proof of special damages. See 26 IOWA L. REV. 893 (1941) for a discussion of this problem.

5. *Grant v. Readers Digest*, 151 F. 2d 733 (C. C. A. 2d 1945) (that plaintiff was an agent of the Communist Party and a believer in its aims); *Wright v. Farm Journal*, 158 F. 2d 976 (C. C. A. 2d 1947) (that plaintiff was a member of the Communist Party).

contempt and ridicule.<sup>6</sup> One of the avowedly necessary steps in the Communists' rise to power is the forcible overthrow of the existing government and the appropriation of private property, this being the primary objective of their activities in their so-called efforts to improve the lot of the "proletariat."<sup>7</sup> The court in one case discussed at length this element of communism.<sup>8</sup> The courts have been unanimous in holding that words impugning one's patriotism are libelous per se.<sup>9</sup> To state that one is a Communist is to impute to him a devotion to the leaders of the Soviet government and their worldwide organization which is inconsistent with a true allegiance to the United States.<sup>10</sup> So, in view of the common belief that Communists subordinate the interests of their own to that of a foreign country; that

6. *Cerveney v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692 (1891); *Lewis v. Daily News Co.*, 81 Md. 466, 32 Atl. 246 (1895).

7. MARX AND ENGELS, *COMMUNIST MANIFESTO*, sec. II (1848): "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions." Although Russian Communist ideology differs somewhat from Marxism, they have retained the aim of forcibly overthrowing the existing governments and social conditions. In the early days of American Communists they openly declared their intention to overthrow the government. Subsequently they ostensibly rejected this objective and instead determined to participate in elections and labor movements. ONEAL, *AMERICAN COMMUNISM* (1927). In 1922 the Executive Committee of the Third International adopted a "thesis" instructing the American Communists to form a "legal" party, involving a surrender of their policy of overthrowing the government. However, they were instructed to maintain an underground party, the "real Communist Party," which was to control the activities of the "legal" party, and they were cautioned not to neglect their "illegal work." They were warned that, on finding themselves "in the easier life of legal activities, many will forget that no matter what maneuvers may be made upon the public stage, the final class struggle must be, until its end, a brutal fight of physical force." So although the American Communists have repeatedly denied any purpose to employ force, BROWDER, *THE PEOPLE'S FRONT* 112 (1938), it appears that instead of a change of principles, there may have been only a change in the tenor of their expressions.

8. *Toomey v. Jones*, 124 Okla. 167, 254 Pac. 736 (1926).

9. *Choctow Coal and Mining Co. v. Lillich*, 204 Ala. 533, 86 So. 383 (1920); *Van Lonkhuyzen v. Daily News Co.*, 195 Mich. 283, 161 N. W. 979 (1917); *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457 (1913); *Wilkes v. Shields*, 62 Minn. 426, 64 N. W. 921 (1895).

10. The activities of the American Communists have always been under the rigid control of the Third International (Comintern) in Moscow, receiving their orders either directly from Moscow or from a representative of the Comintern in the United States. Their first loyalty was to be to the Comintern rather than to the country in which they resided. O'NEAL, *AMERICAN COMMUNISM* (1927); WESTMEYER, *MODERN ECONOMICS AND SOCIAL SYSTEMS* (1940). This loyalty has been demonstrated by desperate attempts by the Communists to justify all moves by the Soviet Government in international affairs, including the invasion of Finland and the Russo-German pact. In view of the long alliance with Russia through the Comintern and previous admitted attempts by the Communists to deceive the public, Americans are not likely to attach much significance to the claim made by the Communist Party in 1938 that they were no longer a section of the Comintern, nor to the purported dissolution of the Comintern in 1943. WESTMEYER, *op. cit. supra*, at 287: "Have the Communists really changed their position, or is this merely a strategic retreat, or, worse yet, is it merely a blind behind which the old party and the old program still lurks?"

they propose to forcibly overthrow the government, to forcibly seize private property, and in so doing, to perpetrate numerous other infamous crimes—both by reason and authority, it is difficult to conceive of a charge which would more surely lower one in the esteem of his fellow men and hold him up to “hatred, contempt and ridicule.”

It should be noted that it is not necessary that the courts be convinced that the principles of the American Communists are in reality those referred to above. They have repeatedly disclaimed any such purposes.<sup>11</sup> But, since the object of the action of libel is the protection of the reputation, it is the opinion engendered of the plaintiff in the minds of others as a result of the charge which is the controlling consideration. It isn't essential that the plaintiff be defamed in the eyes of all those to whom the defamatory words are communicated;<sup>12</sup> nor need their opinions on the subject be necessarily reasonable.<sup>13</sup> Therefore, if it is commonly understood that Communists hold such views, the decision should be the same,<sup>14</sup> though the court is of opinion that such common belief is erroneous. The fact that the earlier decisions showed a greater uncertainty than the most recent ones may have its explanation in that there was formerly more diversity of opinion in the United States as to what the American Communists actually stood for than at the present time. Recent events have done much to bring about an abhorrence of Communists.<sup>15</sup> The purge by the State Department of employees with Communist affiliations has caused many to believe that a Communist is a virtual traitor to the United States. Congress is constantly investigating organizations and individuals with Communist tendencies, and many have been arrested for various “Un-American activities.” Provisions in statutes<sup>16</sup> are indicative of the growing popular distrust and hatred of Communists. The court in the instant case emphasized the importance of considering only what is in fact the common belief when it said, “Even if these views may soon be altered and are in truth only the mores of the time, they must be respected as criteria. If it were libelous per se in 1889 to write of a man as an

11. See notes 7 and 10, *supra*.

12. *Peck v. Tribune Co.*, 214 U. S. 185 (1909); *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911).

13. *Meyerson v. Hurlbut*, 98 F. 2d 232 (App. D. C. 1938) (a charge that plaintiff was a price-cutter); *Van Wiginton v. Pulitzer Pub. Co.*, 218 Fed. 795 (C. C. A. 9th 1914) (the daughter of a murderer); *Katapodis v. Brooklyn Spectator*, 287 N. Y. 17, 38 N. E. 2d 112 (1941) (imputation of poverty).

14. *Spanel v. Pegler*, 160 F. 2d 619 (C. C. A. 6th 1947); *Grant v. Readers Digest*, 151 F. 2d 733 (C. C. A. 2d 1945).

15. The public's hatred of Communists was at least as intense in the early 1920's as at the present time, but no cases involving a charge of Communism were presented for decision during that period.

16. *Selective Training and Service Act of 1940*, 54 Stat. 892 (1940), 50 U. S. C. § 308(i) (1940) (declared the expressed policy of Congress to be that vacancies created in business by inductions should not be filled by Communists); *Emergency Relief Appropriation Act of 1942*, 55 Stat. 396 (1942), 15 U. S. C. §§ 721-728 (Supp. 1945) (denying the benefits of the act to Communists); *Emergency Relief Appropriation Act of 1943*, 56 Stat. 634 (1943), 15 U. S. C. §§ 721-728 (Supp. 1945) (same provision).

anarchist (*Cervený case*)<sup>17</sup> and libelous per se in 1915 to write of a man as a socialist (*Ogren case*)<sup>18</sup> it is libelous per se in 1945 to write of a man as a Communist." The rule that the determination of the question cannot be influenced by the fact that the group in whose opinion the plaintiff has been damaged based such opinion on erroneous or unreasonable beliefs is limited only to the extent that such beliefs cannot be clearly anti-social.<sup>19</sup> So, only to this extent, is the statement true that to have actionable libel the plaintiff must be defamed in the minds of "right thinking" men.

ALVIN C. RANDALL

TRUSTS—PROCEEDS OF MATURED POLICIES OF LIFE INSURANCE HELD ON DEFERRED  
PAYMENT PLANS—RIGHT OF CREDITOR OF BENEFICIARY

*Mullin v. Trolinger*<sup>1</sup>

This was a creditor's suit brought to subject the proceeds of two matured policies of life insurance to the payment of a debt owing to plaintiff by the beneficiary named in the policies. The optional method selected by the insured in each policy provided for payment in specified installments together with interest at three and one half per centum per annum on the balance from time to time remaining unpaid. Each policy further provided as follows: "The beneficiary can neither commute, transfer or encumber any unpaid installments nor withdraw the amount placed in trust except upon the written authority of the insured filed with the Company during his lifetime."<sup>2</sup>

The Saint Louis Court of Appeals reversed the judgment which had been rendered for plaintiff in the trial court saying that "The policy provision with which we are here concerned closely resembles a spendthrift trust, if, indeed, it is not in effect just that."<sup>3</sup>

The court found it quite convenient to deal with the case as though a trust fund were involved since, as it points out in the opinion, "Both the respondent and

17. *Cervený v. Chicago Daily News Co.*, 81 Md. 466, 32 Atl. 246 (1895).

18. *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 132 N. E. 587 (1919). The Socialists, like the Communists, claim to be the true disciples of Marx, and their policies are similar. The Communists were first organized in the United States by the members of the "Left Wing" of the Socialist Party who "bolted" in 1919. In fact, if there is any distinction to be made between the two organizations, there is more reason for the members of the Communist Party to be the subject of contempt. The Socialist Party has never advocated an overthrow of the government, but instead has attempted to accomplish its ends by the use of the ballot. Its application for affiliation with the Third International was rejected in 1920 because it did not favor "the forcible overthrow of the capitalist State." *The Russian Press Review*, Oct., 1920.

19. *Mawe v. Pigott*, 4 Ir. R. C. L. 54 (1869) (defamed in eyes of criminals). PROSSER, *HANDBOOK OF THE LAW OF TORTS* 785 (1941).

1. 237 Mo. App. 939, 179 S. W. 2d 484 (1944).

2. *Id.* at 942, 179 S. W. 2d at 486.

3. *Id.* at 946, 179 S. W. 2d at 488.

appellants plead that the proceeds of the policies constitute a trust fund held in trust by the appellants and made payable to the beneficiary in monthly instalments.<sup>4</sup> However, it seems quite clear that no true trust is involved.<sup>5</sup> In the first place, no specific fund is set aside to which the beneficiary of the policy may look. The amount due is a general charge against the mingled funds of the company. Without the existence of a specific *res* a trust is impossible.<sup>6</sup> In the second place, it is difficult to see how the insurance company can occupy at one and the same time the antagonistic positions of obligor and trustee.<sup>7</sup> Still further objections may be noted in the absolute character of the obligation. The insurance company is bound to pay the full amount of the policy without regard to unforeseen developments, whereas normally a trustee discharges his duty if he exercises due care and caution in managing the trust and will not be liable for unavoidable depreciations in value. The agreement of the company is to pay a fixed rate of interest rather than the income, whatever it may be, from the trust property.<sup>8</sup> These and many other differences might be noted between funds held by an insurance company on deferred payment plans and true trusts. While it is true that many of the earlier cases analyzed insurance policies in terms of trusts, the more recent cases have not found it necessary to call upon trust doctrines to protect the rights of the beneficiary.<sup>9</sup> With the almost universal recognition of the rights which vest in a third party upon the making of a contract for his benefit, he is amply protected without the necessity of stretching the principles applicable to trusts to an interest vastly different. The addition of a deferred payment plan to the ordinary policy would seem only to vary the terms of the debt without changing its essential nature.<sup>10</sup>

Although the court did not flatly state that it was dealing with a spendthrift trust, it reasoned on that basis throughout. Its first premise is that the issuance of a life insurance policy creates an "irrevocable trust" in favor of the beneficiary.

4. *Ibid.*

5. *Mutual Benefit Life Ins. Co. v. Ellis*, 125 F. 2d 127, 138 A. L. R. 1478 (C. C. A. 2d 1942), *cert. denied sub nom.*; *Eisenlord v. Ellis*, 316 U. S. 665 (1942); *Pierowich v. Metropolitan Life Ins. Co.*, 282 Mich. 118, 275 N. W. 789 (1937); *Latterman v. Guardian Life Ins. Co.*, 280 N. Y. 102, 19 N. E. 2d 978 (1939); *Black v. New York Life Ins. Co.*, 126 N. Y. Supp. 334 (Sup. Ct. 1910); *McLaughlin v. Equitable Life Assur. Society of the U. S.*, 112 N. J. Eq. 344, 164 Atl. 579 (1933); 2 APPLEMAN, *INSURANCE LAW AND PRACTICE* §§ 882, 888 (1941); 2 BOGERT, *TRUSTS AND TRUSTEES* § 240 (1935); RICHARDS, *INSURANCE* § 385 (4th ed., 1932); 1 SCOTT, *TRUSTS* § 87.1 (1939); VANCE, *INSURANCE* § 158 (2d ed., 1930); Land, *Life Insurance Option Settlements—Trusts or Debts*, 42 COL. L. REV. 32 at p. 46 *et seq.* (1942).

6. 1 SCOTT, *TRUSTS* 474 (1939).

7. For a case illustrating the antagonistic character of the relations and some unfortunate results thereof, see *New York Life Insurance Company v. O'Brien*, 27 F. 2d 773 (W. D. Mich., 1927), *app. dismissed by stipulation*, 22 F. 2d 1016 (C. C. A. 6th, 1927) (insurance company attempted to rescind the policies for fraud).

8. Land *supra* note 5, at 46.

9. 2 WILLISTON, *CONTRACTS* §§ 357 and 369 (rev. ed. 1936); VANCE, *op. cit. supra* § 35.

10. See note 5 *supra*.

It then points out that spendthrift trusts are valid in Missouri. Having set up these two premises it concludes that plaintiff cannot subject the proceeds of the policies in question to the payment of his debt. With the proposition that spendthrift trusts are enforceable in Missouri no issue can be taken.<sup>11</sup> But it does seem that the first premise is open to criticism. The court attempts to establish it by quotations from a number of cases which, for the most part, dealt with the nature of the right acquired by the beneficiary upon issuance of the policy.<sup>12</sup> Substantially, the position taken by them was that, in policies where the power to change the beneficiary is not reserved by the insured, the beneficiary's right is irrevocable because, during the insured's life, he is treated as trustee of his claim against the insurer, for the benefit of the beneficiary. Although the cases cited did speak in terms of trust, the same result would have been reached by terming him a third party donee beneficiary, and this would seem to be more accurate. Let us assume, however, for purposes of argument, that the insured is a trustee of the promise of the insurer for the benefit of the beneficiary. This is all that was said by the courts which were quoted. It by no means follows that upon his death the insurer becomes a trustee of its own promise. Just how does the insurance company succeed to the legal claim which the insured, as trustee, held against it for the benefit of the beneficiary in the policy? This is nowhere pointed out by the court in its opinion. Even though we leave that troublesome question behind us, we are faced with the many distinctions previously noted between the relation of the insurance company and the beneficiary of the policy and that of the usual trustee and his cestui que trust. It would seem, in view of those distinctions, that no trust is involved.

What is involved is the desirability of extending to a debtor-creditor relationship, legal in character, the equitable doctrines which have sustained spendthrift trusts. By reasoning in terms of trusts in the principal case the court made it unnecessary to discuss on its merits the propriety of permitting similar restraints on the alienation of a legal interest. It has been suggested that due to the peculiar nature of the insurance contract and the ends sought to be achieved thereby that, in jurisdictions which permit spendthrift trusts, restraints of the type here involved should likewise be sanctioned by the courts without resort to the legislature.<sup>13</sup> This is, of course, the effect of the court's decision in the principal case. But the fact

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11. *Bixby v. St. Louis Union Trust Company*, 323 Mo. 1014, 22 S. W. 2d 813 (1929); *Dunephant v. Dickson*, 153 Mo. App. 309, 133 S. W. 165 (1910); *Kessner v. Phillips*, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005 (1905). Also see *Nelson, Restraints on Alienation in Missouri*, 39 U. OF MO. BULL. L. SER. 23, 29 (1928).

12. *Mullin v. Trolinger*, *supra* at 946, 179 S. W. 2d at 488.

13. *Legis.*, 50 HARV. L. REV. 511 (1937); *Comment*, 36 YALE L. J. 394 (1927). Also see materials cited in *Grahame, Insurance Settlement Agreements*, 28 IOWA L. REV. 484 at 487 n. 148 (1943). It is interesting to note that Dean Griswold has changed his position on this matter between the two editions of his work SPENDTHRIFT TRUSTS. He was at first critical of this suggestion, but now is willing to go along. See § 112, n. 55 of the first edition (1936) and §§ 112 and 112.1 of the second edition (1947).



that statutes dealing with the matter have been passed in half of the states is strong evidence that the sanction should not be given until the matter has been fully considered by the policy-making branches of the government.<sup>14</sup> A number of the cases strongly relied on by the court were determined by the laws of New York in which jurisdiction the courts required, and got, legislative action.<sup>15</sup> They would certainly, then, not be authority for the court in the position which it took.

Whether or not the court permits restraints of this type of its own accord, the matter should be considered on its merits. Calling the proceeds a trust fund obviates any necessity of doing so. One might well question the desirability of adding to the great difficulty already encountered by creditors who attempt to satisfy claims to which our courts have solemnly declared them entitled. One might also ask whether, if deferred payment arrangements are to be accorded the same protection as trusts, they should not be subjected to the same requirements relative to investment, separation of funds, and the like, which serve to protect trust funds and their administration, and whether it should be necessary for insurance companies to be specially authorized in their charters to engage in a trust or spendthrift trust business. An examination of the statutes now in force shows that such questions have been deemed pertinent and that the legislatures of the different states have given varying answers to them.<sup>16</sup> It would seem that these matters, as well as any other relevant policy determining factors, should be carefully considered before the principles applicable to spendthrift trusts are extended to the proceeds of matured life insurance policies held by the insuring companies on deferred payment plans. None of them were mentioned, or apparently considered, by the court in this case.

GEORGE E. ASHLEY

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WILLS—WIDOW'S ELECTION—EFFECT OF FAILURE OF GUARDIAN OF INSANE WIDOW  
TO RENOUNCE WILL WITHIN TIME SPECIFIED BY STATUTE

*First Nat. Bank of Kansas City v. Schaake*<sup>1</sup>

This was an action to have the court make an election as to whether it would be for the best interests of testator's insane widow to renounce a provision of his will in regard to property bequeathed her or to take one-half of his estate under the statutes.<sup>2</sup> John Schaake died testate survived by his widow and his brothers and sisters. His will gave and bequeathed to his wife "all that part of my estate

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14. The pertinent statutes are listed in 1 SCOTT, TRUSTS § 87.1 (1939, Supp. 1946), and discussed at some length in GRISWOLD, *op. cit. supra* §§ 114 *et seq.* (2d ed., 1947).

15. This was true of *Crossman Co. v. Rauch*, 263 N. Y. 264, 188 N. E. 748 (1934), and also of *Tate v. Hain*, 181 Va. 402, 25 S. E. 2d 321 (1943).

16. See note 14 *supra*.

1. 203 S. W. 2d 611 (Mo. App. 1947).

2. MO. REV. STAT. § 325 (1939).

Provides for a widow to elect to take, in lieu of dower, one-half share absolutely of real and personal estate belonging to the husband at the time of his death, subject to payment of debts.

to which she shall be rightfully entitled under and by virtue of the laws of descent and distribution of the state of Missouri." Also, sums were given to various religious and charitable institutions and the residuary estate was to be held in trust for his brothers and sisters. Previous to the testator's death the widow had been adjudged a person of unsound mind and a guardian and curator had been appointed. The parties conceded that the trial court ruled correctly that under the will the widow was entitled to dower interest in the real estate unless an election was made as provided by statute.<sup>3</sup> Such election was not made by the guardian within the twelve month period, and the court was asked to make an election. In accordance with previous decisions,<sup>4</sup> the court held that the widow took one-half the personalty without election; but it held that it did not have the power to make an election for the widow after the expiration of the twelve month period, that the statute is mandatory, and that the election must be in accord with the terms of the statute.

There are cases in Missouri to the effect that a court of equity can make an election for an insane widow if the guardian fails to do so or if the guardian makes an election which the court finds is not to the best interests of the ward.<sup>5</sup> However, these cases all involved a situation where the suit was filed within the twelve month period. Where the widow was *sui juris* but failed to comply strictly with this section, relief was denied by the court. The court held that the statute is mandatory as to what shall be done in the manner of an election and that a court of equity cannot dispense with any of the requirements of the statute, excuse failure to comply therewith, or extend the statutory time for filing an election.<sup>6</sup> An early Missouri case in passing upon this question held that the right of election by the widow of a statutory share is a statutory privilege, has no existence outside the statute, and must, therefore, be exercised in substantial compliance with it.<sup>7</sup>

3. MO. REV. STAT. §§ 318, 325, 329 (1939).

Under Section 329 this election must be in writing, acknowledged and filed in the office of the clerk of the court in which letters testamentary or of administration shall have been granted, within twelve months after the first publication of notice of granting the same; and such declaration shall also be filed in the recorder's of the same county within the same period, otherwise she shall be endowed as provided in section 318 *et seq.* This section also provides for the making of an election for a widow of unsound mind by the guardian of such widow.

4. In *Re Dean's Estate*, 350 Mo. 494, 166 S. W. 2d 529 (1942); In *Re Estate of Opel (Aurien)*, 352 Mo. 592, 179 S. W. 2d 1 (1944); *Nies, Adm'x. v. Stone*, 232 Mo. App. 1226, 117 S. W. 2d 407 (1938).

5. In *Re Connor's Estate*, 254 Mo. 65, 162 S. W. 252 (1913); *Primeau v. Primeau*, 317 Mo. 828, 297 S. W. 382 (1927). *Manufacturers Bank and Trust Co. v. Kunda*, 353 Mo. 870, 185 S. W. 2d 13 (1945). In the latter case the guardian renounced the will and took under the statute. The court found it to be to the best interests of the widow to take under the will and thus revoked the election.

6. *Ferguson v. Long*, 341 Mo. 182, 107 S. W. 2d 7 (1937) (election was filed with the clerk of the court, but not with the recorder, within twelve months and relief was denied); *Allen v. Hartnett*, 116 Mo. 278, 22 S. W. 717 (1893) (relief denied where widow made election in the required statutory form and mailed it to the clerk but the letter miscarried—the declaration must actually be filed in the office of the clerk).

7. *Price v. Woodford*, 43 Mo. 247 (1869).

The exact case involving an insane widow who had failed to make the election within the twelve month period has never before been decided in Missouri.<sup>8</sup> It has been decided that the twelve months period provided in Section 329 is to have the effect of a statute of limitations.<sup>9</sup> The statute includes no saving clause in case of a widow of unsound mind. Other statutes of limitation do include such saving clauses. Section 1002 provides for a ten year limitation on the bringing of real actions. It is followed by Section 1004, which is in effect a saving clause in case of minors, insane persons, or those imprisoned for less than life. The same is true regarding the statutes of limitations in case of personal actions,<sup>10</sup> and the statute regarding will contests.<sup>11</sup> The general rule is that a statute of limitations runs against all persons in the absence of a specific saving clause to the contrary.<sup>12</sup>

The result in the principal case may seem harsh. However, it will be noted that the statute allows such an election to be made by the guardian of the insane widow,<sup>13</sup> and if no such election is made or if one is made not in the best interests of the widow, a court on application within the statutory period, can make the elec-

8. The cases from the courts of other jurisdictions are of little aid because of a difference in the statutes. There is a confusion among these cases as to the power of the court to set aside the statutory requirements and make the election for the insane widow. These cases are collected in 74 A.L.R. 461 (1931), 147 A.L.R. 343 (1943). Some of the statutes do not give the guardian power to make this election for the widow. See *Wright v. West* 2 Lea 78 (Tenn. 1878) (an incompetent widow who, on account of her lunacy, neglected to dissent from a provision made for her in her husband's will within the statutory period might afterwards claim her rights in the estate as if she had duly dissented); *Gaster v. Gaster*, 90 Neb. 529, 134 N. W. 235 (1912) (the fact that no election was made within the prescribed time held not to prejudice the right of an insane spouse); *Cf. Re Andrews*, 92 Mich. 449, 52 N. W. 743 (1892) (failure of an incompetent widow to file the election within the year is to be deemed an election to take under the will).

In other states there are statutes in which the guardian is given the power to make the election. *Re Hansen*, 67 Utah 256, 247 Pac. 481 (1926) (failure to make the election did not affect the jurisdiction of the court to direct an election to be made). *Contra Crenshaw v. Carpenter*, 69 Ala. 572 (1881) (courts have no power to create an exception taking insane persons out of the operation of the statute); *Kernan v. Carter* 132 Md. 577, 104 Atl. 530 (1918) (an application to a court of equity to make an election must be made within the time fixed by statute).

9. *Schweer v. Schweer*, 86 S. W. 2d 969 (Mo. App. 1935).

10. Mo. REV. STAT. ART. 9 (1939). Section 1020 of this article provides for a saving clause in case of minors, insane persons, and those imprisoned for less than life.

11. Mo. REV. STAT. § 540 (1939). "If no person shall appear within the time aforesaid (one year), then probate or rejection of such will shall be binding, saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed."

12. 34 AM. JUR., *Limitation of Actions* § 186 and cases there cited. "The statute of limitations is considered as intended to embrace all causes of action not specifically excepted from its operation, and it should not be construed as to defeat that object. Also, it is a general rule that where the legislature has not seen fit to except a particular person or class of persons from the operation of such statutes, the courts will not assume the right to do so."

13. *Supra* note 3.

tion for the widow.<sup>14</sup> Thus it does not leave such widow without means of making the election. On the other hand, an expeditious closing of estates and the rights of creditors must be considered. One of the purposes of the limitation is to protect creditors by enabling them to inspect the instrument if it is filed; if no such instrument is filed within the required time, then they can act upon the presumption that the widow has chosen to take under the will. Furthermore, the lack of such a requirement or a holding that a court of equity can waive the requirement and make an election for the widow in a suit filed after the period has expired would leave the title to real estate in all such cases in a state of uncertainty. Therefore, for the best interests of all concerned, it would seem that the principal case, under a statute of election such as that in Missouri, reaches the most just result.

There is still another problem not present in the instant case which is presented by such a provision for the widow. It will be noted that the testator through the will gave and bequeathed to his wife "all that part of my estate to which she shall be rightfully entitled under and by virtue of the laws of descent and distribution of the state of Missouri." The will then made provisions for various sums to be given to religious and charitable institutions. Following these provisions was the residuary clause giving the remainder of the estate to the testator's brothers and sisters. The parties apparently agreed that this clause gave the widow dower in the real estate, with the right to elect to take a statutory share, so that this question was not before the court. However, as a matter of good draftsmanship, such a clause should not be employed. It is not entirely clear that the language used required the result in the principal case;<sup>15</sup> in other situations, it is very likely that a different result would be reached.

The statute of decent and distribution<sup>16</sup> provides for a classification of next of kin of the intestate, each class to take in exclusion of all others. By the terms of this statute children of the intestate are placed in the first class; father, mother, brothers, sisters and their descendants are of the second; and a husband or wife is of the third. Therefore, if there are no surviving children, the members of the second class take subject to the widow's dower, or a statutory share by election in lieu of dower. However, if the parents and their other descendants had predeceased the testator in the principal case, then the wife by virtue of this statute would be entitled to the whole of the estate, both real and personal, subject to payment of debts. It would seem that this is the only logical result which could be reached in construing a clause giving the widow that to which she is entitled by virtue of the laws of descent and distribution of the state of Missouri on such facts. But it will be noted that the testator gave a portion of his estate to certain religious and charitable institutions. Therefore, it was not his intention to give his wife the whole of his estate. It would seem, then, in

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14. *Supra* note 4.

15. Compare MO. REV. STATS., Art. 14, Descents and Distribution, § 306 (1939) with Art. 15, Dower, §§ 325, 327.

16. MO. REV. STAT. § 306 (1939).

drawing a will for one who wants to leave his wife that to which she is entitled by virtue of the statutes, that it would be better to state expressly what the widow is to receive in terms of certain property or a certain share of the estate. She still could renounce the will and claim dower if that were more advantageous.<sup>17</sup>

William Icenogle

ZONING ORDINANCES—SUIT BY ADJOINING PROPERTY OWNERS,  
SHOWING SPECIAL DAMAGE, TO ENJOIN VIOLATION THEREOF.

*Evans v. Booth*<sup>1</sup>

*Evans v. Roth*<sup>2</sup>

The city of Columbia, Missouri adopted a zoning ordinance<sup>3</sup> by which the city is divided into seven districts for the purpose of defining construction, use of lands and buildings thereon. One section of said ordinance forbids in District A the use of a building as an apartment house, *i.e.* a building designated for or occupied by more than two families.<sup>4</sup> The ordinance also defines "apartment," "apartment house," and "dwelling."<sup>5</sup>

The property of both plaintiff and defendants is located in a District A and in the immediate vicinity of each other. In 1940 the property was owned by one who instituted proceedings before the Planning and Zoning Committee to rezone this property to permit him to build an apartment house. Plaintiff and other property owners filed a protest. This and all subsequent requests for rezoning were denied. Later permission was secured to build a duplex. The building was visited by the city engineer who found that he had installed two kitchens and bathrooms on each floor and that each floor had two rear entrances. At the order of the city engineer the rear doors were closed with brick and tile and the kitchens dismantled in each of the west units. Defendants acquired the building in 1944. Plaintiffs brought this suit to restrain defendants from maintaining an apartment house in violation of the city ordinance. The lower east unit is occupied by defendants; the upper east unit is occupied by another family group; the lower west unit is occupied by one lady; and the upper west unit is occupied by two ladies. Each of the west units consists of a furnished living room, two bedrooms

17. *Id.* § 333.

1. 197 S. W. 2d 718 (Mo. App. 1946).

2. 201 S. W. 2d 357 (Mo. 1947).

3. Chap. 28, Revised Ordinances, City of Columbia, Mo. (1935).

4. Sec. 1160, Revised Ordinances, City of Columbia, Mo. (1935).

5. Sec. 1156, Revised Ordinances, City of Columbia, Mo. (1935).

"Apartment: A suite of rooms or room in an apartment house, arranged, intended, and designed for, or used as a place of residence of a single family group of individuals living together as a single housekeeping unit."

"Apartment House: A building arranged, intended, designed for, or occupied by more than two families."

"Dwelling: A building arranged, intended, designed for, or occupied by not more than two families."

and a bath. Each of the east units consists of five rooms and a bath, one room fully equipped and used as a kitchen. Evidence showed that defendant orally informed those living in the west units that she could not rent them apartments, but that they must come as roomers and restrict their rights and privileges to those ordinarily enjoyed by roomers. Injury or depreciation in value of plaintiffs' property by the maintenance of the alleged apartment house was shown.

The trial court gave judgment for defendants; on appeal, the Kansas City Court of Appeals affirmed the judgment in the trial court, Dew, J., dissenting. The case was certified to the supreme court. The supreme court, en banc, reversed the judgment, all judges concurring.

The issue of law involved in this case was whether property owners showing special damage could bring suit in equity to enjoin violation of the zoning ordinance without having exhausted the remedies available under the statute.<sup>6</sup> The theory of plaintiffs' case was that the city authorities at no time had made a ruling that would have permitted the interested property owners to have such ruling reviewed by a writ of certiorari. The Kansas City Court of Appeals in passing on this question held that the zoning law provides a scheme by which complete relief may be obtained by one who is claiming in violation of a zoning ordinance. He must first resort to the city authorities for relief and sue out a writ certiorari should such relief be denied. It was no answer that the city authorities had not made a ruling which the plaintiffs could have reviewed, as the law provides a method by which plaintiffs may obtain such ruling. Furthermore, the court held that to allow a suit such as this one would be to allow plaintiffs to elect the tribunal in which they would proceed.

In his dissent, Dew, J., analyzed the remedy of plaintiffs under the statute, and argued that if plaintiff were compelled to lodge with the zoning officials their complaint against their neighbors for zoning violations, they would be subject to the contingency that the officials might fail to act with the resulting necessity for legal proceedings to compel them to act, and the plaintiffs would also be subject to the further contingency that if the officials did act, the plaintiffs must abide by the manner and methods used by the authorities in any proceedings brought by and in behalf of the city, which might or might not afford them full relief, and that in the latter case the only "remedy" left would be acquiescence. He then argued that the statutory remedy is not an adequate, complete remedy at law which would preclude plaintiff from applying to a court of equity to enjoin violation of the zoning ordinances.

In deciding this question, the supreme court held that the statute and the ordinances did not constitute such a plain, complete, and adequate remedy as to deprive a court of equity of jurisdiction to grant relief to adjoining property owners; that the statute and ordinances did not purport to provide procedure by which adjoining property owners and others interested may institute com-

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6. Mo. Rev. Stat. §§ 7412-7423 (1939).

plaints to the building inspector, or that his inspection or any order in consequences thereof shall or may be based on any such complaint; and that unlike zoning ordinances in other jurisdictions there is no provision in this ordinance providing for a permit or certificate of use or occupancy apart from the building permit itself.

This was a case of first impression in Missouri. Other cases concerning zoning ordinance having been reviewed by Missouri courts, but these were cases involving the constitutionality of the particular ordinance as applied in a particular case.<sup>7</sup> It has been held that in such a case involving the constitutionality of the ordinance the courts have jurisdiction without resort having been made to the city authorities because the city authorities are presumed not to be qualified to pass on the question of the constitutionality of the ordinance. The question of constitutionality was not involved in the instant case.

Today the weight of authority is to the effect that private property owners may bring suit for an injunction against such violations. "In most of the jurisdictions in which the question has arisen, it has been held that a property owner, at least upon showing that special damage by way of diminution in value of his property has been or will be suffered by him as a result of the violation of the particular zoning ordinance, may pursue his remedy by enjoining such violation; and some of the courts hold that this may be done even in the absence of express authority in that regard either in the ordinance or in a statute."<sup>8</sup> In deciding this question the Supreme Court of Connecticut<sup>9</sup> held that the fact that the duty of enforcing zoning ordinances rests primarily upon the zoning commission does not deprive the property owner specifically injured by their violation of the right to maintain an action to enjoin such violation without application to the commission for relief. However, there is some authority to the contrary, denying equitable relief in cases where the remedy by statute has not been exhausted and proof made of a demand on municipal authorities for enforcement.<sup>10</sup>

Also involved in this case was the question whether a living unit of several

7. *Taylor v. Schlemmer*, 353 Mo. 687, 132 S. W. 2d 913 (1944); *Kingshighway Presbyterian Church v. Sun Realty Co.*, 324 Mo. 510, 24 S. W. 2d 108 (1930); *Schaub v. Sun Realty Co.*, 24 S. W. 2d 111 (Mo. 1930); *Wippler v. Hohn*, 341 Mo. 780, 110 S. W. 2d 409 (1937).

8. *Momeier v. John McAlister, Inc.*, 193 S. C. 422, 8 S. E. 2d 737, 129 A.L.R. 880, 885 (1940); *Welton v. 40 East Oak Street Bldg. Corp.*, 70 F. 2d 377 (C. C. A. 7th, 1934); *Sapiro v. Frisbie*, 93 Cal. App. 299, 270 Pac. 280 (1928); *Zimmerman v. O'Meara*, 215 Iowa 1140, 245 N. W. 715 (1932); *Rice v. Van Vranken*, 225 App. Div. 179, 232 N. Y. Supp. 506 (3d Dep't 1929). Relief has been denied in cases where the plaintiff failed to show that he had been damaged because of defendant's violation of the particular zoning ordinance. *Mullholland v. State Racing Commission*, 295 Mass. 286, 3 N. E. 2d 773 (1936); *Lehmaier v. Wadsworth*, 122 Conn. 571, 191 Atl. 539 (1937); *Srager v. Mintz*, 109 N. J. Eq. 544, 158 Atl. 471 (1932).

9. *Fitzgerald v. Merard Holding Co., Inc.*, 106 Conn. 475, 138 Atl. 483 (1927).

10. 43 C. J. S. 767 § 155; *Keenly v. McCarty*, 137 Misc. 524, 244 N. Y. Supp. 63 (Sup. Ct. 1930); *City of Graham v. Wheelless*, 89 S. W. 2d 792 (Tex. 1935); *Town of Montclair v. Kip*, 110 N. J. Eq. 506, 160 Atl. 677 (1932).

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rooms not containing a kitchen was an apartment within the purview of the ordinance. At the trial several real estate brokers in Columbia testified that in Columbia it was generally considered that a unit not containing complete kitchen equipment was not an apartment. In passing upon this question the supreme court decided that whether a dwelling unit is an apartment does not depend on whether it contains a kitchen or kitchen equipment. The court took judicial notice of the fact that a bachelor apartment does not ordinarily include kitchen equipment, and held that there is nothing in the ordinance, as now drawn, to exclude such units from the ordinary definition of an apartment. The supreme court held that the units on the east, as they were being used, were "single housekeeping units" and therefore "apartments" as defined by the ordinance; and that the oral agreement entered into between defendant and those occupying the east units whereby defendants undertook to style the nature of the occupancy as that of roomer rather than tenant did not change the character of such dwelling units from apartments to rooms.

WILLIAM E. ICENOGLU