Missouri Law Review

Volume 13
Issue 2 *April 1948*

Article 8

1948

Recent Cases

Recent Cases

LIBEL—PUBLICATION TO PLAINTIFF ONLY

Jacobs v. Transcontinental & Western Air, Inc.[1]

One Jacobs brought an action for a libel which was contained in a letter of dismissal from the employ of defendant corporation, the pertinent part of the letter being as follows: ". . . you have, during your working hours been neglecting your assigned duties and causing a loss of efficiency on the part of other employees by unnecessary loitering in the hallway and in the hangar." Copies of this letter were sent to G. A. Putnam and L. M.Reed, employees of the defendant corporation and to the Airline Mechanics Association, a labor union. There was evidence from which the jury could reasonably infer that the true cause of the plaintiff's dismissal was his activities in securing a new labor organization as bargaining agent for himself and those of his classification. The jury so found and the lower court gave judgment for the plaintiff which was affirmed on appeal by the Kansas City Court of Appeals, Cave, J., dissenting. Defendant corporation contended that it was not proved that the letter was read by Reed, Putnam, or the Airline Mechanics Association. The court held that this was not material as MISSOURI REVISED STATUTES § 4760 (1939) makes the communication of the libel "to the party libeled" one mode of publication.[2]

It is well settled at common law that there must be a communication of the libelous matter to some person other than the party libeled in order for there to be a publication.[3] This general rule is based upon the theory that the action for libel is not for compensation for wounded feelings alone, but must be accompanied with an injury to the reputation of the person libeled. This corresponds to other cases of tort, where there must be some damage to the person or property, which may be aggravated by the mental suffering attending the injury. In order for there to be an injury to reputation, the libel must be seen and understood by some

---

1. 205 S.W. 2d 887 (Mo. App. 1947).

2. The section is found in the article entitled "Miscellaneous Offenses" which is a part of the chapter on "Crimes and Punishments" and reads as follows: "Libel, continued—No printing, writing, or other thing is a libel unless there has been a publication thereof, by delivering, selling, reading or otherwise communicating the same or causing the same to be delivered, sold, read or otherwise communicated to one or more persons or *to the party libeled* . . ." (italics added)

3. Warnock v. Mitchell, 43 Fed. 428 (C.C.W.D. Tenn. 1890); Lally v. Cash, 18 Ariz. 574, 164 Pac. 443 (1917); Yousling v. Dare, 122 Iowa 539, 98 N.W. 371 (1904); Kramer v. Perkins, 102 Minn. 455, 113 N.W. 1062 (1907); Howard v. Wilson, 195 Mo. App. 532, 192 S.W. 473 (1917). See Becker v. Brinkop, 230 Mo. App. 871, 880, 78 S.W. 2d 538, 542 (1935). 33 AM. JUR., Libel and Slander, § 90; 26 C.J., Libel and Slander, § 172; NEWELL, SLANDER AND LIBEL, § 175 (4th ed. 1924); PROSSER, TORTS § 93 (1941); RESTATEMENT, TORTS § 577 (1938); See note, 24 A.L.R. 237 (1923).

person other than the person libeled, as a person's reputation is the esteem in which others hold him and not what he himself thinks.[4]

The criminal law in respect to libel has, from early times, differed from the civil law in that communication to the person libeled is generally held to be a publication.[5] A libel communicated to the person libeled would tend to provoke that person to wrath and would thus lead to breaches of the peace. The purpose of the criminal law in making libel a crime was to prevent such breaches of the peace as contrasted to the purpose of the civil action for libel of giving reparation for injury to reputation. Viewed in this light the difference in requirements as to what will constitute a publication in the two actions becomes readily understandable.

In deciding the principal case, the court, by applying a section of the revised statutes taken from the chapter on "Crimes and Punishments,"[6] swept away the distinction between a publication in the tort of defamation and the crime of defamation. This departure from common law concepts should be based only upon a thorough consideration of the problem and of the authorities on which their decision is based. However, the court contents itself with a brief statement that MISSOURI REVISED STATUTES § 4760 (1939) has been held applicable to civil actions and a citation of four cases in support of its position.[7]

The precedent relied on by the court in the principal case stems from the case of *Houston v. Woolley*[8] which was decided by the same court in 1889. In that case plaintiff averred that defendant wrote two letters threatening to accuse plaintiff of certain crimes. The petition not only charged that the defendant delivered the libelous letters to the plaintiff, but also that the defendant published the letters to others. Of course, the latter act would clearly be a publication by the common law of libel without relying on the section in the criminal chapter of the statutes. The court, however, went ahead to state that "the writing and sending of a libellous writing to the libeled is a publication,"[9] citing the section of the statutes which corresponds to MISSOURI REVISED STATUTES § 4760 (1939). There were no reasons given by the court for changing the common law in regard to publication of a civil libel by applying a criminal statute, and, indeed, they did not seem to realize that the section came from the chapter on "Crimes and Punishments." This *dictum* would seem to be a rather precarious foundation upon which to base a line of decisions which change the common law of civil libel in a substantial particular.

---

4. 33 AM. JUR., Libel and Slander, § 90; NEWELL, SLANDER AND LIBEL § 175 (4th ed. 1924); PROSSER, TORTS § 90 (1941); See note, 24 A.L.R. 237 (1923).

5. 1 BISHOP, NEW CRIMINAL LAW § 591(4) (9th ed. 1923); 2 McCLAIM, CRIMINAL LAW § 1055 (1897).

6. MO. REV. STAT. § 4760 (1939).

7. La Mance v. Street & Smith Publications, Inc., 53 F. Supp. 399 (W.D. Mo. 1943); Bendell v. Richardson Lubricating Co., 226 S.W. 653 (Mo. App. 1920); Wright v. Great Northern Ry. Co., 186 S.W. 1085 (Mo. App. 1916); Houston v. Woolley, 37 Mo. App. 15 (1889).

8. 37 Mo. App. 15 (1889).

9. *Id.* at 24.

The question was next considered by the St. Louis Court of Appeals in 1916, in the case of *Wright* v. *Great Northern Ry.*,[10] where a letter containing libelous matter was sent to the plaintiff's agent. The court assumed that publication to the agent of plaintiff was equivalent to publication to the plaintiff himself and applied the section of the criminal statutes making a communication to the person libeled a publication. This would seem to be a dictum, as the agent of the plaintiff would be a third person within the common law definition of a publication.[11] There is no reason given for the statement that the criminal statute is applicable in a civil case other than a citation of *Houston* v. *Woolley*.

These authorities were not followed, however, by the Springfield Court of Appeals in *Howard* v. *Wilson*,[12] decided in 1917. In that case defendant delivered to plaintiff a letter containing libelous matter and the case turned on whether or not there had been a publication of the libel. The court discussed the fact that the section relied on by the plaintiff[13] was in the chapter on "Crimes and Punishments," and pointed out, for the first time in the Missouri cases, the difference in the criminal and civil actions for libel. The decisions in *Houston* v. *Woolley* and *Wright* v. *Great Northern Ry.* were severely criticized, the court disagreeing with them on principle and also saying that both cases could have reached the same result without relying on the statute in question. The court held that the common law rule that the action for libel was for damage to reputation, which, of course, meant that there must be communication of the libelous matter to a third party, was not changed by the section of the statutes defining a publication in criminal libel.

In 1920, a case[14] came before the Kansas City Court of Appeals which again presented the problem. Defendant, a corporation, sent a letter to plaintiff, an employee of defendant, accusing him of embezzling some of its funds. The petition did not allege that the writing was read by a third person, but the court held that "the petition does not fail to state a cause of action for the reason that it does not show that the writing was read by a third person."[15] The court relied on MISSOURI REVISED STATUTES § 4820 (1909)[16] as having changed the common law rule making it necessary to have a communication of the libel to a third party. The court did not mention that the section applied came from the chapter on "Crimes and Punishments" nor were there any reasons given as to why the statute should be applicable to change the common law rule. The court simply cited the *Houston* and *Wright* cases without any discussion of the facts of the two cases or any comment on the reasoning advanced therein. On a motion for rehearing defendant attempted to show that the decision of the court was in

10. 186 S.W. 1085 (Mo. App. 1916).
11. RESTATEMENT, TORTS § 577 (1938).
12. 195 Mo. App. 532, 192 S.W. 473 (1917).
13. Mo. REV. STAT. § 4820 (1909), which corresponds to Mo. REV. STAT. § 4760 (1939).
14. Bedell v. Richardson Lubricating Co., 226 S.W. 653 (Mo. App. 1920).
15. *Id.* at 656.
16. Now Mo. REV. STAT. § 4760 (1939).

conflict with *Howard* v. *Wilson,* but the court refused to certify the question to the Supreme Court of Missouri on the ground that the statements in the *Howard* case were *dicta.*

The precise question has not come before the Missouri courts since that time although the case of *La Mance* v. *Street & Smith Publications, Inc.,*[17] which is cited by the majority in the principal case, contains a statement that MISSOURI REVISED STATUTES § 4760 (1939) applies to civil as well as criminal actions. In this case there had admittedly been a publication of the libel, but the issue was whether the publication had occurred in a place which would give the federal court jurisdiction. The court made the statement that the statute specifically applies to criminal actions, but by construction of the courts has been made applicable to civil cases. There is nothing said on the matter by the court beyond the bare statement and no citation of authority is given in support of the position.

The question of applying a section of the criminal code defining publication to a civil action of libel has been raised in other states, and those courts seem to have been unanimous in holding that the section of the criminal code has no application to a civil suit for damages.[18] In the case of *Warnock* v. *Mitchell,*[19] which was decided by the Circuit Court for the Western District of Tennessee, the court reviewed the growth of the law from its common law source and came to the conclusion that communication of the libel to a third party has always been required. The statute,[20] which it was contended should be applicable to the civil action for libel, was substantially the same as MISSOURI REVISED STATUTES § 4760 (1939), and provided that the communication of a libel "to one or more persons, or to a party libeled, is a publication thereof." Although the court intimated that it would not be adverse to extending the liability of the defendant to the extent of the language of the statute, it was nevertheless held that since the statute in question was in the section relating to criminal actions, it necessarily had to be confined to criminal prosecutions. The language and the holding in this case was approved in the later case of *Sylvis* v. *Miller*[21] which was decided by the Supreme Court of Tennessee.

Considering that what constitutes a publication of a libel is well defined at common law, that there is a substantial difference between publication in civil and criminal actions, that the rule is not settled in Missouri since there is a conflict in the decisions by the courts of appeal and that other jurisdictions which have passed on the question have been unanimous in holding that the criminal statute

17. 53 F. Supp. 399 (W.D. Mo. 1943).

18. Warnock v. Mitchell, 43 Fed. 428 (C.C.W.D. Tenn. 1890); Lally v. Cash, 18 Ariz. 574, 164 Pac. 443 (1917); Yousling v. Dare, 122 Iowa 539, 98 N.W. 371 (1904); McCurdy v. Hughes, 248 N.W. 512 (N.D. 1933); Sylvis v. Miller, 96 Tenn. 94, 33 S.W. 921 (1896). See Kramer v. Perkins, 102 Minn. 455, 458, 113 N.W. 1062, 1064 (1907).

19. 43 Fed. 428 (C.C.W.D. Tenn. 1890).

20. TENN. CODE § 4762 (1858).

21. 96 Tenn. 94, 33 S.W. 921 (1896).

is not applicable to civil actions, the dissenting opinion takes the sound position in holding that MISSOURI REVISED STATUTES § 4760 (1939) is not applicable to civil actions for libel.

ROBERT L. ROSS

PROPERTY—RULE AGAINST PERPETUITIES—REMOTENESS OF INTEREST VESTING

St. Louis Union Trust Company v. Kelley[1]

Appellant Trust Company, testamentary trustee of the residuary trust estate provided by the will of Julia Morrison, deceased, brought suit to construe her will, particularly with reference to Section Six which gave the residue to the Trust Company, in trust to manage and pay the income to a daughter, Martha Kelley, during her life; upon the death of said daughter leaving children or descendants of children at such time, the trustee was to convey and transfer the fee simple title and absolute property to the lineal descendants of Martha Kelley per stirpes, provided that such lineal descendants should have attained the age of thirty, otherwise the trustee was to convey in instalments of one-half at ages twenty-five and thirty; "and the fee simple and absolute ownership shall *vest* in such grandchild only at the times and to the extent next hereinabove prescribed for the conveyance and transfer to him or her of such title, and nothing in this will contained shall be construed to *vest* in such grandchild either of said instalments unless he or she reaches the said ages of twenty-five and thirty years, respectively. . . ."[2] (Italics added.)

The circuit court decreed that the future interest was a contingent remainder which violated the rule against perpetuities, hence the whole trust failed, both as to the life estate and the remainder, following the doctrine laid down in *Lockridge v. Mace*,[3] which provided that if any portion of the limitation were void for remoteness, the whole limitation would be void.

One possible construction, as contended by the plaintiffs, is that the will created a life estate with a remainder in fee vesting at the testatrix' death in the children of the life tenant as members of a class, with an executory devise over to more remote descendants of the life tenant in the event that her children did not attain the specified ages. If this construction is accepted, defeasible interests vested in the children upon the death of the testatrix (vested in those children subject to being opened to let in after-born children, the class closing at the death of the life tenant, a life in being), although the enjoyment of the interest in possession was postponed until said children reached the specified ages. The rule against

---

1. 199 S. W. 2d 344 (Mo. 1947).

2. Except for the quoted portion, the limitation has been paraphrased and simplifid. The pertinent parts of the will are set out in full in the court's opinion.

3. Lockridge v. Mace, 109 Mo. 162, 18 S. W. 1145 (1891); GRAY, PERPETUITIES § 249a (3d ed. 1915); 3 WALSH, FUTURE INTERESTS 370, note 23 (1947); 3 U. OF MO. BULL. L. SER. 3 (1914).

perpetuities does not apply to a vested remainder even though the remainder is defeasible or subject to a condition subsequent or enjoyment is postponed. This contention is supported by language found in Section Six of the will to the effect "that the net income of the share of my estate so intended for such grandchild shall, while said grandchild is living, be paid to or for it at convenient periods by my said Trustees;" and is further supported by language contained in the codicil: "my [named] granddaughter . . . to whom by the provisions of said Section Six of my said Will *I have given an absolute share in remainder upon the death of her mother. . . .*" (Italics added.)

However, if the divesting interest is void because it violates the rule against perpetuities, as it is under this assumed contention, then: 1) the children would have an indefeasibly vested remainder at the death of the testatrix, clearly contrary to the intention of the testatrix; and 2) under the doctrine of *Lockridge v. Mace*[4] the whole limitation would be void.

An alternative construction, the one adopted by the circuit court, is that the will created a life estate with contingent remainders in the children of the life tenant, the condition precedent to vesting being attaining the specified ages. Should this construction be adopted, the contingent remainders might vest too remotely, and therefore violate the rule against perpetuities, and consequently would be void.[5] It is possible that the children of the life tenant living at the testatrix' death could all die, that thereafter the life-tenant could have another child, and that the life tenant would die immediately after that child's birth. The death of the life-tenant would terminate the last "life in being." The newly born child must attain the ages of twenty-five and thirty years before the respective interests will vest in him. Thus lives in being and twenty-five or thirty years might elapse before the remainder would vest, a period too remote under the rule against perpetuities.

The court, in affirming the construction adopted by the circuit court, placed much emphasis upon the clause which provided that "nothing in this will contained shall be construed to *vest* in such grandchild either of said instalments unless he or she reaches the said ages of twenty-five and thirty, respectively." The court thus interpreted these words to mean that it was the intent of the testator that no interest should vest and that these were not vested interests subject to divest-

---

4. *Supra* note 3.

5. The rule against perpetuities as defined in this case is as follows: "The rule against perpetuities is that no interest within its scope is good unless it must vest, if at all, not later than twenty-one years after some life or lives in being at the creation of the interest, to which period is added the period of gestation, if gestation exists." See also: 48 C. J. 937; GRAY, PERPETUITIES (3d ed. 1915; Hudson, *The Rule Against Perpetuities in Missouri*, 3 U. OF MO. BULL. L. SER. 3 (1914); WORDS AND PHRASES, permanent edition, for other definitions of "Perpetuities, Rule Against." For Missouri decisions, see: St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S.W. 2d 569, 101 A.L.R. 1266 (1935); Rutherfurd v. Farrar, 118 S.W. 2d 79 (Mo. App. 1938); Greenleaf v. Greenleaf, 332 Mo. 402, 58 S. W. 2d 448 (1933).

ment, but merely contingent remainders subject to the rule against perpetuities as indicated above.[6]

The word "vested" is commonly used in a number of senses, but the true meaning depends upon the intent of the user in each particular case. Frequently the sense in which it is used is clear, but in border-line cases difficulty arises. Vested may be used in at least four senses in describing an interest: 1) that an interest is possessory; 2) that although an interest is a future interest, it has acquired the character of an existing estate rather than the mere possibility of becoming such estate, *i.e.*, that it is vested in interest; 3) that should the taker of an interest die before the estate becomes possessory, the interest is transmissible to his estate and that his heirs will take such interest; and 4) that an interest has acquired the degree of certainty which under the rule against perpetuities an interest must acquire within lives in being and twenty-one years, or fail.[7]

Herein the court seems to use the word "vested"[8] in a combination of its second and fourth senses as above set out. Although these two senses usually coincide in meaning, it is possible in certain cases that an interest may be vested in one sense and contingent in another sense of the word. Where there is a gift to A for life, remainder to such children of A as shall reach the age of thirty, a child of A who has already reached thirty takes an interest which is vested in the sense that it is not subject to a condition precedent and in the sense that it is transmissible to his heirs if he dies before A dies, but is still contingent so far as the rule against perpetuities is concerned since the class will open to admit additional children of A who may be born and who must reach thirty years of age.

In *Blackhurst v. Johnson*,[9] a case very similar to the principal case, where a trust provided that net income should be distributed to the daughter, and, on the daughter's death, to daughter's issue, and the corpus distributed when daughter's youngest child reached thirty years of age, it was held that the provision violated the rule against perpetuities in view of the settlor's clear intent that no right in the corpus should vest during the life of the trust.

Herein, in view of the testatrix' intention that no interest was to *vest* until certain conditions were performed, the decree of the circuit court, as adopted by the supreme court, declared that the residuary clause isolated the rule against perpetuities and was void.

C. DUDLEY BRANDOM

---

6. The court analyzed other parts of the residuary clause in reaching its decision, but the court's analysis is too extensive to set forth completely in this note.

7. LEACH, CASES AND MATERIALS ON FUTURE INTERESTS, 255-256 (2d ed. 1940); See also: SIMES, FUTURE INTERESTS, § 347 (1936); KALES, FUTURE INTERESTS, § § 118, 654, 684 (2d ed. 1920).

8. Reference is made to the opinion for the court's complete and exhaustive analysis of the meaning of "vested" and also as to the meaning of other words used.

9. Blackhurst v. Johnson, 72 F. 2d 644 (C.C.A. 8th, 1934).

TAXATION—STATE TAX ON GROSS RECEIPTS OF BUSINESS ENGAGED IN INTERSTATE COMMERCE

Freeman v. Hewit[1]

Plaintiff's predecessor, domiciled in Indiana, was trustee of an estate created by the will of a decedent domiciled in Indiana at the time of his death. The trustee instructed his Indiana broker to sell certain securities forming a part of the estate, and such were sold on the New York stock exchange. The securities were then mailed to New York and the proceeds less the broker's fee were given to the trustee. A tax of 1% on the gross receipts of this sale was imposed under the Indiana Gross Income Tax Act of 1933. Plaintiff paid the tax under protest and brought this suit to recover the amount paid.

The majority opinion in this case invalidating the tax indicates a return to the so called mechanical test by which it is determined whether a state tax constitutes such a burden on interstate commerce as to be unconstitutional.[2] The majority based their decision on the fact that it is a direct state tax on "the very process" of interstate commerce. No emphasis is placed on lack of apportionment or threat of multiple taxation as has been done in other recent cases.[3] Multiple taxation occurs where both the state from which shipment begins and the state of the market tax the product on the basis of its value. Clearly, this subjects the product to double taxes whereas a product made and shipped within either of these two states would not be so burdened. The result of such a tax is to put interstate commerce at a disadvantage. If the entire interstate transaction were examined so as to give each state taxes on a part of it, but not on the whole, then there would be such apportionment as to eliminate unfair cumulative burdens.

The rule applied in this case is similar to that laid down in 1925 in the case of *Real Silk Hosiery Company v. City of Portland.*[4] There a city tax was laid on all "peddlers" whether resident or foreign. The tax was $12.50 a quarter for those persons not using a vehicle, and it was held to be an unconstitutional interference with interstate commerce as applied to the solicitors of a corporation engaged in the manufacture of goods in another state and selling to the consumers directly on orders secured by solicitors to be sent to the home office. The effect of such decision was to give interstate business an advantage over intrastate business and relieve it of paying its share of government expenses. While this case

1. 329 U. S. 249, 67 Sup. Ct. 274 (1946).

2. Use of the mechanical test is frowned on by the authors of American Jurisprudence. In § 211 of the chapter on taxation, they state, "The fact that the pursuit of a business or occupation invokes or affects interstate or foreign commerce indirectly or merely incidentally does not preclude a state from levying an excise tax on or measured by the profits or the gross receipts from such business or occupation."

3. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 Sup. Ct. 913 (1938); Gwin, White & Prince Co. v. Henneford, 305 U. S. 434, 59 Sup. Ct. 325 (1939); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 Sup. Ct. 388 (1940); Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 Sup. Ct. 546 (1938).

4. 268 U. S. 325, 45 Sup. Ct. 525 (1925).

was not expressly overruled, the court later abandoned the type of reasoning employed there. Such decisions as *Western Live Stock v. Bureau of Revenue*,[5] *McGoldrick v. Berwind-White Coal Mining Company*,[6] and *Adams Mfg. Co. v. Storen*[7] though difficult to harmonize have the effect of allowing states greater freedom in taxing interstate commerce.

The year 1937 marks the turning point away from the rigid rule against taxation by states of interstate commerce. In this year, the Supreme Court handed down their decision in *Western Live Stock v. Bureau of Revenue*.[8] There the state of New Mexico put a two percent privilege tax on the income from the sale of advertising space in magazines. The plaintiff printed a monthly livestock journal in the state, and it had some interstate circulation. Some of the advertisements were secured from customers out of the state by contracts made there. In sustaining the validity of the tax, Justice Stone points out, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens even though it increases the cost of doing the business."[9] The Court states further that, "Viewed only as authority, *American Mfg. Co. v. St. Louis*[10] . . . would seem decisive in the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local

5. *Supra* note 3.

6. *Supra* note 3. Plaintiff company was a Pennsylvania Corporation and it had sales offices in New York City. Certain sales were made in the city and the contracts were completed there. Later shipments of coal were delivered to the customers in New York after having come interstate from plaintiff's mines in Pennsylvania. A non-discriminatory sales tax was levied by the state of New York and the plaintiff denied the validity of the tax. The tax was found constitutional as not imposing a burden on interstate commerce, for the court found that the delivery in New York was a sufficient local event upon which to make the tax apply. It seems that some local activity within the taxing state may always be found by the court if such is the only requirement.

7. *Supra* note 3.

8. *Supra* note 3.

9. 303 U.S. at 254.

10. 250 U. S. 459, 39 Sup. Ct. 522 (1919). Here the right to manufacture goods was conditioned on the payment of a license tax. The size of that tax was computed upon the amount of the sale of goods manufactured whether sold locally or in interstate commerce. The goods in this case were manufactured in St. Louis, then shipped to warehouses in another state and later sold from these warehouses in interstate commerce. While it appears that the economic affect of such a tax would be equivalent to a tax on gross receipts, the court does not so hold. In sustaining the validity of the tax the court says, "We hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the city of St. Louis; that when the goods were manufactured the obligation accrued to pay the amount of the tax represented by their production when it should be liquidated by their sale by the manufacturer; that the removal from the city of St. Louis and storage elsewhere, whether within or without the state, worked no change in this obligation." Since the court in the Adams case purports to base its decision on the practical effect of the tax, the two decisions are difficult to reconcile.

business."[11] An attempt to distinguish this case from earlier cases dealing with the same problem is made by the court where it states, "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."[12] It was also emphasized that the local business taxed here is separate and distinct from the transportation and intercourse which are interstate commerce and which were employed to conduct the business.

The following year the court followed the same approach to the case of *Adams Mfg. Co. v. Storen*[13] but found the tax to be invalid. Here the plaintiff company maintained its factory and home office in the state. They sold 80% of their products to customers in other states and foreign countries. All orders taken were subject to approval by the home office.[14] The state involved there was the same as in the instant case and the court held it to be bad when applied without apportionment to gross receipts[15] derived from interstate sales of goods made in Indiana and sold in other states. The danger of double taxation which was not present in the *Western Live Stock* case was found here and for this reason and because of lack of apportionment, the tax was held unconstitutional. In the concurring opinion in the instant case Justice Rutledge points out that the *Adams* case would have been sustained if there had been no danger of multiple state taxation or if the tax had been apportioned so as to eliminate cumulative burdens. In speaking of the majority opinion he states, "Yet now they (the threat of multiple taxes or lack of apportionment) are put to one side, either as irrelevant or as not controlling and therefore presumably as insufficient, in favor of another rationalization which ignores them completely. Shortly, this is, in reiterated forms, that the tax as applied is laid 'directly on' interstate commerce, is a levy 'on the very sale' or 'the very process' of such commerce, is therefore and soley thereby a 'burden' on it, and consequently is an exaction the commerce clause forbids."[16]

---

11. 303 U. S. 258.
12. 303 U. S. at 255.
13. *Supra* note 3.
14. A further clarification of the statute involved in the instant case may be obtained from International Harvester Co. v. Dept. of Treasury of Indiana, 322 U. S. 340, 64 Sup. Ct. 1019 (1944). Three distinct types of interstate transactions are involved there, and the court analyzes each in testing the validity of the tax.
15. Gross receipt taxes which have been sustained fall into two groups: (a) Those which were fairly apportioned. See, *e.g.* Illinois C. R. Co. v. Minnesota, 309 U. S. 157, 60 Sup. Ct. 419 (1940); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876 (1891); Ficklen v. Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810 (1892). (b) Those which have been justified on a "local incidence" theory. See *e.g.*, Western Live Stock v. Bureau of Revenue, *supra* note 3; McGoldrick v. Berwind-White Coal Min. Co., *supra* note 3; American Mfg. Co. v. St. Louis, *supra* note 10.
16. 329 U. S. at 261.

A different theory is advanced by Justice Black. He sees the problem as being whether in the absence of regulatory legislation by congress condemning state taxes on gross receipts from interstate commerce—the Commerce Clause of itself, prohibits *all* such state taxes as "regulations" of interstate commerce, even though general, uniform, and non-discriminatory. In his frequent dissenting opinions, Justice Black emphasizes that regulation and taxation are not necessarily synonymous terms and that many local taxes on property used in interstate commerce[17] have been held valid as not constituting a regulation thereof. Thus a distinction should be made between taxes for revenue, which incidentally affect interstate commerce, and other taxes which directly regulate commerce. If these taxes which are levied for the purpose of obtaining revenue should become so large as to seriously impede the freedom of interstate commerce, then Congress should step in and regulate the situation as the constitution empowers them to do. In *Adams Mfg. Co. v. Storen*[18] Justice Black said, "A court may act to protect a litigant from unfair and unjust burdens upon the litigant's interstate business. Yet it would seem that only Congress has the power to formulate rules, and regulations and laws to protect interstate commerce from *merely possible future unfair burdens.*"[19]

Thus it appears that the trend toward greater leniency in permitting state taxation which appeared in 1937 has been checked.[20] In its place the court has in the instant case returned to the reasoning applied in the REAL SILK case which makes any harmony of the cases virtually impossible. Under the doctrine applied here it seems that many state taxes now considered valid would be unconstitutional when examined in the light of *Freeman v. Hewit.*

A recent decision by the Supreme Court[21] recognizes that the problem requires congressional action to prevent one of the two alternatives. Either interstate commerce shall go tax free and put it at an advantage over intrastate commerce, or it shall be taxed and possible burdened in conflict with the purpose of the Commerce Clause. A further suggestion has been offered by Justice Rutledge in his concurring opinion in the instant case. It is there suggested that the state of the market should be permitted to tax the interstate transaction, but to deny

---

17. A detailed discussion of cases dealing with gross receipt taxes on interstate commerce is found in 57 HARV. L. REV. 40 (1943). There Professor Lockhart points out the change in approach used by the Supreme Court in testing the validity of such taxes beginning in 1937 with the Western Live Stock case.

18. *Supra* note 3.

19. 304 U. S. at 328.

20. A discussion of the important cases on this subject up to and including 1945 is found in 11 Mo. L. REV. 197 at 247 (1946). Here the facts and decisions of the leading cases are compared and discussed so as to give a broad picture of the problem involved when attempting to determine the validity of any state tax.

21. The court in McCarrol v. Dixie Greyhound Lines, 309 U. S. 176, 60 Sup. Ct. 504 (1940) points out that any adjustment and remedy made by the courts will be ineffective and that a uniform plan should be enacted by congress as the only practical solution to the difficult problem presented.

this power to the forwarding state, unless by credit or otherwise it should make provision for apportionment. In the absence of some clarification by the Court, only confusion can exist as to the constitutionality of any such state taxes.

JOHN S. DIVILBISS

VENDOR AND PURCHASER—TITLE VENDOR IS TO FURNISH

Leath v. Weaver[1]

The plaintiff vendor executed a contract to convey real estate which required him to furnish "a complete abstract of title to said property from the United States Government to this date with certificate by competent abstractors as to taxes," etc. The purchaser was permitted ten days in which to examine the abstract. "If the title be good," the vendor was to deliver a warranty deed conveying the property free and clear from all liens and encumbrances whatsoever. "If the title is defective," and if the defects could not be rectified within a certain time, the contract was to be null and void. Time was made of the essence. The abstract furnished by the vendor showed breaks in the chain of title, and the purchaser refused to close the transaction. The vendor brought a suit for damages for breach of this contract. The purchaser defended on the ground that the contract required the vendor to furnish an abstract showing a good record title as a condition precedent to performance by the purchaser and that a title which might be good by adverse possession was not sufficient.

In upholding purchaser's contention, the court strongly relied upon *Aker v. Lipscomb*,[2] decided in 1923, in which case the terms of the contract with reference to the abstract and kind of title to be furnished were identical with the provisions of the contract involved in the principal case. Therein it was said: ". . . the words 'if the title be good' have and can only have reference to the showing made by the abstract of title. In other words it means a 'good title' as appears from the abstract. Stated differently, a good record title, and not a mere marketable title."[3] The court thus distinguished between a contract calling for a record title and one requiring mere marketable title which is not of record. This interpretation appears to follow the general rule[4] that where by the contract the seller is to furnish an abstract showing title in him, the furnishing of such an abstract is a condition precedent to the liability of the purchaser to perform; and that such an abstract must disclose a good record title.[5]

---

1. Leath v. Weaver, 202 S. W. 2d 125 (Mo. App. 1947).
2. Aker v. Lipscomb, 300 Mo. 303, 253 S. W. 995 (1923).
3 Only a portion of the court's decision is herein set out; other language of the contract was similarly construed.
4 7 A.L.R. 1162 at 1166 (1920); 55 AM. JUR. 734.
5. The great weight of authority supports the rule that an abstract is an epitome of the record evidence of title; that a contract calling " 'for an abstract showing good title' calls for record evidence; that nothing else will 'satisfy the condition no matter what the vendor's real title might be'; that 'it is not sufficient that the title is good in fact—that is, capable of being made good by the production

It seems settled that parties contracting for the sale of land may provide for the character of title to be delivered and the vendor must furnish the exact title called for by his contract,[6] but it is often a question what the terms of the contract mean. At present there seems to be very little distinction between the customary terms used in such contracts. Marketable title[7] and merchantable title[8] have been held to be practically synonymous;[9] good title has been held synonymous with marketable title;[10] and perfect title is not too dissimilar.[11]

When a contract merely requires a conveyance by warranty deed and contains no provision indicating the character of the title the vendor is to furnish, an undertaking on the part of the vendor to make and convey a good or marketable title to the purchaser is implied.[12] Such contracts and contracts calling for marketable or good title may be performed by proper conveyance although evidence outside the records may be necessary to prove such title, and title by adverse possession for the statutory period will be deemed marketable title.[13] These contracts should be distinguished from a contract[14] requiring a good or marketable title of record or

---

of affidavits or other oral testimony; it must be good of record'; that in such a case title by adverse possession will not suffice." Danzer v. Moerschel, 214 S. W. 849, 7 A.L.R. 1162 (1919); Coble v. Denison, 151 Mo. App. 319, 131 S. W. 719 (1910); Austin v. Shipman, 160 Mo. App. 206, 141 S. W. 425 (1911); St. Clair v. Hellweg, 173 Mo. App. 660, 159 S. W. 17 (1913); see also 52 A.L.R. 1468 and 1469 (1928).

6. Aker v. Lipscomb, 300 Mo. 303, 253 S. W. 995 (1923); Danzer v. Moerschel, 214 S. W. 849, 7 A.L.R. 1162 (1919); Reeves v. Roberts, 294 Mo. 593, 242 S. W. 956 at 958 (1922).

7. Marketable title has been defined as the title "which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept." Wiemann v. Steffen, 186 Mo. App. 584, 172 S. W. 472 (1915).

8. Merchantable title was defined as the title enabling "vendee not only to hold his land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value." McConnell v. Deal, 296 Mo. 275, 246 S. W. 594 (1922).

9. Reeves v. Roberts, 294 Mo. 593, 242 S. W. 956 (1922); 26 WORDS AND PHRASES, 542 and 543 (perm. ed.).

10. Rogers v. Gruber, 351 Mo. 1033, 174 S. W. 2d 830 (1943); Kling v. A. H. Greef Realty Company, 166 Mo. App. 190, 148 S. W. 203 (1912); 57 A.L.R. 1282 and 1283 (1928); 18 WORDS AND PHRASES 549 and 550 (perm. ed.).

11. Perfect title has been defined as a title which will enable one to hold the land in peace, and to be reasonably sure that no flaw will disturb its marketable value. Ives v. Crawford County Farmers' Bank, 140 Mo. App. 293, 124 S. W. 23 (1910); and see Williams v. Ellis, 239 S. W. 157 (Mo. App. 1922).

12. Rogers v. Gruber, 351 Mo. 1033, 174 S. W. 2d 830 (1943); McPherson v. Kissee, 239 Mo. 664, 144 S. W. 410 (1912); 55 AM. JUR. 619.

13. The weight of authority is that unless the contract calls for a record title or a title appearing in conveyances, as by an abstract or something of that nature, a good title by adverse possession under the statute of limitations is sufficient and regarded as a marketable title. Wiemann v. Steffen, 186 Mo. App. 584, 172 S. W. 472 (1915); Scannell v. American Soda Fountain Co., 161 Mo. 606, 61 S. W. 889 (1901); 66 C. J. 872 and 874.

14. A Florida decision clearly so distinguishes the different situations in the following language: ". . . where the contract does not in effect require the conveyance of a good marketable title 'of record,'" the implied obligation "may be dis-

as shown by abstract, which terms are usually construed to require that the title must appear of record as a condition precedent to performance of the contract by the purchaser and that title by adverse possession, prescription, or parol evidence is not sufficient,[15] as hereinbefore discussed.

Vendor asserted that the contract was ambiguous and so must be construed according to the intent of the parties and that the parties intended a good merchantable title and thus adverse possession could supply such title. Although these same contractual provisions had been construed previously,[16] the ambiguity of these provisions again caused these terms to be placed in litigation. Both times the language was construed to mean title of record and not title in fact.

It is submitted that if the purchaser desires that vendor furnish an abstract showing a good record title as a condition precedent to performance by the purchaser, a preferable choice of terms would be: "Vendor shall furnish a complete abstract certified to date showing a marketable (or good) record title . . ." AND "Vendor shall convey to purchaser by Warranty Deed a good title free and clear of all liens and encumbrances whatsoever."[17]

C. DUDLEY BRANDOM

---

charged by the conveyance of a title resting partly in parol, but free from doubt upon questions of both law and fact." De Huy v. Osborne, 96 Fla. 435, 118 So. 161 at 163 (1928); 3 Ala. Lawyer 130 (1942).

15. *Supra,* note 5; 7 A.L.R. 1162 (1920); 66 C. J. 873. But, in Jamison v. Van Auken, 210 S. W. 404 (1919), the contract called for a warranty deed and abstract showing good merchantable title to a certain 1270 acres of land. Purchaser entered and occupied this land for five years, but refused to perform his part of the contract. Good record title was established as to 1050 acres, and sufficient adverse possession was shown to bar all claims against the remaining 220 acres, although record title was defective as to this 220 acres. In an action by vendor for specific performance, the court distinguished between a perfect record title and a good merchantable title, stating that the good merchantable title was not condemned for lack of record evidence, although it would not require a party to accept the title if it was clouded by another title outside the record title. However, in view of the facts of this case, this decision might have been reached on the basis of specific performance with abatement as to the 220 acres. If this is true, the distinction in terms made by the court should not have much value.

16. Aker v. Lipscomb, *supra* note 2.

17. This latter provision should be included in the contract for the purpose of requiring the vendor to furnish good title in fact, as well as a marketable title of record, *i.e.,* title in fact free from defects such as adverse possession, easements by adverse user, fraudulent title, dower interests, etc.