Missouri Law Review

Volume 13
Issue 3 *June 1948*

Article 4

1948

Recent Cases

Recent Cases

Accession—Tires to Motor Vehicles

Goodrich Silvertown Stores v. Brashear Freight Lines[1]

X sold a truck to *Y*, taking a purchase money chattel mortgage thereon. The mortgage was duly recorded[2] and noted on the certificate of title[3] of the vehicle. Subsequently *Y* purchased tires and tubes from the plaintiff, giving a purchase money chattel mortgage on these items as security for the unpaid purchase price. Plaintiff recorded the mortgage on the tires and tubes, but did not have it noted on the certificate of title of the truck. *Y* then sold the truck, with the tires and tubes attached, to the defendant Freight Lines, which satisfied *X*'s mortgage but not that of the plaintiff, of which defendant had no actual notice. Plaintiff's demand upon defendant for the return of the tires and tubes pursuant to the terms of the mortgage was refused, and plaintiff brought this action for conversion. From a judgment for the plaintiff, the defendant appeals, claiming: (1) that the Missouri recordation statutes[4] require not only that such mortgage be recorded or filed, but that it be noted on the certificate of title of the vehicle in order to constitute constructive notice of such a mortgage to one otherwise a bona fide purchaser; and (2) that the articles had, by accession, become an integral part of the vehicle and hence title passed to the defendant when it acquired title to the truck. Both of these arguments were rejected by the court of appeals, and judgment for the plaintiff was affirmed.

In support of the first contention, the defendant relied on the argument that the pertinent portion of *Missouri Revised Statutes* (1939), § 3488, requiring that mortgages on motor vehicles must be noted on the certificate of title or else they "shall not be notice to the whole world," was meant to apply to situations such as this, since such statute was "enacted to prevent fraud in the sale of motor vehicles and to enable a purchaser to readily and quickly ascertain if there are any mortgages affecting them."[5] The court rejects this argument, inasmuch as the statute is plain and unambiguous on its face, stating that it applies only to mortgages *on*[6] motor vehicles.

Though there has been no previous holding in this state on the question of

1. 198 S.W. 2d 357 (Mo. App. 1946).
2. Pursuant to Missouri's general chattel mortgage recording statute. Mo. Rev. Stat. § 3486 (1939).
3. As required by Mo. Rev. Stat. § 3488 (1939) stating in part that "A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided."
4. The statutes are those cited in footnotes 2 and 3.
5. Goodrich Silvertown Stores v. Brashear Freight Lines, 198 S.W. 2d 357, 359 (Mo. App. 1946).
6. Italics added.

whether or not accessories such as demountable tires become a part of a motor vehicle by accession, so that title to the accessory follows title to the principal goods, the court rather summarily rejects the second contention of the defendant. The court quotes from *Franklin Service Stations v. Sterling Motor Truck Co.*,[7] a case involving a sale of tires under a conditional sales contract:

> "These tires were not an integral and permanent part of the truck; they were temporary and separable attachments on the moving parts of the truck; they could be removed without injury to the truck and used elsewhere. . . . The automobile today is often assembled with parts bought from different dealers, which are separable and replaceable. The practice and course of business must be considered on the question of accession as applied to automobiles."

This reasoning is adopted *in toto* by the Missouri court, and the resulting conclusion is that there is no accession, and consequently no change in the title to the accessory. Special emphasis is placed by the court on the practice and course of business in the automobile industry.

The doctrine of accession had its source in the Roman Law, but is found everywhere in the Anglo-American law.[8] The general rule is: ". . . when by labor the materials of one person are united or joined to another's materials resulting in a joint product, under the principle of accession the owner of the principal materials acquires the title to the joint product."[9]

But as with so many simply stated rules, it is not easy of application in divergent fact situations. The problem of when there is a sufficient union of products is susceptible of many answers; and the position of the parties who lay claim to the article often determines the conclusion of the court in a particular case. Efforts have often been made to set an adequate general rule. There have been suggested such tests as relative value of the articles;[10] whether there has been a change of species;[11] and whether the separate materials are identifiable.[12] Because of the frequency with which such questions arise in the field of motor vehicle accessories, efforts to find special tests for this field have been numerous. The usual test is whether the accessory can be identified and severed from the principal part without material injury to either the accessory or the vehicle.[13] This is the rule

---

7. 50 R.I. 336, 147 Atl. 754 (1929).
8. Lampton v. Preston, 1 J. J. Marshall 454 (Ky. 1829); and Lupton v. White, 15 Ves. 432, 33 Eng. Rep. 817 (1808) are among the earliest Anglo-American cases adopting this idea.
9. Twin City Motor Co. v. Rouzer Motor Co., 197 N.C. 371, 148 S.E. 461 (1929); 1 C.J.S. *Accession* § 4.
10. Lampton v. Preston, *supra* note 8. *Contra*: Hamlin v. Jerrard, 72 Me. 62 (1881).
11. Silsbury v. McCoon, 3 N.Y. 379, 53 Am. Dec. 307 (1850).
12. Eaton v. Munroe, 52 Me. 63 (1862).
13. The leading case setting forth this view is Clark v. Wells, 45 Vt. 47 (1872) (involving wheels added to a wagon). The doctrine has been adopted in the field of accessories to motor vehicles in Hallman v. Dothan Foundry and Machine Co., 17 Ala. App. 152, 82 So. 642 (1919); Motor Credit Co. v. Smith, 24 S.W. 2d 974 (Ark. 1930); Passieu v. Goodrich, 58 Ga. App. 691, 199 S.E. 775 (1938);

adopted by the Missouri court in the instant case, with a resultant conclusion that there was no accession.

A different view is espoused in a few cases, the leading one of which is *Blackwood Tire and Vulcanizing Co. v. Auto Storage Co.*[14] In that case the defendant sold an automobile to one Cooper under a conditional sale arrangement. Cooper later bought tires from the plaintiff on credit. The plaintiff retained no security interest in the tires. Upon Cooper's default, defendant repossessed the automobile with the tires attached. Cooper, at the instigation of the plaintiff, then purported to resell the tires to plaintiff. Claiming that this subsequent transaction vested title to the tires in him, plaintiff instituted a replevin action. From an adverse judgment, plaintiff appealed. The judgment was affirmed. The court's ruling was grounded on the fact that the seller of the accessories retained no title in them and hence the general principle that repairs made by the mortgagor (or purchaser under a conditional sale) inure to the benefit of the mortgagee (or conditional seller) was not impugned.

The fallacy of this "retention of title" test is demonstrated by recalling that the states vary in their interpretation of the effect of conditional sale and chattel mortgage transactions. Thus, in a situation involving the purchase money mortgagee or conditional seller of the accessory and the mortgagee of the vehicle (or, as in the principal case, a purchaser from the mortgagor), the question of accession would turn on the view taken of the effect of mortgages and conditional sales on titles. If the jurisdiction in which the transaction took place holds that the purchase money mortgagee of the accessories got (or the conditional vendor retained) title for security,[15] then the logical conclusion would be that there was no accession, and the chattel mortgagee or conditional vendor of the accessory would prevail. Conversely, in other states, which hold that the mortgagee receives only a legal lien,[16] the decision logically will be that there has been accession, and the rights of the mortgagee are defeated.

The test of "retention of title" is unsound. It ignores the comparative merits of the claims of the parties, their intentions, and the extent to which the accessory has become an integral part of the vehicle. Though it reaches a proper result in

---

Clarke v. Johnson, 43 Nev. 359, 187 Pac. 510 (1920); K. C. Tire Co. v. Way Motor Co., 143 Okla. 87, 287 Pac. 993 (1930); Franklin Service Stations v. Sterling Motor Truck Co., 147 Atl. 754 (R. I. 1929).

14. Blackwood Tire and Vulcanizing Co. v. Auto Storage Co., 133 Tenn. 515, 182 S.W. 576 (1916). *Accord*: Diamond Service Station v. Broadway Motor Co., 158 Tenn. 258, 12 S.W. 2d 705 (1929).

15. For a list of states so holding in the case of chattel mortgages, *see* 14 C.J.S. *Chattel Mortgages* § 1, n. 7, 10. This is the usual holding in the case of conditional sales, Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51 (1886); VOLD, HANDBOOK OF THE LAW OF SALES (1931).

16. And such is the effect in Missouri. Adamson v. Fogelstrom, 221 Mo. App. 1243, 300 S.W. 841 (1927); Olean Milling Co. v. Tyler; 208 Mo. App. 430, 235 S.W. 186 (1921). In some jurisdictions this is also the theory of a conditional sale. Clark v. Baker, 30 Colo. 199, 69 Pac. 506 (1901); Westinghouse Electric Co. v. Auburn T. R., 106 Me. 349, 76 Atl. 897 (1910). It would also seem to be the theory of the Uniform Conditional Sales Act, adopted in several states. 2 UNIFORM LAWS ANNOTATED, § 18.

situations involving only the mortgagor of the vehicle and the mortgagee thereof, it would often reach an undesirable conclusion when a third party becomes involved. In the principal case, the conclusion in a "lien theory" state would have been that the tires became a part of the vehicle by accession, with no sounder basis than that the mortgagee of the tires got no "title," but a legal lien. In a "title theory" state the result would be *contra.* Such a situation is patently unsatisfactory.

The "identifiability and severability" test seemingly adopted by the Missouri court appears more acceptable, since it looks primarily to the degree of permanency with which the accessory has been affixed. However, the intentions of the parties and the comparative merits of their claims should not be completely submerged to any rule of law. Such is recognized by the Missouri court when they state, *supra,* that "the practice and course of business must be considered."

Consideration of our problem may be aided at this point by the classification of the various transactions in which the problem arises into typical situations as to parties involved:

A. MORTGAGEE OF VEHICLE v. MORTGAGOR OF VEHICLE

Under such a test, where the sole parties to the controversy are the mortgagee and mortgagor of the vehicle, the slightest degree of attachment is enough for the mortgagee to prevail.[17] This conclusion is often aided by an after-acquired property clause in the mortgage.[18] But even in the absence of such a provision, there is a presumption that the mortgagor intended that the accessory should enhance the security interest of the mortgagee.[19]

B. MORTGAGEE OF ACCESSORY v. MORTGAGOR OF ACCESSORY

If the parties be the owner of the automobile and the seller of the accessory who retains a security interest therein, there should be no accession unless the accessory has become completely unidentifiable or can be severed only with great damage to the vehicle or the accessory. This logically follows from a recognition that the normal business dealings in the field of automobile accessories would be seriously hampered by a ruling that the seller lost his security interest in the accessory upon its attachment to the automobile, the very purpose for which it was sold.

C. MORTGAGEE OF ACCESSORY v. PRE-EXISTING MORTGAGEE OF VEHICLE

Since a great portion of our motor vehicles are constantly subject to mortgages, and accessories such as tires are being constantly replaced, such disputes

17. In Purnell v. Fooks, 32 Del. 336, 122 Atl. 901 (1923), tires acquired by the mortgagor and attached were awarded to the repossessing mortgagee of the truck.

18. As a general rule, this after-acquired property clause is sufficient between the parties without any further act on the part of the mortgagee. *See* 14 C.J.S. *Chattel Mortgages* § 26*e,* and cases cited therein.

19. Holly v. Brown, 14 Conn. 254 (1841); Southworth v. Isham, 3 Sandf. 448 (N. Y. 1850); Clark v. Wells, 45 Vt. 3, 12 Am. Rep. 187 (1872). *But see* Netzrog v. National Supply Co., 28 Ohio C. C. 112 (1905) holding such rule inapplicable where improvements were easily identifiable and separable.

quite commonly arise. The seller of the accessory takes a purchase-money mortgage on the accessory, the purchaser attaches it to the previously mortgaged vehicle. Upon default in payments on the mortgage of the vehicle, the mortgagee repossesses the vehicle with the encumbered accessories attached. In such a situation, there is no room for a presumption that the mortgagee of the accessory intended to enhance the security interest of the mortgagee of the vehicle, and the mortgagee of the vehicle did not rely upon the additional security of these accessories when he entered his agreement. The great harm which would be done to the automobile business by any other holding should constrain the courts to say that there was no accession unless the identity of the vehicle and accessory have become almost completely merged or that severance would do great injury to the vehicle or the accessory.[20]

An additional complication is frequently added in such a situation by the presence in the mortgage of the vehicle of an after-acquired property clause. Courts have not been in complete accord in their analysis of the effect of such agreements. Some say that these transfer no interest *in praesenti,* but operate only as specifically enforceable contracts to give a mortgage on the property when acquired;[21] while others feel that they cause a lien to arise as soon as the property is acquired and attached.[22] If the first view is taken, the buyer of the accessory acquired no title to which the seller of the vehicle could claim to succeed. Under the second, the automobile encumbrancer is but a junior lienor,[23] *i.e.,* his lien attaches to the encumbered accessory. Therefore, such a clause in the mortgage of the vehicle should make no change,[24] and only a very complete merger and loss of identity should be sufficient to hold that the accessory seller has lost his rights under the principle of accession.[25]

D. Mortgagee of Accessory v. Subsequent Encumbrancer or Purchaser of Vehicle

The principal case is typical of this type of dispute. And the subsequent encumbrancer or purchaser of the vehicle has certainly relied upon the presence of the accessories in determining the amount he would pay or loan. However, to rule that a slight adjunction such as is necessary in the case of tires and tubes is sufficient to preclude the mortgagee of the accessory would unnecessarily hamper the auto-

20. Hallman v. Dothan Foundry & Machine Co., 17 Ala. App. 152, 82 So. 642 (1919); Motor Credit Co. v. Smith, 181 Ark. 127, 24 S.W. 2d 974 (1930); General Motors Truck Co. v. Kenwood Tire Co., 94 Ind. App. 25, 179 N.E. 394 (1932); Lincoln Road Equipment Co. v. Bolton, 254 N.W. 884 (Neb. 1934). *Contra*: Twin City Motor Co. v. Rouzer, cited note 9 *supra.*

21. Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N.E. 632 (1894).

22. Howell v. War Finance Corp., 71 F. 2d 237 (C.C.A. 9th 1934); Langford v. Fanning, 7 S.W. 2d (Mo. App. 1928), citing 14 C.J.S. *Chattel Mortgages* § 26*e.*

23. Manhattan Trust Co. v. Sioux City Cable Ry., 76 Fed. 658 (N.D. Iowa 1896).

24. As to purchasers without notice, *see In Re* Alabama Braid Corp., 13 F. Supp. 336 N.D. Ala. 1935), and as to intervening creditors, *see* Westinghouse Electric and Mfg. Co. v. Brooklyn Rapid Transit Co., 291 Fed. 863 (N.D. N.Y. 1922).

25. See note 26, *infra.*

mobile accessory business. The rule of accession should be tempered by a recognition of this course of business and the mortgagee of the accessory should prevail unless there is complete merger or removal of the accessory can be accomplished only by doing considerable damage to the vehicle or the accessory.[26]

The final consideration is the universal requirement that chattel mortgages be recorded in order to constitute constructive notice to others. Recordation is immaterial in situations A and B, *supra*, since no problem of constructive notice is presented. But where third parties are introduced, as in situations C and D, failure to record may have serious consequences. As against a pre-existing mortgagee of the vehicle, the failure of the mortgagee of the accessory to record his mortgage frequently would not be fatal, since the mortgagee of the vehicle would not seem to be within the classes protected by recordation statutes.[27] But if the vehicle mortgagee forecloses, and then purchases at the foreclosure sale, he may be held to be in the position of a subsequent purchaser,[28] a class always protected by the recordation statute.

Failure of the seller of the accessories to properly record his mortgage will certainly deprive him of his protection against subsequent purchasers or encumbrancers of the vehicle who have no actual notice of the mortgage or the accessories.[29] Such subsequent purchaser, in the absence of actual notice, would therefore take good title to the accessory. Interpretation of the applicable Missouri statutes in the principal case indicates that proper recordation of a chattel mortgage means merely recordation or filing in the case of the seller of the accessories; but requires in addition notation on the certificate of title by the seller of the vehicle.

Of necessity, many questions are left unanswered. What if the accessory had been an engine or the bed of a dump truck?[30] And when, if ever, must the seller of a given accessory have his mortgage or conditional sale agreement noted on the certificate of title of the vehicle in order to be protected from subsequent purchasers and encumbrancers? These, and other questions, must remain unanswered until they are adjudicated.

M. HENCY

---

26. In Clark v. Wells, 45 Vt. 3 (1872) it was held that the conditional seller of wheels and axles attached to a wagon purchased on conditional sale could prevail over a subsequent bona fide purchaser from the repossessing vendor of the wagon. (*A fortiori*, from the repossessing vendor of the wagon).

27. This is clearly the case in jurisdictions having the "subsequent purchaser or encumbrancer" type of statute. Snyder v. Aker, 134 Misc. 721, 236 N.Y. Supp. 28 (Sup. 1929). *Caveat* in Missouri, since our statute says it shall not be valid against "any other person than the parties thereto."

28. So held in Perkins v. Loan and Exch. Bank, 43 S.C. 39, 20 S.E. 759 (1895). Obviously, a third party purchasing from the repossessing mortgagee of the vehicle at judicial sale is within the "subsequent purchaser" classification.

29. Haney v. Johnson, 132 Ark. 166, 200 S.W. 788 (1918); Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 S.W. 68 (1908); Oyler v. Renfro, 86 Mo. App. 321 (1900).

30. Twin City Motor Co. v. Rouzer Motor Co., *supra*, note 9, held without discussing the question, that an engine placed in an automobile passed to the repossessing conditional seller of the vehicle, precluding recovery by the conditional seller of the engine.

DEFAMATION—ABSOLUTE PRIVILEGE AS EXTENDED TO QUASI-JUDICIAL PROCEEDINGS

White v. United Mills Co., Inc.[1]

After discharging the plaintiff from its employ, defendant corporation filed the required notice of separation with the unemployment compensation division of the state of Kansas. The notice was to be preserved as testimony to be used at a hearing conducted by the State Labor Commissioner. Plaintiff brought this action and proved the notice to be libelous. Defendant contended that the communication was sent to a quasi-judicial body and therefore, was absolutely privileged. It was admitted that the common law was in force in Kansas. The court upheld the defendant's contention, determining that the commissioner in discharging his duties of conducting hearings and subpoenaing witnesses was acting in a quasi-judicial capacity. Concluding that the general or common law statement of absolute privilege ". . . applies to communications made before tribunals having attributes similar to those of courts," the court gave judgment for the defendant.[2]

Under the particular facts of the instant case, the Unemployment Compensation Law of Missouri would seem to hold such a communication absolutely privileged.[3] There has been no judicial decision in Missouri on this phase of the statute, but it is declarative of the common law in other states.[4] Other than as to proceedings coming within the above statute, the question of extending absolute privilege to quasi-judicial proceedings must be resolved by the courts alone. Prior to the instant case, the problem has been dealt with in Missouri only inferentially by way of dictum.[5] Presumably, the common law as declared by a Missouri court to be in force in Kansas is the law applicable to comparable cases in Missouri, where the law has, as yet, not been established. The Missouri cases deciding what public officers exercise quasi-judicial discretion will, undoubtedly, prove useful in ascertaining the practical application of the doctrine of this case.[6]. However, as an aid in resolving the exact question, the decisions of other jurisdictions must be relied upon almost exclusively. The general rule elsewhere seems to be the one declared by the court in this case.[7]

---

1. 208 S.W. 2d 803 (Mo. App. 1948).
2. 53 C.J.S. *Libel and Slander*, § 104(b).
3. Mo. REV. STAT. (1939) § 9426 (g): ". . . any report or statement written or verbal made by any employing unit to the commission . . . shall be privileged communications and no person, firm or corporation shall be held liable for slander or libel on account of any such report or statement."
4. *Cf.* Nash v. Brooks, 276 N.Y. 75, 11 N.E. 2d 545 (1937); Higgins v. Williams Pocahontas Coal Co., 103 W. Va. 504, 138 S.E. 112 (1927); *see* Bleecker v. Drury, 149 F. 2d 770, 771 (C.A.A. 2d 1945).
5. See Brown v. Globe Printing Co., 213 Mo. 611, 643, 112 S.W. 462, 470 (1908).
6. Kirby v. Nolte, 349 Mo. 1015, 164 S.W. 2d 1 (1942); Mangieracina v. Haney, 141 S.W. 2d 89 (Mo. 1940); State on Inf. McKittrick v. Wymore, 345 Mo. 169, 132 S.W. 2d 979 (1939).
7. See note 4 *supra;* Parker v. Kirkland, 298 Ill. App. 340, 18 N.E. 2d 709 (1939); Shummway v. Warrick, 108 Neb. 652, 189 N.W. 301 (1922); Alagna v. N.Y. and Cuba Mail S.S. Co., 155 Misc. 796, 279 N.Y. Sup. 319 (Sup. Ct. 1935);

Invariably, the extension of the rule of absolute privilege to most quasi-judicial bodies is said to be based upon the same considerations as exist in strictly judicial proceedings. As stated by the Missouri Supreme Court in *Laun v. Union Electric Company,* ". . . the tendency and policy of the courts is to not extend the number or instances of absolute privilege unless the policy upon which privilege is based is found to exist in the new situations."[8] Emphasizing that it is the occasion which determines the privilege, and not the communication, the courts do not regard every exercise of judicial discretion as an automatic criterion for invoking absolute privilege.[9] The facts of each case are viewed in the light of the dictates of public benefit. Thus, where the state insurance commission exercised its discretion in revoking an agent's license after a hearing, the court considered the likelihood that poor, ignorant people might be duped by unscrupulous agents. Therefore, it decided that the benefit to the public from complete freedom of speech at the hearing outweighed the possibility of harm to the licensee agent.[10] It would seem to follow that the same jurisdiction might determine a communication in one quasi-judicial proceeding as absolutely privileged, while not so privileged in another type of quasi-judicial proceeding.

Some courts point out that, for efficacy of administration, absolute privilege should extend to administrative bodies engaged in quasi-judicial proceedings. As stated by the Texas court in *Arkansas Harbor Terminal Railway Company v. Taber,* "To deny protection to witnesses and complainants before the Commission would result in the Commission being compelled to recognize and permit the right of such witnesses to refuse to testify."[11]

Where administrative tribunals have tended to become more and more like courts with a settled jurisdiction and rules of procedure and manned with law trained personnel, the extension of absolute privilege to the proceedings would seem to be for the public good.

NEDWYN R. NELKIN

DOWER—IN ESTATE BY ENTIRETIES

Murawski v. Murawski[1]

A lot was conveyed to husband and wife thereby creating a tenancy by the entireties. Subsequently, the wife was awarded a decree of divorce for the husband's

Wilson v. Whitacre, 4 Ohio CC 15 (1889); Independent Life Insurance Co. v. Rodgers, 165 Tenn. 447, 55 S.W. 2d 767 (1933); Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166 S.W. 2d 909 (1942); Arkansas Harbor Terminal Ry. v. Taber, 235 S.W. 841 (Tex. 1921); 136 A.L.R. 535 (1942); 42 COL. L. REV. 1286 (1942); 41 HARV. L. REV. 403 (1927); 40 MICH. L. REV. 919 (1942).

8. Laun v. Union Electric Co. of Mo., 350 Mo. 572, 578, 166 S.W. 2d 1065, 1069 (1942).

9. Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E. 2d 414 (1943); Independent Life Insurance Co. v. Rodgers, 165 Tenn. 447, 55 S.W. 2d 767 (1933).

10. *Ibid.*

11. 235 S.W. 841, 842 (Tex. 1921); *accord* note 10 *supra; see* Bleecker v. Drury, 149 F. 2d 770, 771 (C.C.A. 2d 1945).

1. 209 S.W. 2d 262 (Mo. App. 1948).

fault or misconduct. The former wife then brought an action of partition alleging that because the divorce was granted her by reason of the misconduct of the husband she had inchoate right of dower in his undivided one-half interest in the lot.

The right of the wife to dower is determined in Missouri by Mo. REV. STAT. § 318 (1939), the pertinent part of which is: "Every widow shall be endowed of the third part of all the lands whereof her husband . . . was seized of an *estate of inheritance,* at any time during the marriage, to which she shall not have relinquished her right of dower, . . ." (Italics added.) Thus the wife had a right of inchoate dower if the husband was seized of an estate of inheritance during coverture.[2] Although inchoate dower is a mere expectancy contingent on the wife surviving the husband, it nevertheless possesses the elements of property and a wife may maintain an action for its protection.[3]

The instant case held that defendant was seized of an estate by the entireties and that this is not an estate of inheritance. An estate of inheritance has been defined in Missouri as: "An estate that will descend to a man's heirs by the simple operation of law. . . ."[4]

It is necessary to consider the nature of a tenancy by the entireties in order to determine whether it is an estate of inheritance within the meaning of the above definition. Tenancy by the entireties originated in the common law where, as husband and wife were considered as being but one person, they took the estate as one person each being the owner of the whole.[5] It differs from joint tenancy in that the surviving spouse does not take the whole estate by the right of survivor-

---

2. AM. JUR., *Dower,* § 47.

3. Kober v. Kober, 324 Mo. 379, 23 S.W. 2d 149 (1929).

4. Casteel v. Potter, 176 Mo. 76, 75 S.W. 597 (1903). See 1 STEPH. COMM. 218 (1841); BLACK, LAW DICTIONARY 687 (3d ed. 1933).

5. Note, 4 Mo. L. REV. 73 (1939). Stewart v. Shelton, 201 S.W. 2d 395 (Mo. 1947); A. J. Meyer & Co. v. Schulte, 189 S.W. 2d 183 (Mo. App. 1945); Magidson v. Stern, 235 Mo. App. 1039, 148 S.W. 2d 144 (1941); Schwind v. O'Halloran, 346 Mo. 486, 142 S.W. 2d 55 (1940); Baker v. Lamar, 140 S.W. 2d 31 (Mo. 1940); Hartford Fire Ins Co. v. Bleedorn, 235 Mo. App. 286, 132 S.W. 2d 1066 (1939); Greene v. Spitzer, 343 Mo. 751, 123 S.W. 2d 57 (1938); Ahmann v. Kemper, 342 Mo. 944, 119 S.W. 2d 256 (1938); Fulbright v. Phoenix Ins. Co., 329 Mo. 207, 44 S.W. 2d 115 (1931); Samuel v. Frederick, 262 S.W. 713 (Mo. 1924); I. R. Goldberg Plumbing Supply Co. v. Taylor, 209 Mo. App. 98, 237 S.W. 900 (1922); Wimbush v. Danford, 238 S.W. 460 (Mo. 1921); Lomax v. Cramer, 202 Mo. App. 365, 216 S.W. 575 (1919); Messenbaugh v. Goll, 198 Mo. App. 698, 202 S.W. 265 (1918); Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S.W. 72 (1918); Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); Craig v. Bradley, 153 Mo. App. 586, 134 S.W. 1081 (1911); Holmes v. Kansas City, 209 Mo. 513, 108 S.W. 9 (1907); Frost v. Frost, 200 Mo. 474, 98 S.W. 527 (1906); Wilson v. Frost, 186 Mo. 311, 85 S.W. 375 (1905); Bains v. Bullock, 129 Mo. 117, 31 S.W. 342 (1895); Russell v. Russell, 122 Mo. 235, 26 S.W. 677 (1894); Hall v. Stephens, 65 Mo. 670 (1877); Garner v. Jones, 52 Mo. 68 (1873); Gibson v. Zimmerman, 12 Mo. 385 (1849). 26 AM. JUR., *Husband Wife,* § 82; 2 BL. COMM. 182 (1822); 41 C.J.S., *Husband and Wife,* § 82; MADDEN, PERSONS AND DOMESTIC RELATIONS, § 45 (1931); TIEDEMAN, REAL PROPERTY, § 181 (4th ed., Gill, 1924); 2 TIFFANY, REAL PROPERTY § 430 (3d., Jones, 1939); WARVELLE, REAL PROPERTY § 111 (3rd ed. 1909); 1 WASHBURN, REAL PROPERTY § 911 (6th ed., Wurts, 1902).

ship but because the original grant invested each grantee with the whole estate.[6] Thus if either spouse dies the estate continues in the survivor, the only change being in the person and not in the estate.[7] As the surviving spouse remains the owner of the entire estate on the death of the other spouse it would seem that during their joint lives neither spouse is "seized of an estate of inheritance" as, after his or her death, the estate will not descend to his or her heirs by the simple operation of law.[8]

The effect of the divorce decree, which was procured by the wife, was to destroy the tenancy by the entireties and to vest in each of the parties title to the property as tenants in common,[9] which is an estate subject to dower.[10] The same act which

---

6. Note, 4 Mo. L. REV. 73 (1939); Magidson v. Stern, 235 Mo. App. 1039, 148 S.W. 2d 144 (1941); Baker v. Lamar, 140 S.W. 2d 31 (Mo. 1940); Schwind v. O'Halloran, 346 Mo. 486, 142 S.W. 2d 55 (1940); Greene v. Spitzer, 343 Mo. 751, 123 S.W. 2d 57 (1938); Ahmann v. Kemper, 342 Mo. 944, 119 S.W. 2d 256 (1938); Fulbright v. Phoenix Ins. Co., 329 Mo. 207, 44 S.W. 2d 115 (1931); I.R. Goldberg Plumbing Supply Co. v. Taylor, 209 Mo. App. 98, 237 S.W. 900 (1922); Wimbush v. Danford, 238 S.W. 460 (Mo. 1921); Messenbaugh v. Goll, 198 Mo. App. 698, 202 S.W. 265 (1918); Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S.W. 72 (1918); Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); Craig v. Bradley, 153 Mo. App. 586, 134 S.W. 1081 (1911); Frost v. Frost, 200 Mo. 474, 98 S.W. 527 (1906); Wilson v. Frost, 186 Mo. 311, 85 S.W. 375 (1905); Bains v. Bullock, 129 Mo. 117, 31 S.W. 342 (1895); Garner v. Jones, 52 Mo. 68 (1873). 26 AM. JUR., *Husband and Wife,* § 82; 2 TIFFANY, REAL PROPERTY § 430 (3d ed., Jones, 1939); WARVELLE, REAL PROPERTY § 111 (3d ed., 1909); 1 WASHBURN, REAL PROPERTY § 912 (6th ed., Wurts, 1902).

7. Note, 4 Mo. L. REV. 73 (1939); Magidson v. Stern, 235 Mo. App. 1039, 148 S.W. 2d 144 (1941); Schwind v. O'Halloran, 346 Mo. 486, 142 S.W. 2d 55 (1940); Baker v. Lamar, 140 S.W. 2d 31 (Mo. 1940); Greene v. Spitzer, 343 Mo. 751, 123 S.W. 2d 57 (1938); Ahmann v. Kemper, 342 Mo. 944, 119 S.W. 2d 256 (1938); Fulbright v. Phoenix Ins. Co., 329 Mo. 207, 44 S.W. 2d 115 (1931); I. R. Goldberg Plumbing Supply Co. v. Taylor, 209 Mo. App. 98, 237 S.W. 900 (1922); Wimbush v. Danford, 238 S.W. 460 (Mo. 1921); Lomax v. Cramer, 202 Mo. App. 365, 216 S.W. 575 (1919); Messenbaugh v. Goll, 198 Mo. App. 698, 202 S.W. 265 (1918); Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S.W. 72 (1918); Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 .W. 67 (1918); Craig v. Bradley, 153 Mo. App. 586, 134 S.W. 1081 (1911); Frost v. Frost, 200 Mo. 474, 98 S.W. 527 (1906); Wilson v. Frost, 186 Mo. 311, 85 S.W. 375 (1905); Garner v. Jones, 52 Mo. 68 (1873). 26 AM. JUR., *Husband and Wife,* § 82; 2 TIFFANY, REAL PROPERTY § 430 (3rd ed., Jones, 1939); WARVELLE, REAL PROPERTY § 111 (3rd ed: 1909); 1 WASHBURN, REAL PROPERTY § 912 (6th ed., Wurts, 1902).

8. In TIFFANY, REAL PROPERTY § 330 (Abridged Ed., Zollman, 1940) at page 340 it is said: "An estate by the entirety . . . is not an estate of inheritance but is an estate of survivorship and hence the foundation of dower is lacking."

9. Cisel v. Cisel, 352 Mo. 1097, 180 S.W. 2d 748 (1944); Hiatt v. Hiatt, 168 S.W. 2d 1087 (Mo. 1943); Hernandez v. Prieto, 349 Mo. 658, 162 S.W. 2d 829 (1942); Jones v. Jones, 325 Mo. 1037, 30 S.W. 2d 49 (1930); State *ex rel.* Roll v. Ellison, Judges, 290 Mo. 28, 233 S.W. 1065 (1921); Funk v. Funk, 205 Mo. App. 178, 223 S.W. 780 (1920); Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); Aeby v. Aeby, 192 S.W. 97 (Mo. 1917); Holmes v. Kansas City, 209 Mo. 513, 108 S.W. 9 (1907); Joerger v. Joerger, 193 Mo. 133, 91 S.W. 918 (1906). 26 AM. JUR., *Husband and Wife,* § 118; 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 1651 (1891); MADDEN, PERSONS AND DOMESTIC RELATIONS, § 45 (1931); 2 TIFFANY, REAL PROPERTY § 436 (3d ed., Jones, 1939);

invested the husband with an estate of inheritance also destroyed the marital relationship. Thus the husband was not seized of an estate of inheritance "at any time during the marriage."[11] The court therefore correctly ruled that the wife did not have inchoate dower in the husband's one-half interest in the property.

The principal case was one of first impression in Missouri and although the court cites no case authority directly in point for its decision, the courts of Arkansas and Oregon have considered cases involving the same issue and reached the same result as did the Kansas City Court of Appeals.[12]

In *Roulston v. Hall,*[13] one Hall and wife were tenants by the entireties at the time the wife procured a divorce. At the termination of the divorce proceedings the court decreed that the wife was entitled to one-half of said property and one-third of the husband's one-half for her lifetime. The court relied on the Arkansas statute[14] which provided: ". . . in every final judgment for divorce from the bonds of matrimony granted to . . . the wife . . . against the husband, (the wife) shall be entitled to one third part of the husband's personal property absolutely, and one third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, for her life, . . ." (Italics added.) It is to be noted that although this statute is designed for a different purpose than Mo. REV. STAT. § 318 (1939), it also requires that the husband be seized of an estate of inheritance during coverture. The Arkansas Supreme Court held that an estate by the entireties is not an estate of inheritance and that the lower court erred in granting the wife a life estate in one-third of the husband's one-half interest. The reasoning of the Arkansas court was the same as that of the court in the principal case.

ROBERT L. ROSS

LANDLORD AND TENANT—PERIODIC TENANCY ARISING FROM OCCUPANCY UNDER VOID LEASE—NOTICE TO TERMINATE

Vanderhoff v. Lawrence[1]

In the principal case, the Missouri Supreme Court held that, where a tenancy from year to year arises by virtue of occupancy and payment of rent under an

---

WARVELLE, REAL PROPERTY § 111 (3rd ed., 1909); 1 WASHBURN, REAL PROPERTY § 916 (6th ed., Durts, 1902). See Note, 52 A.L.R. 890 (1928).

10. Mo. REV. STAT. § 340 (1939).

11. Mo. REV. STAT. § 318 (1939).

12. Roulston v. Hall, 66 Ark. 305, 50 S.W. 690 (1899); Schafer v. Schafer, 122 Ore. 620, 260 Pac. 206 (1927). In the latter case a husband and wife owned certain realty as tenants by the entireties. The wife procured a divorce making them tenants in common. The Oregon statute was construed to mean that the party on whose prayer the divorce was granted was entitled to one-third of the property in which the other spouse held an estate of inheritance during coverture. The court, citing Roulston v. Hall, *supra,* held that a tenancy by the entireties is not an estate of inheritance and that since the husband did not become a tenant in common until the divorce decree was rendered terminating the marital relationship, he was not seized of an estate of inheritance during coverture and therefore the statute was not applicable.

13. 66 Ark. 305, 50 S.W. 690 (1899).

14. Sand. & H. Dig., § 2517 (1894).

1. 206 S.W. 2d 569 (Mo. 1947).

oral lease of farm lands which is void under the statute of frauds, no notice is required to terminate the tenancy at the end of the period stipulated in the void oral lease. The decision affirms that of the Kansas City Court of Appeals.[2]

Plaintiff and defendant made an oral contract on Jan. 24, 1945, whereby defendant was to lease the farm in question from Mar. 1, 1945, to Mar. 1, 1946. Defendant went into possession in February, having already paid a portion of the rent due. No notice to vacate the premises was given before Mar. 1, 1946, and defendant remained in possession past that date. Plaintiff brought an action for unlawful detainer. A jury was waived and the issues were found by the trial court. At the trial, defendant claimed the original agreement was that he was to have the place as long as he wanted it, perhaps for four or five years. However, the court found the agreement was for a term of one year ending Mar. 1, 1946. On appeal, defendant claimed that the contract was void under the statute of frauds and that therefore a tenancy at will arose which became a tenancy from year to year upon occupation and payment of rent. As a tenant from year to year, defendant claimed the tenancy could be terminated only by notice sixty days prior to the end of the year. Plaintiff claimed no notice was necessary, since the date of termination was set in the agreement. The Kansas City Court of Appeals found that no notice was necessary, but certified the case to the supreme court because of a possible conflict with a decision of the Springfield Court of Appeals.[3]

The Missouri statute of frauds provides that "No action shall be brought . . . upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing."[4] The statutory period begins at the time the contract is made, not at the time performance is to begin.[5] Since the performance was not to be completed until some fifteen months after the contract was made, it is clear that the agreement falls within the statute of frauds.[6]

However, entry into possession and payment of rent under such a void agreement does create a tenancy from year to year.[7] Where a tenancy from year to year arises under such an agreement, the terms of the agreement will govern the conditions of the tenancy, except as to the duration thereof.[8] It has been held that

2. Vanderhoff v. Lawrence, 201 S.W. 2d 509 (Mo. App. 1947).
3. Coleman v. Fletcher, 188 S.W. 2d 959 (Mo. App. 1945).
4. Mo. Rev. Stat. § 3354 (1939). Apparently the decision of the court is based entirely on this section, and not on the lease section (§ 3352), of the statute of frauds.
5. Hamilton v. Fred Miller Brewing Co., 125 Mo. App. 579, 102 S.W. 1088 (1907); Womach v. Jenkins, 128 Mo. App. 408, 107 S.W. 423 (1908); Reeder v. Sayre, 70 N. Y. 180 (1877).
6. This seems to be the general rule in those states which follow the original English Statute of Frauds. 49 Am. Jur. 384. *Contra* in those states which do not follow the original English statute. 37 C.J.S. 602.
7. Fisher v. Lape, 176 S.W. 2d 871 (Mo. App. 1944); Kerr v. Clark, 19 Mo. 132 (1853); 51 C.J.S. 742.
8. Williams v. Deriar, 31 Mo. 13, 18 (1860); Ferri v. Liberatoscioli, 338 Pa. 454, 13 A. 2d 45 (1940). *Contra*: Ragsdale v. Lander, 80 Ky. 61 (1882).

the terms of the agreement govern the amount of rent,[9] the division of crops,[10] the condition in which the premises are to be left,[11] the liability for repairs,[12] and the time of payment of the rent.[13]

In Missouri, a tenancy from year to year may be terminated by either party upon notice given 60 days before the end of any year.[14] In *Coleman v. Fletcher*, the statement is made that a tenancy from year to year can be terminated by the landlord *only* by notice given 60 days prior to the end of the year.[15] Since this statement conflicts with the decision of the Kansas City Court of Appeals, in the instant case, this case was certified to the supreme court.

There are three situations in which the question of termination of a tenancy from year to year may be involved: where the tenancy is for an indefinite period; where it is for a definite period but one party wishes to terminate it before the end of that period; and where it is for a definite period and the tenant remains in possession for the entire period. It appears that the length of the period set is immaterial, if the circumstances are such that a tenancy from year to year arises.[16]

In affirming the decision of the court of appeals, the supreme court pointed out that a statement like that in *Coleman v. Fletcher* appears in many cases. However, examination reveals that "the rule was applied to oral contracts of rental for an indefinite term, or where no notice had been given and the period fixed by the oral agreement had not expired."[17] In those cases in which the tenant remained in possession for the full period of the oral letting, as in the instant case, no notice is required to terminate the tenancy.[18]

In Missouri, it is possible to justify such a distinction on the basis of the statutory statement that "No notice to quit shall be necessary from or to a tenant whose term is to end at a certain time, or when, by special agreement, notice is dispensed with."[19] Thus, where an oral contract specifies the date of termination, no notice is required, even though the contract is void under the statute of frauds,

---

9. Cole v. Bunch, 85 Okla. 38, 204 Pac. 119 (1921).
10. Snyder v. Harding, 38 Wash. 666, 80 Pac. 789 (1905).
11. Martin v. Smith, L.R. 9 Ex. 50, 8 Eng. Rul. Cas. 646 (1874).
12. Bergamo v. Tarello, 183 Ill. App. 314 (1913).
13. Norris v. Morrill, 40 N.H. 395 (1860).
14. Mo. REV. STAT. § 2969 (1939). At common law, six months notice was required. Doe v. Porter, 3 Term R. 13, 100 Eng. Rep. 429 (1789). When the term is for a fraction over an exact number of years, a question arises as to whether the tenancy from year to year arises as of the date of the commencement of the tenancy, or as of the contemplated terminal date. By English authority, notice to terminate must be given according to the terminal date. Doe *ex dem* Rigge v. Bell, 5 T.R. 471, 101 Eng. Rep. 265, 15 Eng. Rul. Cas. 596 (1793). But in this country, the tenancy arises as of the date of commencement. Coudert v. Cohn, 118 N.Y. 309, 23 N.E. 298, 7 L.R.A. 69, 16 Am. St. Rep. 761 (1890).
15. *Supra*, note 3, at 962.
16. Vanderhoff v. Lawrence, 201 S.W. 2d 509 (Mo. App. 1947).
17. Vanderhoff v. Lawrence, *supra*, note 1, at 570.
18. Ray v. Blackman, 120 Mo. App. 497, 97 S.W. 212 (1906); Butts v. Fox, 96 Mo. App. 437, 70 S.W. 515 (1902); 32 AM. JUR. 73.
19. Mo. REV. STAT. § 2972 (1939).

since the foregoing section is not limited by its provisions to contracts not affected by the statute of frauds.[20]

However, it would seem that the rule set out in the instant case is fully justified even in the absence of such a statutory provision as above. Where a tenant enters into possession under an oral agreement, and both landlord and tenant fully comply with all the other stipulations of the agreement, there seems to be no reason to hold that they should not also be bound by the stipulation as to the termination of the agreement. The same considerations which permit taking a case out of the statute of frauds because of part performance would seem to fully justify a decision such as that here.

The principal difficulty in this type of case is in determining the fact as to whether the parties actually intended to fix a terminal date. Where the letting is for "a year" from and after March 1, 1945, does that mean, in the minds of the ordinary landowner and tenant farmer, "from March 1, 1945, to Feb. 28, 1946, inclusive," or does it mean for an indefinite number of years, each one to commence on March 1? This question must be answered in every case of this type, and upon the answer will depend the requirement or non-requirement of notice to terminate. In this case, the trial court found as a fact that the parties had fixed a definite terminal date; had the opposite finding been reached, there seems no escape from the conclusion that notice of termination would have been required.

JOSEPH J. RUSSELL

MASTER AND SERVANT—THE FELLOW SERVANT RULE AND THE MASTER'S DUTY TO MAINTAIN A SAFE PLACE TO WORK

Graczak v. City of St. Louis[1]

Plaintiff and Boubek, defendant's employees, were engaged in punching holes in some iron links by the use of a steam hammer and a die. The hammer was operated by Boubek by means of levers. When the necessary preparations had been made, plaintiff, facing Boubek at a distance of about three feet, would hold the box and link in place by the die box arm. On plaintiff's signal, Boubek would operate the lever, driving the punch through the link. In addition to the use of oral signals, a nod of the head was the signal to bring the hammer down and holding up the hand signaled a halt. On the occasion in question the men were at their stations when plaintiff noticed that there was no white lead on the punch (the punch was dipped in white lead every tenth punch and when the die was changed). Plaintiff put up his right hand and said, "Halt." Plaintiff reached in to take the plunger out when the hammer came down on his hand, injuring it. Plaintiff brought suit to recover damages for such injury. Judgment having been given for plaintiff, defendant appeals. Held: Reversed.

This case presented again to the court the perplexing problem of the extent to which the doctrine of the master's nondelegable duties impinges upon the fellow

---

20. Ray v. Blackman, *supra*, note 18.
1. 202 S.W. 775 (Mo. 1947).

servant rule. The plaintiff contended that Boubek's failure to heed and to give customary signals and warnings was a breach of the defendant's nondelegable duty to provide plaintiff with a reasonably safe place in which to work. Defendant contended that there was no breach of his duty to provide a safe place in which to work; that Boubek and plaintiff were fellow servants, and therefore there could be no recovery.

Every time a servant is injured, the place where he is working is unsafe for the time being. But if the master's duty to maintain a safe place in which to work may be invoked in all such cases, the effect of the fellow servant rule would be completely nullified. Some line must be drawn between the two opposing doctrines. As the law now stands, in other jurisdictions as well as in Missouri, the course of that line is not easily ascertained. The general rule is that the master has not breached his duty to maintain a safe place in which to work when an employee is injured by the negligence of a fellow servant in the performance of the operative details of the master's business.[2] The question has arisen, however, as to whether the master may be held liable, not because of the manual act which caused the injury, but because of failure of the delinquent servant to give a warning before he did the act. There are a group of Missouri cases holding that the fact that the injury could have been prevented by a warning doesn't affect the rule that the master is not liable when the injury is caused by a fellow servant of the plaintiff in the performance of an operative detail of the work.[3] On the other hand, the case of *Gettys v. American Car & Foundry Co.*,[4] on which plaintiff in the instant case relied, held the master liable for the failure of plaintiff's fellow servant to warn plaintiff of an act, incident to an operative detail of the work, which caused the injury, when there was a custom to give such warning.

In the *Gettys* case defendant was a manufacturer of steel cars. Plaintiff and one Jackson were working inside a car, Jackson reaming holes in a cover plate resting on center sills and plaintiff driving rivets with a pneumatic hammer. The two men started at opposite ends of the car and worked toward each other, eventually meeting at the center. The pneumatic hammer created a noise; the reamer was practically noiseless. When the men approached each other Jackson failed to warn plaintiff of his proximity, which, according to plaintiff's evidence, was customary. The reamer caught plaintiff's clothing and body and twisted his hand off. In affirming judgment for plaintiff the Missouri Supreme Court said, "The practice and custom of warning of his presence when the reamer, in the course of his work, came near or close to the riveter, had evolved from the work and was in effect equivalent to a rule. The duty to warn thus devolved on the corporation. This nondelegable duty was by force of circumstances and custom intrusted to the reamer. The theory of the corporation's liability was not the manual act of Jackson in han-

2. RESTATEMENT, AGENCY § 474, comment *b* (1933).
3. State *ex rel.* Kroger Grocery & Baking Co. v. Haid, 323 Mo. 9, 18 S.W. 2d 478 (1929); Richardson v. Mesker, 171 Mo. 666, 72 S.W. 506 (1903); Burge v. American Car & Foundry Co., 274 S.W. 842 (Mo. App. 1925).
4. 322 Mo. 787, 16 S.W. 2d 85 (1929).

dling and operating the reamer, but it was the failure of Jackson, the alter ego of defendant and acting for it, to warn plaintiff of the proximity of the reamer so that he might protect himself."[5]

If the court accepted the reasoning in the *Gettys* case it would be difficult to reach a contrary decision, for the holding was based on facts identical with those in the present case—violation of a "practice and custom" to warn. The court chose to reject the reasoning of the *Gettys* case as to warnings. It quoted Labatt, *Master and Servant,* as follows: "And on warnings: 'The general principle that the master's duty to provide a safe place to work is not deemed to have been violated where the unsafety is caused solely by the acts of coservants in carrying out the details of the work clearly involves the corollary that the master is not chargeable with the failure of those servants to warn each other as to the existence of dangerous conditions which have already supervened.' 4 Labatt, Sec. 1531. And: 'Frequent attempts have been made to bring the negligence of servants deputed to give signals within the scope of the principle that the duty to maintain a safe place of work is nondelegable. But this contention is rejected (except in Washington. . .).' 4 Labatt Sec. 1537."[6] This would seem to be the better view. Failure to give a warning is merely evidence of negligence on the part of the one on whom rests the duty to exercise care in doing the manual act, and should be no basis for imposing a duty on a different person.

The court next construed the facts in the *Gettys* case as creating a situation where "an independent act of another employee not connected with the detail of the work *under performance by the plaintiff* made the place of work unsafe and caused the injury," while in the instant case "plaintiff's injury was attributable to . . . the negligence of a competent fellow employee in an operative detail of the work *they* were engaged in at the time."[7] (Italics added) No satisfactory explanation is given why the fact that the act causing the injury was not connected with the operative details of the work under performance by the plaintiff should result in liability by the master. It may possibly be an extension of the theory underlying the "different department" or "consociation" test, which is used to determine whether two employees are fellow servants. This test has been stated as follows: ". . . they are coservants who are so related and associated in their work that they can observe and have an influence over each other's conduct, and report delinquencies to a common correcting power; and they are not coservants who are engaged in different and distinct departments of work."[8] In the *Gettys* case the servant injured and the servant causing the injury were coservants within the "different department" rule, and yet the act which resulted in the injury was "not connected with the details of the work under performance by the plaintiff." So it appears that the intimacy of the connection between the work of the employee causing the

5. *Id.* at 799, 16 S.W. 2d at 89.
6. *Op. cit. supra* note 1, at 777.
7. *Id.* at 779, 780.
8. Relyea v. Kansas City, Fort Scott & Gulf Railroad Co., 112 Mo. 86, 20 S.W. 480 (1892).

injury and that of the employee injured must be greater to relieve the master of liability for breach of his duty to maintain a safe place in which to work, than to relieve him of liability under the doctrine or respondeat superior by invoking the fellow servant rule.

A brief review of the various steps in the development of the law of the master's liability to his servants is necessary to show more clearly the present status of the law in Missouri. The first step was the placing of a limitation on the doctrine of respondeat superior—the rule that the master is liable for the torts of his servant committed while acting within the scope of his employment. The doctrine of respondeat superior was said not to be applicable when the person injured was a fellow servant of the employee who caused the injury. The extent to which this limitation would affect the relative rights and liabilities of the parties depended, of course, on the definition given to the term "fellow servant." Those were said to be fellow servants who were employed and paid by a common employer and engaged in a common service. They were engaged in a common service if they were working in the same general enterprise. The first case decided in Missouri held that the engineer of a train, who was injured when a bridge collapsed, was a fellow servant of those who built the bridge.[9]

Almost immediately there developed the feeling that the courts had gone too far in restricting the rights of servants, and the means adopted to rectify this error was to redefine the term fellow servants as those who were working in the same "department."[10]

The next development pertinent here took the form of fixing personal duties of the master to his servants, which are known generally as the master's nondelegable duties.[11] There has been a gradual extension of the application of the theory of nondelegable duties in favor of the employee, the manner in which the court in the instant case justified the *Gettys* case being the latest extension of liability on the ground of a breach of a particular one of those duties—the duty to maintain a safe place in which to work. The theory of nondelegable duties should not be considered as a limited application of the doctrine of respondeat superior. That this is so is evidenced by the fact that liability resulting from breach of the master's non-

9. McDermott v. Pacific Railroad Co., 30 Mo. 115 (1860).

10. *Op. cit. supra* note 8. The court in the McDermott case, *supra* note 9, had suggested that the basis of the fellow servant rule might be (1) to secure diligence on the part of the servants, (2) implied contract, or (3) public policy. The first is now embraced in the "different department" rule. See the dissenting opinion of Judge Thomas in Parker v. The Hannibal & St. Joseph Railroad Co., 109 Mo. 362, 19 S.W. 1119 (1892) for a good discussion of the development of the law in Missouri up to that time.

11. Thomas v. American Sash & Door Co., 14 S.W. 2d 1 (Mo. Sup. 1929) (duty to provide a reasonably safe place to work); Amis v. Standard Oil Co. of Indiana, 233 S.W. 195 (Mo. 1921) (to provide employees with reasonably safe appliances); Levecke v. Curtis & Co. Mfg. Co., 197 Mo. App. 262, 193 S.W. (1917) (to provide an adequate number of servants); Jarrell v. Blackbird Block Coal Co., 154 Mo. App. 552, 136 S.W. 754 (1911) (to adopt a reasonably safe method of work).

delegable duties is not restricted by the fellow servant rule.[12] It is true that the master who delegates to a servant the performance of an act which the master is under a duty to perform with care is liable for the servant's negligent performance, just as the master is liable for the negligent performance of an act by a servant within the scope of his employment in cases where the doctrine of respondeat superior is applicable. But the master is liable for the breach of a personal (nondelegable) duty because that duty has not been discharged, whether it be because of an omission to do the required act, or a negligent doing of the act by the master or by a servant. Liability under the doctrine of respondeat superior, on the other hand, springs from the identification of the servant with the master. In the former case the relationship between the master and the servant which makes it possible to hold the master liable for the acts of the servant results from the duty,[13] while in the latter case the duty results from the relationship.

Accordingly, it is necessary in this state of the law to approach a particular set of facts from two distinct angles—to determine whether the master is liable under the doctrine of respondeat superior as limited by the fellow servant rule, and to determine whether he is liable under the doctrine of nondelegable duties. But under the theory of the instant case it would seem—when it is claimed that, upon one employee injuring another, the master has breached his nondelegable duty to maintain a safe place in which to work—that a single determination of the degree of connection between the work of the two employees would determine simultaneously whether the doctrine of respondeat superior *and* the doctrine of nondelegable duties were applicable. In cases where the master is not liable for a breach of his duty to maintain a safe place in which to work, he would not be liable under the doctrine of respondeat superior, since the greater degree of connection would include the lesser.

ALVIN C. RANDALL

TAXATION—PAYMENT FOR DOWER—INCOME TO HUSBAND

Le Croy v. Cook[1]

In 1911, Le Croy and his wife entered into an oral contract providing that whenever the wife joined in a conveyance of her husband, or otherwise released or relinquished her dower rights, she was to receive one-third of the proceeds as compensation for the dower rights so released. During 1939 and 1940, Le Croy

---

12. Further evidence that nondelegable duties are independent of the doctrine of respondeat superior is the fact that landowners owe similar duties to business guests. RESTATEMENT, AGENCY, chap. 14, topic 4, title 6, introductory note (1933).

13. "He is viewed . . . solely as the medium through which the culpable violation of duty operated to the injury of the plaintiff." 4 LABATT'S, MASTER AND SERVANT § 1468 (2d ed. 1913). In this view of the matter, it would seem to be erroneous to call the servant, who has been delegated the performance of an act which the master is under a nondelegable duty to perform with care, the *alter ego* of the master.

1. 204 S.W. 2d 173 (Ark. 1947).

conveyed several tracts of land. In all but one instance, she joined in her husband's conveyance and the entire consideration presumably was paid to him, after which he transferred one-third of the amount to her. In a single instance, in 1940, she did not join in the conveyance by her husband, but three months later executed a separate deed to the purchaser, for which she received four hundred dollars directly from him.

The Arkansas Revenue Commissioner deemed the sums so received by the wife to be taxable income to the husband, and upon his refusal to pay, a distraint warrant was issued. This is an action to enjoin the enforcement of that warrant on the ground that the sums paid to the wife for the relinquishment of her dower were income to her and not to the husband.

In affirming the action of the revenue commissioner, the Arkansas Supreme Court reviews the nature of dower inchoate.[2] It is a valuable right.[3] But, being inchoate, it cannot be, in a proper sense, conveyed. Rather, it is a future contingent right, which is relinquished to the grantee of her husband.[4] Therefore, reasons the court, the manner of release is of no concern. She may release her interest by joining in her husband's conveyance or by separate instrument receiving the compensation directly from the grantee, the result is still the same. And it is immaterial that she has a valid, subsisting contract with her husband that she shall receive a portion of the sales price as the price for relinquishing her interest. In all of these instances, says the Arkansas court, the payments to her are, nevertheless, *nothing more than gifts.*[5]

The author frankly admits that the reasoning of the court escapes him. With the statement that the manner of release is immaterial, he is in full accord, since the substance of the transaction remains the same. But the conclusion that the payments which she eventually receives for the release of her dower are but gifts from her husband has no supportable rationale. The court itself quotes from *Hershy v. Latham*[6] which held in part: "A wife's relinquishment of dower, or her cession of any other rights of property, is a sufficient consideration for a settlement upon her by her husband out of his own property."[7] Yet a payment by a third party to the wife for relinquishing her dower is income to the husband and passes to her only by way of gift from the husband.

---

2. The Arkansas statute is Pope's Dig. § 4396 (1937), providing: "A widow shall be endowed of a third part of all the lands whereof her husband was seized of an estate of inheritance (a) at any time during the marriage, unless the same shall have been relinquished in legal form." Missouri's basic statute, Mo. REV. STAT. § 318 (1939) is substantially the same.

3. B. H. and M. Oil Co. v. Graves, 182 Ark. 659, 32 S.W. 2d 630 (1930). *Accord*: Firebaugh v. Wittenberg, 309 Ill. 536, 141 N.E. 379 (1923), *reversing* 227 Ill. App. 77 (1922); Vantage Mining Co. v. Baker, 170 Mo. App. 457, 155 S.W. 466 (1913).

4. The terms of the Arkansas statute, *supra* note 1, so provide. *Accord*: Lemon v. Lemon, 273 Mo. 484, 201 S.W. 103 (1918); Durrett v. Piper, 58 Mo. 551 (1875).

5. Italics added.

6. 46 Ark. 542 (1885).

7. *Id.* headnote 1.

The first federal case involving the problem was *Frank v. Commissioner of Internal Revenue.*[8] In that case, the husband and wife were separated, and divorce proceedings had been instituted. The wife refused to join in a conveyance of certain property unless she received compensation, so a written agreement was drawn up. The agreement recited "unhappy differences" had arisen and that the wife would not join to release dower unless she received one-half of the proceeds. The commissioner whom the Board of Tax Appeals[9] upheld, assessed the entire sale price as income to the husband; ruling that the money paid to the wife was alimony, and hence income to the husband. The circuit court of appeals reversed, and held the money paid to the wife was income to her. They ruled: (1) it was not, on the facts, a payment of alimony; and (2) it was not a gift to the wife, but the price of her interest in the intestate rights in the property, citing several cases from the jurisdiction in which the transaction took place (Pennsylvania) so holding.[10] There is no significant difference in the nature of dower in Pennsylvania and in Arkansas. And the Arkansas case cited *supra*[11] and approved by the court, holds that in Arkansas dower is an equally valuable right.[12]

The Arkansas decision would seem to be in direct conflict with the only federal case on the matter; and is certainly much less satisfactory in its reasoning. But a more recent Board of Tax Appeals decision,[13] under a set of facts indistinguishable from either the principal case or the *Frank* case, held that money paid directly to the wife for relinquishing her dower, was taxable income to the husband. They reasoned that the transaction was nothing more than a tax avoidance scheme; since the allowance of such a transaction would result in the husband's paying to the wife whatever gain he made on the sale. The board "distinguished" the *Frank* case, saying that all the court there decided was that the payment to the wife was not alimony. Ignored was the specific ruling therein that the payment to the wife was *not a gift, but the price of the wife's inchoate property interest.*[14] Unfortunately, the petition for review of the board's decision was dismissed, not on its merits, but for failure of the appellant to prosecute.[15]

If, in fact, the payment of money to the wife for releasing her dower is a scheme for tax avoidance, then the court may properly look through the transaction, no matter what form it takes. But to say that begs the very question involved. If dower is a valuable and alienable interest, though inchoate and defeasible, then it is hardly tax avoidance to accept consideration for that valuable interest. The Arkansas and Board of Tax Appeals holdings are, in logic, unsupportable.

---

8. 51 F. 2d 923 (C.C.A. 3rd 1931).
9. Report unavailable.
10. Heckman's Estate, 299 Pa. 369, 149 Atl. 646 (1930); Hannan v. Carroll, 283 Pa. 61, 128 Atl. 657 (1925); Burk's Appeal, 75 Pa. St. 141, 15 Am. Rep. 587 (1874).
11. Hershy v. Latham, *supra* note 6.
12. *See* cases cited note 3, *supra.*
13. Digan v. Commissioner of Internal Revenue, 35 B.T.A. 256 (1937).
14. Italics added.
15. Dismissed by C.C.A. 2d, August 31, 1937, for non-prosecution.

But where matters of revenue are involved, the governments have been as ingenious in upholding taxes as the taxpayers have been in their attempts to decrease the tax burden. Hence the decision of the court in the principal case comes as no surprise to a student of taxation.

And with joint returns and tax-splitting scheduled to be the rule under the new federal tax statute, there would not be many cases where the "tax avoidance scheme" would benefit the federal taxpayer under a contrary rules anyway.[16]

MACK HENCY

TAXATION—RECOVERY OF TAX PAID ON UNAUTHORIZED BONUS

Gargaro v. United States[1]

Plaintiff sued to recover income taxes paid by him in 1942. In 1942 plaintiff was an officer and employee of Gargaro Co., Inc., a Michigan corporation. An agreement between the company and plaintiff provided that plaintiff was to receive a stipulated salary, plus a bonus consisting of 10% of the net profits of the company for that year. The company made a profit in 1942 and plaintiff was paid his bonus. Plaintiff paid an income tax on this amount. In August, 1944 the Reconstruction Finance Corporation Price Adjustment Board initiated renegotiation proceedings against the company with respect to amounts realized by that company during 1942 under contracts with governmental agencies. In March, 1945 it was agreed that the company was to refund a certain amount to the government. The refund was made. Plaintiff was requested and he did repay a proportionate amount to the company.

Plaintiff contended that from the time of payment of the excess bonus, he was obligated to repay it because it was paid by the company and received by the plaintiff under a mutual mistake of fact as to what was the true net income of the company for 1942. The government demurred to the complaint and argued that as plaintiff received the money in 1942 under a claim of right, and without restriction as to its disposition, the amount was properly included as income for 1942.

The court, in an opinion by Madden, J., overruled the demurrer and noted that a taxable gain was conditioned upon (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain.[2] Here, plaintiff's claim of right was said to be neutralized by the fact that he was ignorant of the relevant facts. The absence of a definite unconditional obligation to repay was

---

16. Exceptions, for example, would be where a divorced wife receives payment for release of a dower interest she still holds, or where separate returns are filed in order to get the benefit of increased capital loss deductions under INTERNAL REVENUE CODE § 117 (d) (2).

1. 73 F. Supp. 973 (Ct. of Claims, 1947).

2. This was the test enunciated in Commissioner of Internal Revenue v. Wilcox, 327 U. S. 404, 66 Sup. Ct. 546 (1946).

due only to the fact that the governmental agency had not yet exercised its statutory discretion to initiate renegotiation proceedings. The definite obligation to repay arose after the deductions had been made by the Board.

In a dissenting opinion, Whitaker, J., says there was no mutual mistake at the time the bonus was given as it was based on the company's true income. The thought that the government might demand a refund was only contingent, speculative and imaginary. "Tax liability is determined on the basis of the facts at hand or ascertainable at the close of the taxable year, not on what may happen in the future."

The principle case raises the general question of unauthorized and illegal receipt of money by the taxpayer.[3] Generally gains from unlawful business or gains that are unauthorized have been taxed. Thus if a gain results from a usurious transaction which is illegal, it is still taxable in the hands of the receiving party.[4] Even though the income is received under a statute which is subsequently declared unconstitutional, the amount is taxable.[5] Income taxes paid by lessee for lessor under a contract making payment of taxes a duty of the lessee, became income taxable to the lessor even though such contract was subsequently held not to bind the lessee to pay income taxes.[6] A judgment creditor who receives payment on the judgment and then is compelled to return the same to his debtor when the case is reversed, has been held to have sustained a taxable gain.[7] And when a taxpayer must return dividends received under a ultra vires stock allotment plan, the amount received is taxable in the year received.[8] A shareholder who receives proceeds from the liquidation of a corporation's assets, such proceeds representing a profit over the original investment, and who pays the tax on such profits and subsequently returns a portion in order to allow the corporation to meet a deficiency assessment levied against it, is held to have no right to recover his excess payment.[9]

Embezzlement cases seem to be an exception to the general rule set forth

---

3. For collections of cases see 43 A.L.R. 799 (1926), 51 A.L.R. 1026 (1927), and 166 A.L.R. 884 (1947).

4. Barker v. Magruder, 68 App. D. C. 211, 95 F. 2d 122 (1937); Barker v. United States, 88 Ct. Cl. 468, 26 F. Supp. 1004 (1939).

5. Security Flour Mills Co. v. Commissioner, 321 U.S. 281, 64 Sup. Ct. 596 (1944).

6. United States v. Mahoning Coal R. R. Co., 51 F. 2d 208 (1931). Note that the court in holding this income to the lessor, stressed the fact that there was no clear duty on the part of the lessor to repay the amount previously paid by the lessee. Indicated that if there had been a clear duty to repay, the result might have been different.

7. Commissioner of Internal Revenue v. Alamitos Land Co., 112 F. 2d 648 (1940). Note that this result was reached even though the account books of the company contained a statement that the amount so received was subject to return to the debtor, if the judgment was reversed.

8. Penn v. Robertson, 155 F. 2d 167 (1940).

9. Schramm v. United States, 36 F. Supp. 1021 (1941).

above. In the *Wilcox* case,[10] the taxpayer had embezzled and spent the money and had been convicted. The Court, in an opinion by Mr. Justice Murphy, held that this was not taxable income. It was said that the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a "gain" or "profit" within the meaning of the Revenue Act. Taxable income was held not to accrue from the mere receipt of property or money which one is obligated to return or repay to the rightful owner. Here the law of the jurisdiction where the facts occurred allowed the owner of the money to replevin the same as soon as the appropriation was accomplished. This decision was strongly relied upon by the court in the principal case, the court noting the injustice of taxing an honest man while an embezzler is allowed to go tax free.

The principal case involves the receipt of an unauthorized bonus. Formerly such bonuses were held income to the taxpayer receiving them.[11] The case of *Greenwald v. United States*[12] was the first breach in this general rule. Greenwald was vice-president and a stockholder in the Interstate Hosiery Mills, Inc., and received a stipulated salary plus a certain per cent of the profits. During the period in question the books were falsified so as to show a larger profit then was actually made. Plaintiff received his percentage and paid his income tax thereon. Upon discovery of the fraud, plaintiff repaid the firm and sued for a refund. The court, in an opinion by Madden, J., allowed recovery of the excessive tax paid and said that the negligence of plaintiff, if any, in discovering the fraud would not forfeit his right to a refund of taxes paid on income which he had not earned and did not keep.

The dissenting judge in the principal case attempts to distinguish the *Greenwald* case on the ground that in that case there was a mistake as to the company's actual income because the books had been falsified. But in each case there is

---

10. Commissioner v. Wilcox, *supra* note 2. Also see McKnight v. Commissioner, 127 F. 2d 572 (1942) where the court said an embezzler who had spent the money made no taxable gain. But in Kurrle v. Helvering, 126 F. 2d 723 (1942) it was held that funds embezzled by an employee of a national bank, together with profits earned by the embezzler through their use, constituted a taxable gain to the employee. Because of the element of profits in the Kurrle case, it does not seem inconsistent with the results in the Wilcox and McKnight cases.

11. In National City Bank of New York v. Helvering, 98 F. 2d 93 (1938), O'Neil was an officer of the Bank and received an illicit bonus on a contract negotiated by him for the Bank. The bonus was in the form of bonds. The income was not reported as income, and after the death of O'Neil, his executor (Bank) was assessed for the deficiency. The court said persons in possession of property may be taxed on such property as constituting income even though third parties (Bank) may be entitled to recover the property from them.

In Saunders v. Commissioner of Internal Revenue, 101 F. 2d 407 (1939), plaintiffs received a bonus of capital stock and paid a tax on the same, but subsequently returned a sum of money equivalent to the bonus under a threat of litigation by the receiver of the corporation. The court refused to allow a recovery for overpayment and said that revenue received under a claim of right and without restrictions on its use and disposition, is taxable income, even though the person receiving it may subsequently be adjudged liable to restore it or its equivalent.

12. 57 F. Supp. 569 (1944).

a mutual mistake which affects the claim of right. In the *Wilcox* case, the court said that "a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain."[13] In that case the government's claim to the tax failed under the second point. The gain in the *Greenwald* and principal cases failed to meet the first condition.

Nevertheless, the latter cases seem to represent a departure from earlier decisions,[14] and from the basic premise that income must be finally determined at the end of each taxable year. The result may be to render non-taxable unauthorized gains which the taxpayer is compelled to restore within the period for claiming refunds. Undoubtedly this would be a fair result so far as the taxpayer is concerned, and, as pointed out in the *Gargaro* case, it seems unlikely that it will seriously interfere with the Government's revenues.

CHARLES B. FITZGERALD

VENDOR AND PURCHASER—CONTRACT FOR RECORD TITLE—AFFIDAVIT OF ADVERSE POSSESSION TO CLEAR TITLE

Johnson & Co. v. Mueller[1]

The contract for the conveyance of land in the principal case was treated by the parties and by the court as requiring the vendor to furnish an abstract showing merchantable title. A material break appeared in the abstract of title and the purchaser refused to perform. The vendor sought specific performance of the contract and at the trial attempted, for the first time, to establish his title by testimony of witnesses proving adverse possession for thirty-eight years. The trial court's denial of specific performance was affirmed.

The vendor relied upon the following quoted portions of two Missouri cases, *Danzer v. Moerschel,*[2] and *Reeves v. Roberts,*[3] to substantiate her theory that proof of adverse possession would entitle her to specific performance.

In *Danzer v. Moerschel*[4] the supreme court said: "It may be granted that, in a suit for the specific performance of a contract for a marketable title, a title by adverse possession, *if adequately proved,* is sufficient to justify a judgment for the vendor." (Italics added) That case involved a contract to deliver an abstract showing a good title. Recognizing a distinction between a contract requiring a record title and a contract requiring a mere merchantable title, the court held

---

13. *Supra,* note 2.

14. In North American Oil Consolidated v. Burnet, 286 U. S. 417, 52 Sup. Ct. 613 (1932) oil land owned by the plaintiff was in the hands of a receiver and income from the lands for 1916 was paid by the plaintiffs to the receiver. In 1922 the plaintiff's title to the land was upheld and the money was returned. Brandeis, J. said the contingency of never receiving the money back did not make it non-taxable in 1916. See also the cases *supra* note 11.

1. 205 S.W. 2d 521 (Mo. 1947).
2. Danzer v. Moerschel, 214 S.W. 849, 7 A.L.R. 1162 (Mo. 1919).
3. Reeves v. Roberts, 294 Mo. 593, 242 S.W. 956 (1922).
4. *Supra,* note 2.

that a contract requiring an abstract showing a good title required a record title and that title by adverse possession outside the record was not enough; so, the title attempted to be shown by affidavits of adverse possession was not in compliance with the contract.[5] The quoted portion above was mere dicta, applying only to a contract not calling for a record title. Further, the court does not state what "adequately proved" means, and does not indicate whether affidavits would be adequate proof.

In *Reeves v. Roberts*[6] the supreme court said: "It is true that a marketable title may be shown by affidavits, which connect up the showing made by the record title. Title by adverse possession may *perhaps* be so shown, and thus a marketable title shown." (Italics added) A break in the chain of title appeared in the abstract where a deed was to *Ida M. Smith* and the next conveyance was from *Amy A. Smith.* In an attempt to clear up this break, ex parte affidavits to identify Amy A. Smith as Ida M. Smith appeared in the abstract.[7] The court held that an error of this type in a deed of record could not be corrected by mere ex parte affidavits. The quoted portion above was mere dicta, applying only to a contract not calling for a record title. But, even there, the language expresses doubt whether title by adverse possession may be so shown.

And, in the principal case the supreme court says: "If . . . she (vendor) had attached affidavits to her abstract of title adequately showing adverse or peaceable possession for the statutory periods, and had tendered her warranty deed, she would have been in a stronger position."

From the dicta in these three supreme court cases should we infer that affidavits of adverse possession will cure defects in the record title so as to comply with a contract requiring record title?

The proposed Title Standards for the Missouri Bar provide for the acceptance of affidavits in certain instances, especially where the affidavit has been recorded for a number of years.[8] However, none of the recommendations mention the use of

---

5. The report of the case did not mention whether the affidavits had been placed of record, but it is assumed that they were recorded since they appeared in the abstract. The sufficiency of the particular affidavits was not considered by the court; the court said generally that affidavits of adverse possession would not comply with the contract.

6. *Supra,* note 3.

7. The report of the case did not mention whether the affidavits had been placed of record, but it is assumed that they were recorded since they appeared in the abstract. The sufficiency of the particular affidavits was attacked since the conveyance questioned was recent and no affidavits were furnished by the grantor, only by the grantee. Other affidavits were offered at the trial, but were refused admission.

8. Title Standards of The Missouri Bar, 4 J. Mo. BAR. 40 (1948):

> Sec. 7: Recitals of death and heirship in the affidavit contained in an application for letters of administration or testamentary, or in a deed from a person recited to be an heir, should be accepted without further requirement as sufficient evidence of the truth of such recitals, where the affidavits or deed has been of record not less than 31 years, unless controverted by other entries in the abstract.
>
> Sec. 8: Intestacy may be presumed and administration waived,

affidavits of adverse possession to cure old breaks in the chain-of title. In certain instances where there is a very old break in the chain of title, it might be advisable to permit the use of such affidavits since it would greatly decrease the costs of litigation and simplify title requirements. However, the contents of the affidavits in each case would determine whether they were of sufficient value to bridge this break in the chain of title.

Generally, affidavits are inadmissible as evidence, and it has been held that a mere ex parte affidavit as to adverse possession, even when placed of record, is purely hearsay and inadmissible as evidence in the courts, and is not record evidence of title.[9] This has been so held even where a statute authorized the recording of affidavits to explain defects in a chain of title.[10]

Contrary to the dicta in the three Missouri Supreme Court cases above cited is *Williams v. Ellis*,[11] a Kansas City Court of Appeals case. Therein a contract required the vendor to furnish an abstract of title showing good merchantable title. There was a break in the title shown by the abstract. The vendor attempted to show in the abstract affidavits of adverse possession and payment of taxes for thirty-five years. The court held that the vendor had not complied with his contract since the affidavits were not sufficient to clear the defects in the chain of title.[12] Cases in other jurisdictions are in accord.[13]

In view of the Missouri cases herein set out, it is submitted that where a contract requires the vendor to furnish an abstract showing record title, it is doubtful whether recorded affidavits of adverse possession bridging a break in the title and appearing in the abstract are sufficient to comply with the contract; recorded deeds of release from all possible adverse claimants or a suit to quiet title would be necessary to establish the required record title.

C. DUDLEY BRANDOM

---

where the abstract of title contains satisfactory information either by affidavit or deed recital as to date of death, place of domicile, heirship and intestacy, and probate of the estate is not shown, and it further appears that the deceased has been dead more than 10 years.

9. Owens v. Jackson, 35 S.W. 186 (Tex. Civ. App. 1931); Adkins v. Gillespie, 189 S.W. 275 (Tex. Civ. App. 1916); Cline v. Booty, 175 S.W. 1081 (Tex. Civ. App. 1915).

10. Crenshaw v. True, 295 S.W. 632 (Tex. Civ. App. 1927); Upton v. Smith, 183 Iowa 588, 166 N.W. 268 (1918); Fagan v. Hook, 134 Iowa 381, 105 N.W. 155 (1905).

11. Williams v. Ellis, 239 S.W. 157 (Mo. App. 1922).

12. The report of the case did not mention whether the affidavits had been placed of record, but it is assumed that they were recorded since they appeared in the abstract. The sufficiency of these particular affidavits might be questioned since some conflict existed between the affidavits furnished.

13. Vicker v. O'Connor, 218 Wis. 216, 260 N.W. 426 (1935); Zunker v. Kuehn, 113 Wis. 421, 88 N.W. 605 (1902); Myrick v. Leddy, 37 S.W. 2d 308 (Tex. Civ. App. 1931); Beeler v. Sims, 93 Kan. 213, 144 P. 237, also reported in 91 Kan. 757, 139 P. 371 (1914).