Missouri Law Review

Volume 16
Issue 2 *April 1951*

Article 4

1951

Recent Cases

Recent Cases

CHATTEL MORTGAGES—AUTOMOBILES—NOTATION ON CERTIFICATE OF TITLE

Butler County Finance Co. v. Prince[1]

O, through used car dealer S, sold his automobile to B, the latter executing his promissory note secured by chattel mortgage on said car to S, in payment of the purchase price thereof. The mortgage was recorded in the county where B resided. The existence of such mortgage was not shown on the certificate of title. Subsequently S endorsed the note and transferred the mortgage to P. B sold the car to D, a purchaser for value without actual notice of the mortgage—its existence not appearing on the certificate of title when given to him, and likewise not appearing on the new certificate thereafter issued to him. After default by B on the payments, P brought a replevin action against D for the automobile. Judgment for plaintiff, the court holding that it was not necessary, in the case of a used car, to note the existence of a purchase-money mortgage on the certificate of title as provided for by *Missouri Revised Statutes* § 3488 (1939)[2] in order to give notice to a subsequent bona fide purchaser. Recordation in the county of the mortgagor's residence, as provided for by *Missouri Revised Statutes* § 3486 (1939)[3], was deemed sufficient to give constructive notice of the mortgage so as to sustain the mortgagee's rights as against the subsequent bona fide purchaser.

Missouri's general chattel mortgage recordation statute[4] in substance provides that where the mortgagor retains possession the mortgage must be recorded or filed in the county of the mortgagor's residence, or in the county where the property was situated at the time of the transaction in the case of a non-resident mortgagor, in order to give constructive notice of the mortgage to subsequent parties. This statute has, until recent years, been fairly satisfactory in determining the respective rights of bona fide purchasers and mortgagees where there has been a fraudulent sale of mortgaged property. In today's highly mobile civilization, however, the rights of a bona fide purchaser rest on a precarious foundation under such a statute. Even in the case of refrigerators, household furniture, and like chattels residences today are often of such transitory and impermanent nature that a purchaser who wishes to be sure he is receiving an unencumbered title might conceivably have to search records in numerous distant parts of the country. Even then he might still be in doubt, depending on the accuracy and extent of the information which the seller gave him. This truth becomes even more self-evident in the sale of automobiles because:

1. They are capable of rapid and easy movement to, and sale in, other areas of the state or nation.

---

1. 231 S.W. 2d 834 (Mo. App. 1950).
2. MO. REV. STAT. § 443.480 (1949).
3. MO. REV. STAT. § 443.460 (1949).
4. *Ibid.*

2. The certificate of title to an automobile purports to show the present status of said title.

Probably for the above reasons the Missouri legislature in 1939 passed a statute[5] which apparently had as its purpose the protection of subsequent purchasers of mortgaged motor vehicles. In substance the statute provided that a mortgage on a motor vehicle should not be notice to the whole world unless its existence was noted on the certificate of title. This would seem to set forth a requirement other than and in addition to that of recordation. In the same statute certain exceptions were provided to which the statute was not to apply. In these exceptional situations recordation would thus be sufficient to give constructive notice. It is the scope of the proviso of the statute embodying the exceptions which has occasioned litigation. The pertinent part of the statute as it appeared in the session laws of 1939 and as it was printed in the revised statutes of 1939 appears below:

Missouri Laws 1939, p. 278:

"Sec. 3097A. Recorder to certify filing of chattel mortgage—fee.—It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. . . . 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. Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price *of any part thereof or to a motor vehicle* sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

Missouri Revised Statutes § 3488 (1939):

"Sec. 3488. Recorder to certify filing of chattel mortgage—fee.—It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. . . . 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: Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price *of a motor vehicle* sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

The session laws version, *supra* (left) was erroneously printed.[6] This is the form of the house bill as originally introduced.[7] There was, however, a Senate

5. Mo. Laws 1939, p. 278. See Mo. Rev. Stat. § 3488 (1939).

6. See House Journal, Senate Journal, Missouri (60th General Assembly, (1939) and bill as signed by Gov. Stark on July 8, 1939 on file in Secretary of State's Office.

7. House Bill No. 546 (60th General Assembly, 1939). The Original version may have had several typographical errors. It may have been meant to read:

amendment thereto, which became a part of the bill as finally passed.[8] The correct version, which includes the Senate amendment, appeared in the *Revised Statutes, supra* (right). Apparently basing their decision upon the correct version as set out in the *Revised Statutes* (though the point is not free from doubt), the Springfield Court of Appeals held, in *Interstate Securities Co. v. Barton*,[9] that the exceptions applied to *new cars*.[10] From this interpretation, it would seem that there were two exceptions:

1. Chattel mortgages given to secure the purchase price of a new motor vehicle sold by the manufacturer or their distributing dealers.

2. Chattel mortgages given by dealers to secure loans on the floor plan stock of motor vehicles.

In 1941, however, the statute was repealed and reenacted to make the exceptions read as they do today:

> ". . . . Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price *or any part thereof or to a motor vehicle* sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."[11]

It will be noted that the wording of this amendment, with the exception of changing "of" to "or" immediately before the words "any part thereof" (an apparent typographical error), is exactly the same as that of the proviso erroneously printed in the session laws of 1939. It may well be then that the legislature thought that in passing the 1941 amendment it was correcting an error on the part of the revision committee in compiling the *Revised Statutes* of 1939, and in addition correcting a typographical error in the session laws of 1939.[12] On the other hand, the 1941 amendment embodies the language of the 1939 house bill prior to the Senate amendment thereto, so the true intent of the 1941 amendment remains obscure.[13] What may have been its purpose will probably remain in doubt. In *Butler County Finance Co. v. Miller*,[14] the court gives an elaborate analysis of the history of the section. However the analysis is faulty in that the court (quite reasonably) assumed the version in the 1939 session laws was correct and the version in *Missouri Revised Statutes* (1939) was erroneous.

With the exception of a minor change concerning recorder's fees, made in 1947,[15] the statute is the same today[16] as it was following the 1941 amendment. In

---

"Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price *or* (for *of*) any part thereof *of* (for *or to*) a motor vehicle sold by the manufacturer" etc.

8. See note 6, *supra*.
9. 236 Mo. App. 325, 153 S.W. 2d 393 (1941).
10. *Id.* at 332, 153 S.W. 2d at 396.
11. Mo. Laws 1941, p. 327.
12. See notes 6 and 7, *supra*.
13. See Note 7, *supra*.
14. 225 S.W. 2d 135, 136 (Mo. App. 1949).
15. Mo. Laws 1947, V. II, p. 220.
16. Mo. Rev. Stats. § 443.480 (1949).

this present form the exceptions of the statute have been interpreted to apply to any purchase-money chattel mortgage on an automobile, by whomsoever given, whether the car is new or used.[17] Apparently, then, the present interpretation is that the statute includes three exceptions:

1. Any purchase-money chattel mortgage on any automobile.

2. A chattel mortgage on an automobile sold by the manufacturer or their distributing dealers.

3. A chattel mortgage given by dealers to secure loans on the floor plan stock.

There may be some basis for questioning the courts' interpretation of the statute as including all purchase-money mortgages. If the proviso of the statute were intended to except any purchase-money mortgage on any automobile, it is difficult to understand why clear language to this effect was not used in the statute instead of allowing the second exception to remain a part of the statute. Further, there is a grammatical deficiency in the structure of the sentence. If what had originally been one exception was intended to be converted to two distinct exceptions by the 1941 amendment, why is there no phrase available for "the purchase price or any part thereof" to refer to, other than "a motor vehicle sold by the manufacturer or their distributing dealers"?[18] At least a comma might have been placed between exceptions one and two (if two exceptions were intended), as was done between exceptions two and three.

There is, however, considerable justification for the courts' present interpretation of the statute in view of the 1941 amendment. Considering the apparent contradiction between the courts' present interpretation and the statute's probable original purpose, plus the doubtful intent of the 1941 amendment, it would seem some legislative clarification of the statute is desirable.

There should be no question as to the wisdom of the floor plan exception, or of the dealers' sales' exception, as applied to *new* cars, on either a legal or practical basis, since it is generally held that a dealer has power to pass an unencumbered title, if the sale is made in the usual course of business to a bona fide purchaser, on a theory of either apparent authority or estoppel.[19] Thus in this situation there is no need for special legislation to protect the bona fide purchaser. On the other hand, as a practical matter, the dealer has no certificate of title to a new car, but merely

---

17. Butler County Finance Co. v. Miller, *supra* n. 14, 225 S.W. 2d at 137; Butler County Finance Co. v. Prince, *supra* n. 1, 231 S.W. 2d at 836. (In the Prince case some emphasis was given to the fact that recordation of the mortgage preceded issuance of the certificate of title. Neither this fact nor the fact that the language of the statute does not make notation by the recorder absolutely mandatory seem to the writer to be controlling. The essential question is whether the mortgage be noted on the certificate of title, and if it be not, then whether the transaction comes within one of the exceptions in the statute.) See also: Goodrich Silvertown Stores of B. F. Goodrich Co. v. Brashear Freight Lines, Inc., 198 S.W. 2d 357 (Mo. App. 1946) (statute does not apply to mortgages on tires and tubes); Burtrum Bros. Motor Co. v. Dryden, 38 So. 2d 88 (La. 1948).

18. This phase, in Interstate Securities Co. v. Barton, *supra* n. 9, held to apply to *new* cars.

19. *Comment*, 12 Mo. L. Rev. 189 (1947).

issues a bill of sale therefor, and the purchaser must apply to the Commissioner of Motor Vehicles for a certificate.[20] There is thus no certificate of title on which the dealer can cause the notation of the mortgage to be placed in the case of a new car. The dealer *can* fully protect himself or his assignee however, if he takes a purchase-money mortgage on a new car, by showing the mortgage on the bill of sale, which must be sent to the Commissioner of Motor Vehicles in order for the purchaser to receive his certificate of title. If this be done, then the mortgage will also appear on the certificate of title. It is believed that in the case of a dealer's sale of a new car, a purchase-money mortgage being taken at the time of the sale, a subsequent bona fide purchaser should be protected unless the original certificate of title carries a notation as to the mortgage, or unless the dealer has the recorder make such a notation on the certificate of title.

Conceding that the courts' interpretation of the statute is justified, it is highly doubtful if the intent of the legislature accords with the courts' interpretation as applied to *used* cars. Assuming the general purpose of the statute is to protect bona fide purchasers of mortgaged automobiles, was it the legislature's intent to protect them in the case of a mortgage given as security for a loan, and then to withhold that protection when a purchase-money mortgage was given? The writer can find no logical grounds for believing this distinction was intended by the legislature.

In order to dispel the confusion surrounding the language, purpose and scope of the statute, it is suggested that the legislature take action to remove both the hidden and apparent ambiguities therein, by amending the statute to conform with either the court's interpretation in the *Miller* and *Prince* cases, *supra,* or as per the court's interpretation in the *Barton* case, *supra.*

Considerable reason in favor of the latter course of action exists. First, it was and still appears to be the general purpose of the statute to protect bona fide purchasers. Second, it is the general custom among prospective purchasers to regard the certificate of title as safe evidence of the status of the title itself without inquiring further, and there are practical business reasons for maintaining the validity of that assumption. Third, the interests of the mortgagee-seller, or his assignee, are not prejudiced by such a result because there is no reason, in the case of used cars, other than the mortgagee-seller's own negligence, for the notation failing to appear on the certificate of title.

ROY W. MCGHEE, JR.

CONFLICT OF LAWS—RECOGNITION OF A FOREIGN CHATTEL MORTGAGE

Bank of Atlanta v. Fretz[1]

One Harris executed a chattel mortgage on an automobile in favor of the plaintiff bank in Georgia. This mortgage was duly filed for record in compliance

---

20. MO. REV. STAT. § 301.200 (1949).
1. 226 S.W. 2d 843 (Tex. 1950).

with the laws of Georgia. At the time, Harris was a resident of Georgia and the automobile was located in that state. Thereafter, without the knowledge or consent of the plaintiff, Harris removed the automobile to Texas and applied for a certificate of title fraudulently representing that there was no liens existing against said automobile. On the same day, Harris sold the automobile to defendant Fretz for valuable consideration and Harris executed an assignment of the application for a certificate of title to Fretz. At the time of his purchase of the automobile, Fretz had no actual knowledge of the fact that it was then subject to the chattel mortgage lien held by the plaintiff bank. The mortgage was not recorded in Texas. No certificate of title act was in force in Georgia. Fretz, in turn, sold the automobile to Sweiven, for value, who had no actual knowledge that the autombile was subject to a chattel mortgage. Plaintiff learned of the removal and brought suit in Texas to foreclose its mortgage, joining as defendants, Harris, Fretz and Sweiven. The trial court and the court of civic appeals gave judgment for defendants. Plantiff then appealed to the supreme court which reversed the judgment for defendant and gave judgment for the plaintiff. *Held:* a valid mortgage lien recorded in the state where mortgage was given is enforceable in Texas against an automobile in the hands of an innocent purchaser for value without knowledge of lien. It is immaterial that the mortgage was not noted on the Texas certificate of title or that the foreign state had no certificate of title act.

This case is of interest to Missouri lawyers in that it overrules *Consolidated Garage Co. v. Chambers*,[2] which held that a bona fide purchaser for value without notice took free of a chattel mortgage duly recorded in another state but not recorded in Texas. The court, in the *Chambers* case, protected the purchaser in Texas regardless of the fact that the automobile was removed from the foreign state without knowledge or consent of the mortgagee. The doctrine announced in the *Chambers* case had become known as the "Texas doctrine" and had made Texas a mecca for the sale of stolen automobiles. In the instant case, the Supreme Court of Texas overruled the *Chambers* case and adopted the majority viewpoint.

By the great weight of authority, the state to which the chattel is removed will recognize the validity of a foreign mortgage properly recorded in the foreign state.[3] Missouri follows the majority doctrine.[4] Recognition of the foreign chattel mortgage

2. 111 Tex. 293, 231 S.W. 1072 (1921).

3. Hoyt v. Zibell, 259 Fed. 186, 187 (7th Cir. 1919); Shapard v. Hynes, 104 Fed. 449, 452 (8th Cir. 1900); Hinton v. Bond Discount Co., 214 Ark. 718, 218 S.W. 2d 75, 77 (1949); First National Bank of Nevada v. Swegler, 336 Ill. App. 107, 82 N.E. 2d 920, 921 (1948); First National Bank of Ellsworth v. Ripley, 204 Ia. 590, 215 N.W. 647, 649 (1927); Citizens State Bank v. Farmers Union Livestock Co-op, 165 Kan. 96, 193 P. 2d 636, 639 (1948); Green Finance Co. v. Becker, 151 Neb. 479, 37 N.W. 2d 794, 797 (1949); 2 BEALE, CONFLICT OF LAWS § 268.2 p. 997 (1935); RESTATEMENT, CONFLICT OF LAWS § 268 (1934); 10 AM. J. p. 729 § 21; 14 C.J.S. p. 607, § 15; see Note, 13 A.L.R. 2d 1318 (1950).

4. National Bank of Commerce v. Morris, 114 Mo. 255, 21 S.W. 511, 513 (1893); Morris Plan Co. of Kan. v. Jenkins, 216 S.W. 2d 160, 164 (1948); Wisdom v. Keithly, 237 Mo. App. 76, 167 S.W. 2d 450, 456 (1943); Yellow Mgf. Acceptance Corp. v. Rogers, 235 Mo. App. 96, 142 S.W. 2d 888, 892 (1940); Steckel v. Swift, 56

is based on comity.[5] One state, Wyoming, has held that comity implies reciprocity and refused to recognize a Texas mortgage when Texas would not recognize a Wyoming mortgage.[6] However, there is much authority to the contrary, holding that the local state will recognize the validity of the foreign mortgage even though the foreign state would not recognize the validity of a local mortgage.[7] The general rule does not seem to be affected by the local certificate of title act requiring a notation of mortgage on the certificate, provided the lien is valid in the foreign state where the mortgage was given.[8] It is essential, however, that the mortgage be a valid one in the state where given.[9] There is a difference of opinion as to whether the mortgagee's consent to or acquisence in the removal of the property affects the general rule. The greater weight of authority says that the general rule does not apply where the mortgagee consented to or acquiesed in the removal, and the mortgagee must re-record the mortgage in the state into which the property is removed.[10] Missouri follows this rule.[11] However, the removal consented to must be permanent and not temporary or intermittent for short periods only.[12]

A minority of the states refuse to recognize the validity of a foreign mortgage. In these states, the record of a chattel mortgage in another state is not constructive notice to a creditor of or a subsequent purchaser from the mortgagor.[13] They apply the rule regardless of the fact that the property was removed without the consent or

---

S.W. 2d 806, 808 (1933); Metzger v. Columbia Terminal Co., 227 Mo. App. 135, 50 S.W. 2d 680, 682 (1932); Adamson v. Fogelstrom, 221 Mo. App. 1243, 300 S.W. 841, 844 (1927); Finance Service Corp. v. Kelly, 235 S.W. 146, 147 (1921); Geiser Mfg. Co. v. Todd, 224 S.W. 1006 (1920); Hollipiter-Shonyo & Co. v. Maxwell, 205 Mo. App. 357, 225 S.W. 113, 114 (1920).

5. Hoyt v. Zibell, 259 Fed. 186, 187 (7th Cir. 1919); Metzger v. Columbia Terminals Co. 227 Mo. App. 135, 50 S.W. 2d 680, 682 (1932).

6. Union Securities Co. v. Adams, 33 Wyo. 45, 236 Pac. 513, 517 (1925).

7. Hinton v. Bond Discount Co., 214 Ark. 718, 218 S.W. 2d 75 (1949), recognized a Texas mortgage; General Motors Acceptance Corp. v. Nuss, 195 La. 209, 196 So. 323 (1940), recognized a Missouri mortgage; Hart v. Oliver Farm Equipment Sales Co., 97 N. M. 267, 21 P. 2d 96 (1933), recognized a Texas mortgage.

8. Bank of Atlanta v. Fretz, *supra* n. 1. See Note, 13 A.L.R. 2d 1326 (1950).

9. Burtrum Bros. Motor Co. v. Dryden, 38 So. 2d 88 (La. 1948), certificate of title issued in Missouri did not have notation theron of the mortgage as required by Missouri statute; Morris Plan Co. of Kan. v. Jenkins, 216 S.W. 2d 160, 164 (1948), mortgaged property was not in Oklahoma at the time of the execution of the mortgage in that state; Great Amercian Indemnity Co. v. Utility Contractors, 21 Tenn. App. 478, 111 S.W. 2d 901, 909 (1937), defective acknowledgement.

10. Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 Pac. 190, 194 (1928); Moore v. Keystone Driller Co., 30 Idaho 220, 163 Pac. 1114 (1917); 14 C.J.S. p. 609, § 15.

11. Adamson v. Fogelstrom, 221 Mo. App. 1243, 300 S.W. 841, 844 (1927); Geiser Mfg. Co. v. Todd, 224 S.W. 1006, 1008 (1920); Hollipiter-Shonyo & Co. v. Maxwell, 205 Mo. App. 357, 224 S.W. 113, 114 (1920).

12. Flora v. Julesburg Motor Co., 69 Colo. 238, ,193 Pac. 545, 546 (1920); Yellow Mfg. Acceptance Corp. v. Rogers, 235 Mo. App. 96, 142 S.W. 2d 888, 892 (1940); P. R. Smith Motor Sales v. Lay, 179 Va. 117, 3 S.E. 2d 190, 191 (1939).

13. Lee v. Bank of Georgia, 159 Fla. 481, 32 So. 2d 7 (1947); see note, 13 A.L.R. 2d 1306 (1950); First National Bank v. Sheldon, 161 Pa. Super. 265, 54 A. 2d 61, 63 (1947).

knowledge of the mortgagee. Some states have statutes which expressly require that foreign mortgages must be re-recorded in the local state to which the property is removed.[14]

The adoption by the Supreme Court of Texas of the majority rule, protection of the mortgagee under a valid foreign mortgage, is an important step toward preventing the sale of stolen automobiles in Texas.

MONTGOMERY L. WILSON

CORPORATIONS—STOCK TRANSFER—OPEN PENALTY BOND

Chemical Bank and Trust Co. v. Anheuser-Busch[1]

On June 26, 1925, appellant, Anheuser-Busch, Incorporated, issued to Walter Reisinger a certificate numbered 33 representing shares of stock. At the time of the trial the 18,750 shares were worth $375,000.00.

In December, 1932, Mr. Reisinger informed the directors that certificate #33, registered in his name, had been lost and could not be found, and that the certificate had not been endorsed by him. Mr. Reisinger then requested the issuance to him of a new certificate representing the same number of shares. In support of his request he tendered a bond, without surety, for $200,000.00 to indemnify Anheuser-Busch against any claims which might result from the loss of the original certificate or the issuance of a new certificate. Agreement between Mr. Reisinger and the Corporation failed. Thereafter, the executor of Mr. Reisinger brought an action against Anheuser-Busch Inc., to issue a new stock certificate in lieu of the old certificate purported to have been lost. The Circuit Court of St. Louis held that it had a discretionary right to determine the amount of the indemnity bond to be given by Mr. Reisinger as protection to the corporation upon it issuing a new certificate to replace certificate # 33. The amount of the bond approved by the court was $750,000.00 (double the market value of 18,750 shares at $20.00). The defendant appealed. The Missouri Supreme Court held that an open penalty bond was required prior to issuance of a new certificate.

Section 17 of the Uniform Stock Transfer Act, Laws of Missouri 1943, reads as follows: "Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate thereof on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

---

14. ALA. CODE Tit. 47, § 111 (1940); GA. CODE § 67-108 (1933); MISS. CODE § 870 (1942); OKLA. STAT. ANN. Tit. 46, § 58 (1937); VA. CODE § 55-99 (1950).

1. 231 S.W. 2d 165 (Mo. 1950).

"The issue of a new certificate under an order of the court as provided in this section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate."[2]

The problem presented is whether Section 17 of the Uniform Stock Transfer Act, *supra*, contemplates the giving of a bond in an amount of indemnity or penalty fixed by the court in the exercise of the court's discretion, or whether it contemplates an "open penalty bond" whereby the obligors indemnity against liability on claims in any amount which may arise by reason of the original certificate remaining outstanding. This problem has never arisen in Missouri and there are no cases in other jurisdictions directly answering the question.[3] It had been held in Missouri, before the enactment of Section 17, that double liability attached where the corporation issued two certificates for the same number of shares,[4] and this principle has long been recognized.[5] From the facts presented, it is to be noted that for 18 years no one had presented certificate #33 to the corporation, and regular dividend payments had been made to Mr. Reisinger. On the other hand, the market price during this period had advanced from $6.12 to $31.00 and the value of certificate #33 had varied between $117,375.00 and $581,250.00. The corporation's possible liability, therefore, varies from zero to an indeterminable future amount depending on a fluctuating market. The circuit court, exercising its discretion, set bond at double the present market value, yet the stock had increased 500% in 18 years. Section 17 specifically requires a bond for the purpose of protecting the corporation from any liability by reason of the original certificate remaining outstanding.

Section 17 has been adopted by the great majority of the states which have enacted the Uniform Transfer Act. Seven states adopting this act have changed Section 17. The New York statute is representative of the statutes in these few states. It expressly provides that the bond given in the case of the issuance of a new certificate in lieu of a lost certificate shall be, "an amount which shall appear to the court sufficient in the circumstances of the case to protect the interests of any persons to whom the corporation may incur liability, and shall be in such form and with such sureties as the court shall approve" and further provides, "The

2. Mo. Laws 1943, p. 495, Mo. REV. STAT. ANN. § 5563.17 (Supp. 1950), Mo. REV. STAT. § 403, 210 (1949).

3. In Dyer v. Bridge Heights Realty Co., 170 La. 1092, 129 So. 647 (1930), there is dictum to the effect that under Section 17 of the act, the power of the court is limited to requiring the bond in an amount to be fixed within its discretion with such surety thereon as may meet with the court's approval. In Bringardner Lumber Co. v. Crockett's Administratrix, 304 Ky. 324, 200 S.W. 2d 753 (1947), it is pointed out that the responsibility for the loss of the certificate can in no way be placed upon the appellant, thus indicating that an open penalty bond is required. This is the extent of available case law.

4. Keller v. The Eureka Brick Machine Manufacturing Co., 43 Mo. App. 84, 11 L.R.A. 472 (1890).

5. Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691 (1887); McCoy v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204 (1905); Allmon v. Salem Building and Loan Association, 275 Ill. 366, 114 N.E. 170 (1916).

corporation shall not be liable to any such transferee (of the original certificate) in an amount in excess of the amount of the bond or the amount of the security required to be deposited."[6] On the assumption that Section 17 as originally drafted required an "open penalty bond," these statutes allow discretion in fixing the amount of the bond, but at the same time provide complete protection to the corporation since it is in no way at fault. Also, these statutes suggest the impossibility of separating the extent of the security from the problem of liability to the corporation.

In the case of administrator's bonds the Missouri statute[7] requires a bond, "in such amount as the court or judge or clerk shall deem sufficient, not less than double the amount of the personal estate." As to an appeal bond in Missouri[8] the court may, "fix the amount of the supersedeas bond." In contrast, the language of Section 17 would seem to exclude an exercise of discretion by the court as to the amount of a bond in the instant case.

ROBERT L. RILEY

CRIMINAL LAW—ENTRAPMENT—CRIMINAL LIABILITY OF OFFICERS

Reigan v. People[1]

It is a rare case when the convicted defendants in a criminal prosecution are officers of the law, prosecuted for an overzealous attempt at the performance of their duty.

Such was the principal case. Defendants were game wardens of the state of Colorado. They were convicted, under a general conspiracy statute[2] and an accessory statute,[3] of conspiring to commit the crime and misdemeanor of unlawfully trapping and killing beaver, and the unlawful possession of the hides of beaver, and of conspiring to become accessories before the fact of such crimes contrary to the form of the statutes.[4] Defendants represented themselves as fur buyers and sought to induce two boys, not then engaged in unlawful trapping, to agree to trap and kill beaver to be delivered to defendants. Held: the conviction must stand since the acts of defendants amounted to an attempted entrapment of the boys.

The only other case in point, coming to the attention of the writer, is *Com-*

---

6. N. Y. PERS. PROP. LAW § 178, as amended by L. 1940, c. 13, § 2; DELA. REV. CODE § 70 (1935) (§17 omitted); CAL. CORPORATIONS CODE § 2485 (Deering, 1948); FLA. LAWS 1943, c. 21894, § 19; GA. CODE ANN. § 22-1917 (1933); NEB. REV. STAT. § 21-1121 (1943); Maryland omitted Section 17 completely.

7. MO. REV. STAT. § 18 (1939), MO. REV. STAT. § 461.260 (1949).

8. General Code for Civil Procedure, Mo. Laws, 1943, § 132.

1. 210 P. 2d 991 (Colo. 1949).

2. COLO. STAT. ANN. c. 48 § 177 (1935).

3. COLO. STAT. ANN. c. 48 § 13 (1935).

4. It appears that the charge of conspiracy to become accessories before the fact was the principal charge relied upon by the People.

monwealth ex rel. *Dennis Shea v. Leads, Sheriff.*[5] In that case defendants, who appeared to be officers of the law, were arrested and charged with conspiracy to induce another to sell beer, in violation of a Sunday liquor law. Defendants instituted a habeas corpus proceeding, there contending that their purpose had been lawful. Refusing to discharge them, Judge Paxton[6] said, ". . . assuming such to have been their purpose, did they resort to any unlawful means to accomplish it? If they did . . . there was a conspiracy . . . These relators, in their anxiety to procure evidence . . . went a step too far . . . they urged and persuaded him to furnish beer; in fact they resorted to artifice and deception for that purpose. . . . The resort to such means . . . is more than questionable. The law does not sanction it. . . ."

One difference between the principal case and the *Shea* case is that in the former case nothing beyond a tentative agreement between defendants and the boys to trap beaver took place, while in the latter case beer was given to defendants, though no sale thereof was consummated.

A distinguishable type of case[7] growing out of facts similar to those of the principal case is a case where defendants induce criminal acts, not with a purpose of performing some public duty, but to receive a reward or other personal gain for reporting the crime.[8]

Cases in which courts have often expressed an opinion or collaterally stated that officers might be criminally responsible for inducing criminal acts by third parties are those in which the non-officer defendants contend that the testifying officers are accomplices and, therefore, their testimony must be corroborated. It should be noted, however, that in these cases the officers are not being tried. In the leading case of *Dever v. State*[9] the court pointed out that if the officer had incited the conspiracy he certainly would be an accomplice and perhaps a principal. In a similar case, *Smith v. State,*[10] the court held that one sent by officers to purchase liquor contrary to the form of the statute was an accomplice and corroboration of his testimony was necessary.[11]

Cases involving an entrapment as a defense are replete with *dicta* expressing the attitude of the court toward the conduct of the entrapping officers. In *O'Brien v. United States:*[12] ". . . . if the conspiracy were unlawful it must have been so not only to those who subsequently joined it, but also to those who originated it."

---

5. 9 Phila. 569 (1872).
6. Judge Paxton later became a judge and then Chief Justice of the Pennsylvania Supreme Court. See 26 D.C. 178, 184 (Pa. 1916).
7. See Hazen v. Commonwealth, 23 Pa. 355 (1854).
8. It should be noted that the principal case held that desire for personal gain is not needed for successful prosecution.
9. 37 Tex. Cr. Rep. 396, 30 S.W. 1071 (1895).
10. 93 Tex. Cr. Rep. 529, 248 S.W. 685 (1923).
11. See also Carr v. State, 128 Tex. Cr. Rep. 510, 82 S.W. 2d 667 (1935); Plachy v. State, 91 Tex. Cr. Rep. 405, 239 S.W. 979 (1922); Bush v. State, 68 Tex. Cr. Rep. 299, 151 S.W. 554 (1912).
12. 51 F. 2d 674 (C.C.A. 7th 1931).

In *Connor v. People:*[13] ". . . when in their zeal, or under a mistaken sense of duty, detectives suggest the commission of crime, and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked, rather than encouraged, by the courts . . . it shows a state of facts that have no place in the decent administration of justice." The Missouri Supreme Court in *State v. Lee*[14] stated, ". . . (the) conduct of the officers in furnishing money to Hutchison to go into the place and start a game cannot be too severely condemned." In *State v. Torphy*[15] defendant, a city councilman, actually entered into an illegal poker game, but in order to detect the participants. Though defendant was acquitted, there was a strong dissent stating that defendant was guilty; that he might properly detect the participants, but not actually participate in the act for which the offenders were sought. Wharton[16] in his work on criminal evidence states that one who incites a crime is an accomplice, and no distinction is made between officers and non-officers.

There are other cases, however, stating either by way of *dicta* or direct holding that officers are not criminally responsible for their acts when purporting to perform their duty.[17] In *Woodworth v. State,* [18] the court held that there was no crime committed when an officer entrapped. A number of these cases are determined on the question of intent. In *State v. Hicks,*[19] a prosecution defended on a theory of entrapment, the defendant was exonerated because the crime was conceived in the mind of an officer. The court said of the officer, "The criminal intent was lacking, for his purpose was to detect." In *State v. Lee,*[20] *supra,* the court found a lack of intent to be an accomplice on the part of the one acting in behalf of the officers. Similarly, in *Commonwealth v. Baker*[21] the court refused to rule as a matter of law that an officer participating in gaming (not for pleasure) was an accomplice. In *Love v. People*[22] defendant was induced to aid an officer in committing burglary (the officer was entrapping). The court said the officer committed no crime because there was a lack of felonious intent, and, therefore, defendant could not be an accomplice. *Corpus Juris Secundum*[23] points out that it is a crime to incite crime, but it seems to make an exception in the case of detectives seeking evidence.

It seems clear that a number of courts, if presented with an opportunity, would hold as the Colorado court in the principal case.[24]

---

13. 18 Colo. 373, 33 Pac. 159 (1893).
14. 228 Mo. 480, 128 S.W. 987 (1910).
15. State v. Torphy, 78 Mo. App. 206 (1899).
16. 1 WHARTON, CRIMINAL EVIDENCE § 440 (10th ed. 1912).
17. See, *e.g.,* note 15 *supra.*
18. 20 Tex. Cr. Rep. 275 (1886).
19. 326 Mo. 1056, 33 S.W. 2d 923 (1930).
20. See note 14 *supra.*
21. 155 Mass. 287, 29 N.E. 512 (1892).
22. 60 Ill. 501, 43 N.E. 710 (1896).
23. 15 C.J.S. 108.
24. A distinction should be made between cases such as the principal case and those in which an officer commits a crime, but with *no* pretense of performing

The court's theory of prosecution in the principal case, though apparently upholding the conviction primarily on the charge of conspiracy to become accessories before the fact, emphasized the fact that there was an attempted entrapment. A careful distinction was made between entrapment and detection. The former was said to be when officers induce a third party to commit a crime he would not otherwise have committed. The crime must have had its beginning in the minds of the entrapping officers. Detection, on the other hand, results when officers have reason to suspect a crime is being or about to be committed and they merely afford opportunity for defendant to transgress the law, short of actual participation themselves. The crime is originated with defendant in such cases.

Traditionally, it is to be seen that the one induced to commit a crime is charged therewith, and the entrapment is used as a defense.[25] The state, prosecuting, contends that there is no entrapment, and that the officers were merely detecting.[26] It is interesting to note that defendants here were obliged to use detection, so often an aid to the prosecution, as a defense when they were confronted with a prosecution based upon what amounted to an attempted entrapment. It is more than doubtful that the court looked upon entrapment *per se* as a crime.[27] There is no need of a new and separate crime—conspiracy to become accessories before the fact is obviously sufficient. It remains, however, that the facts *do* set out an attempted entrapment, and by its very definition it is an inciting of one to commit crime. This, then, suggests the conclusion: When there is in fact an entrapment, there is a valid defense to prosecution of the one entrapped; and further, there is also a crime committed by the entrapping officers.

It is questionable whether the cases cited *supra*, indicating that an officer might not be criminally responsible when he is entrapping, considered all of the theories of prosecution suggested by the principal case. In addition, with the

---

his duty. See *e.g.*, State v. Grunewald, 211 Minn. 74, 300 N.W. 206 (1941), where defendant officer was convicted of wilful neglect of duty in failing to arrest keepers of house of ill-fame. State v. Palmersten, 210 Minn. 476, 299 N.W. 669 (1941), where defendant officer was convicted of wilful neglect of duty in respect to a house of ill-fame by receiving money from the operator thereof. State v. Raasch, 201 Minn. 158, 275 N.W. 620 (1937), where defendant officer encouraged gambling through horse racing and slot machines and furnished information to unauthorized persons in regard to police activities which affected them.

25. Sorrells v. United States, 287 U.S. 435, 53 Sup. Ct. 210, 77 L.Ed. 413 (1932); Morei v. United States, 127 F. 2d 827 (C.C.A. 6th 1942); O'Brien v. United States, 51 F. 2d 674 (C.C.A. 7th 1931); Butts v. United States, 273 Fed. 35 (C.C.A. 8th 1921); United States v. Lynch, 256 Fed. 983 (S.D. N.Y. 1919); United States v. Echols, 253 Fed. 862 (S.D. Texas 1918); Scott v. Commonwealth, 303 Ky. 353, 197 S.W. 2d 774 (1946); State v. Hicks, 326 Mo. 1056, 33 S.W. 2d 923 (1930); State v. Decker, 321 Mo. 1163, 14 S.W. 2d 617 (1929); Sanders v. State, 72 Okla. Cr. Rep. 85, 113 P. 2d 198 (1941); Warren v. State, 35 Okla. Cr. Rep. 430, 251 Pac. 101 (1926); Humphrey v. State, 212 S.W. 2d 159 (Tex. 1948).

26. Shaw v. United States, 151 F. 2d 967 (C.C.A. 6th 1945); Mitchell v. United States, 143 F. 2d 953 (C.C.A. 10th 1944); People v. Seely, 66 Cal. App. 408, 152 P. 2d 454 (1944); People v. Paderewski, 373 Ill. 197, 25 N.E. 2d 784 (1940). Cf. Wilson v. People, 108 Colo. 441. 87 P. 2d 5 (1939).

27. It has not been so considered. See note 25 *supra*.

facts as presented, the common law crime of solicitation might well have been used as a basis of prosecution of the officer defendants. It perhaps would be less circuitous than a charge of conspiracy to become accessories before the fact of a given crime.[28] Further, when there is just one officer entrapping, thus precluding any question of conspiracy, solicitation could be relied upon by the state.

It is submitted that there are sufficient and adequate laws under which officers of the law might be convicted for criminal excesses even though committed when the officers are purporting to perform their duty.[29] This is to say, the technical obstacles do not present a serious problem. The conspicuous lack of such cases as the principal case is more likely due to practical obstacles such as the close association between the officers and the prosecutor and the laxness or unwillingness on the part of a prosecutor to harrass those upon whom he must depend for adequate evidence in other prosecutions.

When in fact officers do over reach their bounds and commit an act for which they might be criminally responsible, there would seem to be no reason to exempt them, as compared with non-officers, from criminal prosecution. "It was never intended that a man should violate the law in order to vindicate the law."[30]

JACK L. BRANT

MASTER AND SERVANT—SCOPE OF EMPLOYMENT

Linam v. Murphy[1]

Plaintiff was enrolled with defendants, who conducted a flying school, for a private flying course. On July 11, 1948, defendant Weese instructed one Cooke, defendants' flying instructor, to take the plaintiff "out for some dual instruction." Plaintiff executed the take-off and handled the plane for several miles' flight. Cooke then said, "Let me have it," and took control without telling plaintiff why he wanted control. Cooke proceeded to buzz[2] various objects and continued this for a few minutes. The result was that the plane struck some power lines and the ship plunged into a stream. Plaintiff sued the defendants for personal injuries sustained in the crash.

The Supreme Court of Missouri reversed a directed verdict for the defendants

---

28. The crime of solicitation "consists in urging, inciting, requesting, or advising another to commit a crime. See 1 *Burdick*, Law of Crime § 104 (1946). There should be little difficulty in utilizing the crime of solicitation in cases of misdemeanors. Burdick, *supra*, points out that ". . . . solicitations to commit misdemeanors of an evil or vicious nature are indictable, including such misdemeanors as especially affect public society." See also, Commonwealth v. McHale, 97 Pa. 397 (181). "The test is not whether precedents can be found in the books, but whether they injuriously affect the public police and economy."

29. See note 24. *supra.*

30. Judge Paxton in Commonwealth *ex rel.* Dennis Shea v. Leeds, Sheriff, 9 Phila. 569, 570 (1872).

1. 232 S.W. 2d 937 (Mo. 1950).

2. "'. . . maneuvers of aircraft close to the ground, or close to objects on the ground at a speed in access of normal cruising speed, usually accomplished by diving on objects and then pulling up in a sharp climb.'" 232 S.W. 2d at p. 940.

and held that Cooke was acting within the scope of his employment while operating the plane. The ruling was limited to the facts.

The case did not involve treating the defendant as a common carrier[3] or the plane as a dangerous instrumentality.[4]

The idea that a master should be liable for the torts of his servant is founded on certain dicta of Lord Chief Justice Holt[5], and while the theories advanced to explain it have filled countless pages,[6] it is still somewhat of an anomaly in the common law. A limitation on the doctrine of vicarious liability was also established so that a master became liable for the torts of his servant only when the act done was done in the scope of employment.[7] Since the advent of the "frolic" and the "detour"[8], courts have struggled to evolve rules whereby the scope of employment can be determined.[9]

Missouri courts are no exception and the results no more successful than else-

---

3. See North American Acc. Ins. Co. v. Pitts, 213 Ala. 102, 104 So. 21, 1928 U. S. Av. R. 178 (1925), for a discussion of the attributes of a common carrier as applied to airplanes; See also 1 J. AIR L. 241 (1930).

4. See Euting v. Chicago and N. W. Ry., 116 Wis. 13, 92 N.W. 358 (1902), and Pittsburgh, C. & St. L. Ry. v. Shields, 47 Ohio St. 387, 24 N.E. 658 (1890), for doctrine that a playful motive on the part of the servant with no intention to serve the master will not absolve the master if he has entrusted a "dangerous instrumentality" to the servant. *Contra:* Obertoni v. Boston & Me. R.R., 186 Mass. 481, 71 N.E. 980 (1904).

5. Turberville v. Stampe, Carth. 425, 1 Com. 32, Comb. 459, Holt, K. B. 9, 1 Ld. Raym. 264, 12 Mod. Rep. 152, 1 Salk. 13, Skin. 681, 91 Eng. Rep. 1072 (1697); Jones v. Hart, 2 Salk. 441, Holt, K. B. 642, 91 Eng. Rep. 382 (1698); For a quotation allegedly from the Turberville case stating that a master is liable for the acts of his servants, see Patten v. Rea, 2 C.B.N.S. 606, 26 L.J.C.P. 235, 29 L.T.O.S. 161, 21 J. P. 647, 3 Jur N. S. 892, 5 W. R. 689, 3140 Eng. Rep. 554 (1857); See BATY, VICARIOUS LIABILITY 7-34 (1916), for an excellent account of how the agency doctrine grew.

6. BATY, VICARIOUS LIABILITY (1916); Douglas, *Vicarious Liability and Administration of Risk,* 38 YALE L. J. 584 (1929); Laski, *The Basis of Vicarious Liability,* 26 YALE L. J. 105 (1916); Smith, *Frolic and Detour,* 23 COL. L. REV. 444, 716 (1923); Comment, 2 Mo. L. REV. 351 (1937).

7. See Mitchell v. Crassweller, 13 C.B. 237, 22 L.J.C.P. 100, 20 L.T.O.S. 237, 17 Jur. 716, 1 W.R. 153, 138 Eng Rep. 1189 (1853); Joel v. Morrison, 6 C. & P. 501, 176 Eng. Rep. 1338 (1834); M'Manus v. Crickett, 1 East. 106, 102 Eng. Rep. 43 (1800) (willful torts were always without the scope of employment until Croft v. Allison, 4 B & Ald. 590, 106 Eng. Rep. 1052 (1821)).

8. Joel v. Morrison, 6 Car. & P. 501, 172 Eng. Rep. 1338 (1834); "The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against the master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." In Mitchell v. Crassweller, 13 C.B. 237, 22 L.J.C.P. 100, 20 L.T.O.S. 237, 17 Jur. 716, 1 W.R. 153, 138 Eng. Rep. 1189 (1853), it was held that the driver was serving only his own purpose and that he was therefore on a frolic of his own In Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 27 L.R.A. 161, 38 Am. St. Rep. 361 (1893), a servant who went after some shoes while delivering for the master was held to have merely "detoured" as he was still serving his master's purpose as well as his own. See in general Smith, *Frolic and Detour,* 23 COL. L. REV. 444, 716 (1923).

9. See footnote 6 and TIFFANY ON AGENCY § 38, pp. 105-110 (2d ed. 1924).

where.[10] A *Missouri Law Review* writer in 1937 stated that "Until the Supreme Court has ruled on more of the cases, it will be impossible for a lawyer to know definitely what factors are to be the motivating factors for Missouri courts."[11] It is still necessary in 1951 for a writer to preface his remarks with a similar statement; however, due to the variety of fact situations presented by the "scope of employment" cases, it is unlikely that a lawyer can ever know "definitely" what the factors are.

The basic rule followed by the Missouri courts in determining the scope of employment is that the master is liable if his business was being done and his general purpose promoted.[12] The theory of liabilty, though authority is not too conclusive, appears to be based on the idea that the master should employ fit servants.[13] Scope of employment is not a technical phrase[14] and must be implied from the circumstances;[15] each case, therefore, depends on the particular facts involved,[16] and the generality of the Missouri test makes the test's application, either by jury or court, quite difficult. If the act is clearly within the scope of employment, it is so held as a matter of law.[17] If the act is clearly without the scope of employment, it is so held as a matter of law.[18] In all other cases it is for the jury to decide whether the servant was performing his master's business.[19]

Even though the servant may have his own personal desires in mind at the time of the act in question, the master will be liable if his business was being performed.[20] The fact that the servant was disobeying express orders will not relieve

---

10. Compare, for instance, Anderson v. Nagel, 214 Mo. App. 134, 259 S.W. 858 (1924), and Ursch v. Heier, 210 Mo. App. 129, 241 S.W. 439 (1922) with Slothewer v. Clark, 191 Mo. App. 105, 179 S.W. 55 (1915). See 2 Mo. L. REV. 351 (1937) for an anlysis of these cases.

11. 2 Mo. L. REV. 351, 356 (1937).

12. Wolf v. Terminal R. R. Assoc., 282 Mo. 559, 222 S.W. 114 (1920); Guthrie v. Holmes, 272 Mo. 215, 198 S.W. 854, Ann. Cas. 1918D, 1128 (1917); Hinkle v. Railroad, 199 S.W. 227 (Mo. 1917); Maniaci v. Express Co., 266 Mo. 633, 182 S.W. 981 (1916); Whiteacre v. Railroad, 262 Mo. 438, 160 S.W. 1009 (1913), *aff'd* 239 U. S. 421 (1915); Garretzen v. Duenckel, 50 Mo. 104 (1872); Ursch v. Heier, 210 Mo. App. 129, 141 S.W. 439 (1922).

13. Haehl v. Wabash R.R., 119 Mo. 325, 339, 24 S.W. 737 (1893).

14. Nichols v. Chicago, R. I. and P. Ry., 232 S.W. 275 (Mo. App. 1921).

15. Ephland v. Mo. Pac. Ry., 137 Mo. 187, 37 S.W. 820, 59 Am. St. Rep. 498, 35 L.R.A. 107, *rehearing denied* 137 Mo. 187, 38 S.W. 926 (1896).

16. Chiles v. Metropolitan Life Insurance Co., 230 Mo. App. 350, 91 S.W. 2d 164 (1936); Schmitt v. American Press, 42 S.W. 2d 969 (Mo. App. 1931); Borah v. Zoellner Motor Car Co., 257 S.W. 145 (Mo. App. 1925); Noland v. Morris and Co., 212 Mo. App. 1, 248 S.W. 627 (1923); Wrightman v. Glidewell, 210 Mo. App. 367, 239 S. W. 574 (1922).

17. Fidelity and Casualty Co. of N. Y. v. Kansas City Rys., 207 Mo. App. 137, 231 S.W. 277 (1921).

18. Fidelity and Casualty Co. of N. Y. v. Kansas City Rys., 207 Mo. App. 137, 231 S.W. 277 (1921); Anderson v. Nagel, 214 Mo. App. 134, 259 S.W. 858 (1924); Ursch v. Heier, 210 Mo. App. 129, 141 S.W. 439 (1922).

19. Fidelity and Casualty Co. of N. Y. v. Kansas City Rys., 207 Mo. App. 137, 231 S.W. 277 (1921); Sullivan v. Thurman, 266 S.W. 745 (Mo. App. 1924).

20. Foster v. Campbell, 355 Mo. 349, 199 S.W. 2d 147 (1946); Byrnes v. Poplar Bluff Printing Co., 74 S.W. 2d 20 (Mo. 1934); La Bella v. Southwestern

the master.[21] Where the business of the master was not being performed, the master is not liable.[22]

The Missouri courts have generally paid more attention to the act of the servant than to his purpose,[23] and the state of mind of the servant has been held to be of little importance.[24] However, in 1944 the supreme court cited with approval the *Restatement of Agency* doctrine that "Conduct of a servant is within the scope of employment if, but only if . . . it is actuated at least in part by a purpose to serve the master."[25] The instant case, on the other hand, states that "His

---

Bell Telephone Co., 224 Mo. App. 708, 24 S.W. 2d 1072 (1930); Noland v. Morris and Co., 212 Mo. App. 1, 248 S.W. 627 (1922).

21. Porter v. Thompson, 357 Mo. 31, 206 S.W. 2d 509 (1947); Riggs v. Higgins, 341 Mo. 1, 106 S.W. 2d 1 (1937); Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405 (1872); Slothower v. Clark, 191 Mo. App. 105, 179 S.W. 55 (1915); Moore v. Jefferson City Light, Heat and Power Co., 163 Mo. App. 266, 146 S.W. 825 (1912).

22. Milazzo v. Kansas City Gas Co., 180 S.W. 2d 1 (Mo. 1944) (assault on meter man); Smothers v. Welch & Co. House Furnishing Co., 310 Mo. 144, 274 S.W. 678, 40 A.L.R. 1209 (1925) (rape by clerk); Guthrie v. Holmes, 272 Mo. 215, 198 S.W. 854, Ann. Cas. 1918D, 1128 (1917) (drunken joy-ride by chauffeur); Priest v. F. W. Woolworth Five and Ten Cent Store, 228 Mo. App. 23, 62 S.W. 2d 926 (1933) (manager bent customer back over counter); Ursch v. Heier, 210 Mo. App. 129, 141 S.W. 439 (1922) and Anderson v. Nagel, 214 Mo. App. 134, 259 S.W. 858 (1924) (servant went on personal journey after completing journey for master).

23. See footnote 22. Wolf v. Terminal Railroad Association, 282 Mo. 559, 563, 222 S.W. 114 (1920), states that "The fact that the act was done during the *time* of the servant's employment is not conclusive, *nor is the motive* of the servant so. The question is, was the *act* done by virtue of the employment and in furtherance of the master's business." (italics added).

24. La Bella v. Southwestern Bell Telephone Co., 224 Mo. App. 708, 24 S.W. 2d 1072 (1930).

25. Milazzo v. Kansas City Gas Co., 180 S.W. 2d 1, 6 (Mo. 1944); RESTATEMENT, AGENCY § 228 (1933); *caveat,* however, in that the purpose alone will not make the employer liable if the servant is in other respects outside the duties he is to perform [Oganaso v. Mellow, 356 Mo. 228, 201 S.W. 2d 365 (1947)]. For other states' decisions holding the servant must be actuated at least in part by a purpose to serve the master if the servant is to be held within the scope of employment see: Scott v. Birmingham Electric Co., 250 Ala. 61, 33 So. 2d 344 (1948) (mental attitude plus time and space requirements determine whether servant is in scope of employment); Page Lumber Co. v. Carman, 214 Ark, 784, 217 S.W. 2d 930 (1949) (servant acting for a purpose all his own is a stranger to the master); McChristian v. Popkin, 75 Cal. App. 2d 249, 171 P. 2d 85 (1946) (servant must act in behalf of employer to be in scope); Mock v. Polley, 116 Ind. App. 580, 66 N.E. 2d 78 (1946) (master not liable if act not committed to serve him); East Coast Freight Lines v. Mayor and City Council of Baltimore, 190 Md. 256, 58 A. 2d 290 (1948) (servant must be actuated at least in part by purpose to serve the master); Kornec v. Mike Horse Mining and Milling Co., 120 Mont. 1, 180 P. 2d 252 (1947) (servant who acts entirely for his own benefit is generally held to be outside the scope); Klause v. Nebraska State Bd. of Agriculture, 150 Neb. 466, 35 N.W. 2d 104 (1948) (servant must do act with a view to the service for which he was employed); Lemarier v. A. Towle Co., 94 N. H. 246, 51 A. 2d 42 (1947) (an act is not within the scope if done with no intention to perform it as incident to service); Louisville and N. R.R. v. Vinson, 310 Ky. 854, 223 S.W. 2d 89 (1949) (an important factor is whether the servant was motivated, at least in part, by a purpose to serve his employer.).

motive is not material if he was still engaged in defendants' business and if his acts in taking the controls and thereafter operating the plane were part of his duties and within the scope of employment."[26] In one sense this statement is compatible with the rule of *Restatement;* that is, if the court meant a collateral motive or purpose on the part of the servant was immaterial as long as there was *also some* purpose to serve the master, the statement is not inconsistent.[27] In another sense, however, the court has begged the question of whether or not the servant was acting within the scope of his employment and in determining this the purpose of the servant *is* material. Though it is stated that "So long as the act . . . is done in the performance of the master's business *as well* as 'for fun', such an act . . . is deemed to be within the scope of enployment,"[28] the court at no point explains how they found the servant to be within the scope. It may well be that where the act of the servant is not a deviation from his regular duties, an inquiry into his purpose would be immaterial as his acts clearly manifest a purpose to serve the master. However, when the act itself is a deviation, the act alone is not a manifestation of purpose and the actual purpose of the servant would appear to be material.[29] The "buzzing" done by the servant in this case may or may not have been actuated by some purpose to instruct. If it was, he was serving his master's business; if it wasn't, he was serving only his own. The purpose of the act, though, was disregarded by the court and they found *as a matter of law* that the servant was within the scope of employment.

Not only was the purpose of the pilot disregarded, but the extent of his deviation was also evidently immaterial to the court. They stated: "In our opinion, it was impossible for Cooke (the pilot) to have 'deviated' from or gone without the scope of his employment from the time the plane took off from the Joplin airport."[30] This statement, if taken literally, would eliminate any scope of employment test in the case of pilot-instructors, and the assurance of the court that the absence of a direct route prompted it fails to explain the breadth of language used.

The effect of the case is to leave one with a decision limited to certain peculiar

---

26. 232 S.W. 2d at p. 942.

27. RESTATEMENT, AGENCY § 236 (1933): "An act may be within the scope of employment although done in part to serve the purposes of the servant or a third person." (*Comment:* "If the purpose of serving the master actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service.")

28. 232 S.W. 2d at p. 942.

29. For a case so holding and containing similar facts as the instant case, see Sheboygan Airways v. Ind. Comm., 209 Wis. 352, 245 N.W. 178 (1932); Galveston H. & S.A. Ry. v. Currie, 100 Tex. 136, 96 S.W. 1073, 10 L.R.A. (N. S.) 367 (1906); see RESTATEMENT, AGENCY, § 235 (1933). The question of proof of the purpose of the servant naturally requires testimony by the servant if the act itself is ambiguous; this means that the servant may in some cases attempt to exonerate his master. Nevertheless, the fact remains that a master should not be held to pay for an act which the servant did solely for the servant's own purpose. The jury must be depended on to weigh the testimony. (In Hankinson v. Lynn Gas and Electric Co., 175 Mass. 272, 56 N.E. 604 (1900), the jury found the master liable even though the servant testified he was serving only his own purpose.)

30. 232 S.W. 2d at p. 942.

facts and with little word of explanation as to the reasoning involved. It seems that a sounder ground for the decision might have been found; as it is, the already confused situation of *respondeat superior* is even more confused. Perhaps the court felt that greater liability should attach to the owner of an airplane[31] or that a contract relationship between the plaintiff and defendant should increase the liability.[32] If these factors or others influenced the decision, it is unfortunate they were not spelled out instead of stretching "scope of employment" into a nonentity. The case has certainly not furthered an understanding of the "motivating factors" considered by the Missouri courts.

WILLIAM W. SHINN

PRACTICE—*Forum Non Conveniens*—FEDERAL EMPLOYERS' LIABILITY ACT

State of Missouri v. Mayfield[1]

Plaintiff, a non-resident of Missouri, brought suit in the Circuit Court of the City of St. Louis, Missouri based on the Federal Employers' Liability Act[2]. The defendant, a carrier, was a foreign corporation and the accident which gave rise to the claim of liability for negligence took place outside Missouri. Defendant by motion to dismiss invoked the doctrine of *forum non conveniens*. The trial court denied the motion as being beyond the jurisdiction of the court to grant. Defendant began a proceeding in mandamus in the Supreme Court of Missouri to compel the trial court to exercise discretionary jurisdiction in disposing of the motion. The Supreme Court of Missouri quashed the motion[3] on the ground that, under the cases of *Miles v. Illinois Central R. R.*[4] and *Baltimore and Ohio R. R. v. Kepner*[5], a state court cannot dismiss a Federal Employers' Liability case solely under the *forum non conveniens* doctrine. On certiorari to the Supreme Court of the United States, held, the Supreme Court of Missouri should be free to decide the availability of the principle of *forum non conveniens* in the suit according to its own local law, no restrictions having been imposed upon a state's application of its own procedural policies by reason of the fact that the Employers' Liability Act empowered state courts to entertain suits arising under the act.[6]

We are concerned here with Section 6 of the Federal Employer's Liability Act which provides that, "An action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the

---

31. 232 S.W. 2d at pp. 942-943 "The very natures of airplanes, of air travel and of the responsibilities of airplane pilots are such that previous applications of these rules to particular facts (in the horse-drawn automobile and railroad engine cases) are often of little aid."

32. See BATY, VICARIOUS LIABILITY 7-34 (1916); see also 2 HARV. L. REV. 342 (1931).

1. 71 Sup. Ct. 1 (1950).
2. 35 STAT. 65 as amended, 45 U. S. C. A. § 51 *et seq.* (1943).
3. 359 Mo. 727, 224 S.W. 2d 105 (1949).
4. 315 U.S. 698 (1924).
5. 314 U.S. 44 (1941).
6. 71 Sup. Ct. 1 (1950).

cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this Chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The Supreme Court of the United States construed Section 6 in the case of *Baltimore and Ohio R.R. v. Kepner.*[7] In the *Kepner* case a suit was brought in a state court of Ohio against an injured resident employee of the Baltimore and Ohio Railroad to enjoin him from prosecuting a suit he had instituted in the United States District Court of New York under the Federal Employers' Liability Act for an injury he received in the State of Ohio. The Supreme Court of Ohio denied the injunction.[8] Upon certiorari to the Supreme Court of the United States the Ohio decision was affirmed. The basis of the decision was that the unqualified venue provisions of the Employers' Liability, Section 6, *supra,* created a federal privilege of venue in federal courts which is not subject to the pre-existing equitable doctrine of *forum non conveniens,* but is absolute.

A few months after the *Kepner* case was decided, the Supreme Court of the United States handed down the decision in the case of *Miles v. Illinois Central R.R.*[9], another case construing Section 6. In the *Miles* case, plaintiff, a resident of Tennessee, brought suit under the Federal Employers' Liability Act in a Missouri state court. The defendant railroad was an Illinois corporation but had its principal offices in Tennessee. The accident giving rise to the claim occurred in Tennessee. The railroad obtained an injunction in the Tennessee state court forbidding plaintiff to continue his suit in Missouri because of inconvenience and expense to the railway. On appeal to the United States Supreme Court, held, reversed. As in the *Kepner* case, Section 6 of the Employers' Liability Act was the basis of the decision. The court stated that, (emphasis added) "Since the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right to sue in federal courts. *It is no more subject to interference by state action than was the federal venue in the Kepner case . . . .*".

There is another congressional provision which must be considered at this time in connection with the problem presented. The 1948 revision of the Judicial Code, Title 28, *United States Code Annotated,* contained in section 1404 (a) a provision that, "For the convenience of the parties and witnesses, in the interest of Justice, a district court may transfer any civl action to any other district or division where it might have been brought."

A question appears as to what effect this provision has on Section 6 and the cases decided thereunder proclaiming the right of venue. In the recent cases of

7. *Supra* note 4.
8. 137 Ohio St. 409, 30 N.E. 2d 982 (1940).
9. 315 U.S. 698 (1942).

Ex parte Collett[10] the Supreme Court of the United States answered that question. The Court stated that, "Prior to the current revision of Title 28 of the United States Code Annotated, forum non conveniens was not available in Federal Employers' Liability Act suits." The Court observed that Section 1404 (a) does give a federal district court power to transfer a Federal Employers' Liability Act case if it sees fit. However, the Court went on to say that, "Section 1404 (a) does not limit or otherwise modify any right granted in Section 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously."

On the basis of the *Kepner* case, the *Miles* case, and the interpretation of the effect of Section 1404 (a) of the revised Judicial Cole upon Section 6 of the Federal Employers' Liability Act by the Court in the *Collett* case, Judge Tipton of the Missouri Supreme Court in the principal case, speaking for a unanimous court sitting *en banc,* stated that, "Thus it is clear . . . a state court cannot dismiss a Federal Employers' Liability case solely under the forum non conveniens doctrine."[11]

Certiorari was then taken to the Supreme Court of the United States. Mr. Justice Frankfurter who dissented in the *Kepner* case and the *Miles* case wrote the opinion of the court.

Mr. Justice Frankfurter stated that the Missouri Court apparently had deemed itself bound to deny the motions for dismissal on the ground of *forum non conveniens* because of the Supreme Court decisions in the *Kepner* and *Miles* cases. Mr. Justice Frankfurter then states, referring to the *Kepner* and *Miles* cases, "But neither of these cases limited the power of a state to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the state for reasons of local policy denies resort to its courts and enforces its policy impartially, . . . so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges and Immunities clause of the Constitution."

It is no doubt true that the *Kepner* and *Miles* cases did not of themselves preclude a state from refusing to take jurisdiction of a Federal Employers' Liability case on the grounds of forum non conveniens since such a fact situation was not before the court. However the language and reasoning quoted above from the cases would seem to lead one to that conclusion, particularly in the light of Mr. Justice Reed's statement in the Miles case[12] that, "The Missouri Court here involved must permit the litigation." It is not clear but what Mr. Justice Frankfurter's opinion, at one time at least, was that the cases referred to did, though in his opinion erroneously, establish an absolute right of venue not subject to the rule of *forum non conveniens.* Mr. Justice Frankfurter stated in his dissent in the *Kepner*[13] case that, "To read the venue provision of the Act as do the majority of the Court is to translate the permission given a plaintiff to enter Courts previously closed

10. 337 U.S. 55 (1949).
11. 359 Mo. 827, 224 S.W. 2d 105 (1949).
12. 315 U.S. 698 (1942).
13. 314 U.S. 44 (1941).

to him into a withdrawal from the state courts of power historically exercised by them, and into an absolute direction to the specified federal and state courts to take jurisdiction."

In any event, Mr. Justice Frankfurter concluded in the principal case, but with little discussion, that the Supreme Court of Missouri should be relieved of the compulsion it had felt was enunciated in the *Kepner* and *Miles* cases and should be free to decide the availability of the principle of *forum non conveniens* according to its own local law. The cause was therefore remanded for that purpose. Thus a state may elect to limit the shopping by a plaintiff for a forum in a Federal Employers' Liability case by the doctrine of *forum non conveniens.*

Mr. Justice Jackson observed in a brief concurring opinion that the *Miles* case was no longer controlling on the question since it was based expressly on the compulsion invoked by Section 6 of the Liability Act and that compulsion was removed by Section 1404 (a) of the revised judicial code. Mr. Justice Jackson states, "Certainly a state is under no obligation to provide a court for two non resident parties to litigate a foreign born cause of action when the Federal Government which creates the cause of action, frees its own courts within that state from mandatory consideration of the same case." Mr. Justice Jackson made no mention of the Missouri Court's reasoning to the effect that, since the Missouri courts have no power of transfer to be used in such cases, Section 1404 (a) did not relieve them of the compulsion of Section 6 of the Liability Act as previously interpreted.

Mr. Justice Clark, The Chief Justice, Mr. Justice Black and Mr. Justice Douglas concurred in dissenting on the ground that the decision below should be upheld if there was any valid ground to sustain it. These members of the court thought there was such a valid ground since the Missouri Court stated that it was of the opinion that a contrary decision from the one it reached would violate Article 4, Section 2 of the Constitution of the United States, in addition to being in discord with the *Kepner* and *Miles* cases.

The present state of law concerning the doctrine of *forum non conveniens* in Federal Employers' cases would appear to be as follows:

1. Under the provisions of Section 1404 (a) of the revised Judicial Code, Title 28, United States Code, a federal district court may in the "interest of justice" transfer a Liability Act case to another district court where the action might have been brought.

2. Under the *Mayfield* case a state court may refuse jurisdiction to a Liability Act case on the grounds of *forum non conveniens,* so long as it does not discriminate against Employers' Liability Act suits and is careful not to offend against the Privileges and Immunities clause of the Constitution.

3. It is not at all clear what result will be reached in the future in the *Miles* situation where a state court attempts to enjoin a resident citizen from suing in a foreign state court on a Liability Act clause of action on the ground that such suit is vexatious and oppressive. The *Miles* case held that such injunction could not

issue. In the *Collett*[14] case the court said, (emphasis added) "Section 1404 (a) *does not limit or otherwise modify* any right granted in Section 6 of the Liability Act or elsewhere to bring suit in the particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously." But Mr. Justice Jackson in his concurring opinion in the *Mayfield* case said that, because of 1404 (a), "the Missouri court should no longer regard it [the *Miles* case] as controlling."

4. In the *Kepner* situation where a state court attempts to enjoin a resident citizen from suing on a Federal Employers' Liability Act cause of action in a foreign federal district court on the grounds that the suit is inequitable and vexations, it is not clear what result will be reached under 1404 (a). Prior to 1404 (a) the injunction could not issue because the *Kepner* case held there was a *right* of venue created by Section 6 of the Liability Act. As noted above, the Court in *Ex parte Collett*[15] said that a plaintiff's right to use any forum when jurisdiction existed was not effected by 1404 (a), other than that a district court could transfer the cause. But now since a federal court may refuse to hear a Liability Act case because it would be unjust to the defendant, as provided in 1404 (a), may it not be possible for a state court to enjoin a resident citizen from suing in such foreign district court for the same reason. Mr. Justice Jackson stated in his concurring opinion in the principal case that the *Miles* case was inoperative because of 1404 (a). Since both the *Miles* case and the *Kepner* case involve state action in a Liability Act case and on the same theory, Mr. Justice Jackson may also be of the opinion that the *Kepner* case is no longer controlling.

WILLIAM J. CASON*

REAL PROPERTY—ABSENCE OF "HEIRS AND ASSIGNS" AS AFFECTING TRANSFERABILITY OF FISHING RIGHTS

Williams v. Diederick[1]

Knepel and Matson, separate owners of adjoining tracts of land, both conveyed by separate warranty deeds a part of each tract to the Missouri, Kansas and Texas Railroad Company, which intended to construct a reservoir upon such land. Knepel's deed contained a clause which reserved to himself and Matson ". . . the exclusive boating and fishing privileges on any reservoir which the said Railway Company may construct on the land covered by this deed with equal rights to each." Matson's deed contained an almost identical provision. The words "heirs and assigns" were not used in the reservation clause of either deed. Knepel sold and assigned his fishing and boating rights[2] to one Watson, and the defendants

14. 337 U.S. 55 (1939).
15. *Ibid.*

*Attorney, Clinton, and former student editor of the *Review*. B.S. 1948, LL.B., Feb. 1951, University of Missouri.

1. 359 Mo. 683, 223 S.W. 2d 402 (1949). See Eckhardt, *Property*, 15 Mo. L. REV. 399 (1950).

obtained these rights through successive assignments. The retained tract of land owned by Matson was later conveyed to the plaintiff, and the retained Knepel tract was conveyed to the defendants' intestate. The Railroad Company leased the entire reservoir to the plaintiff. Both parties asked for a determination of the title and interest in the land. The issue was whether or not the rights and privileges reserved by the grantors are inheritable and assignable. Affirming the judgment of the lower court that the defendants have no rights in the land, the Missouri Supreme Court held that the reservation clause in the Matson deed conveyed nothing to Knepel, who was a stranger to the deed; the reservation clause in the Knepel deed conveyed nothing to Matson, who was a stranger to that deed; and that due to the absence of the words "heirs and assigns" the rights reserved were merely personal rights and as such were not inheritable or assignable.

In order to ascertain the transferability of fishing rights it is necessary to ascertain whether such rights constitute a mere license, or an easement in gross, or a profit a prendre in gross, or an appurtenant easement or profit. The general rule is that neither a license[3] nor an easement in gross[4] is assignable or inheritable, whereas a profit a prendre in gross constitutes an estate in the land itself[5] and is assignable and inheritable.[6] A license[7] or an easement in gross[8] constitutes a personal privilege

---

2. Boating rights, in so far as they are exercised in conjunction with the fishing rights, are treated the same as the fishing rights. Bosworth v. Nelson, 170 Go. 279, 152 S.E. 575 (1930). But, it is highly doubtful whether boating rights for mere "pleasure" can be carved out of an estate. Eckhardt, *op. cit. supra* note 1. at 400, 401. This note does not purport to deal with this question, hence boating and fishing rights will be treated the same, and for the purpose of brevity only fishing rights will hereafter be referred to.

3. Davidson v. Dingeldive, 259 Ill. 367, 129 N.E. 79 (1920); Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484 (1857); CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 33 (2d ed. 1947); 3 TIFFANY, REAL PROPERTY § 832, p. 407 (3d ed. 1939).

4. Salem Capital Flour Mills Co. v. Stayton Water-Ditch and Canal Co., 33 Fed. 146, 154 (1887); Traylor v. Parkinson, 355 Ill. 476, 189 N.E. 307 (1934); Wooldridge v. Smith, 243 Mo. 190, 147 S.W. 1019 (1912); Saratoga State Waters Corporation v. Pratt, 227 N. Y. 429, 125 N.E. 834 (1920); Boatman v. Lashley, 23 Ohio St. 614 (1873); CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND," III, p. 67 (2d ed 1947); 3 TIFFANY, REAL PROPERTY § 761, pp. 211, 212 (3d ed. 1939); 17 AM. JUR., *Easements*, § 11, p. 932.

However, some jurisdictions hold out that an easement in gross is capable of being assignable or inheritable if such intention is established in the instrument creating the easement. Miller v. Lutheran Conference and Camp Ass'n, 331 Pa. 241, 200 Atl. 646 (1938), 130 A.L.R. 1245 (1941).

5. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 P. 2d 599 (1934); Saratoga State Waters Corporation v. Pratt, 227 N. Y. 429, 125 N.E. 834 (1920); 19 AM. JUR., *Estates*, § 14, p. 473.

6. Minnesota Valley Gun Club v. Northline Corporation, 207 Minn. 126, 290 N.W. 222 (1940); Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 P. 2d 599 (1934); Saratoga Waters Corporation v. Pratt, 227 N. Y. 429, 125 N.E. 834 (1920); CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" p. 65 (2d ed. 1947); 3 TIFFANY, REAL PROPERTY § 843, p. 434 (3d ed. 1939).

7. Smith v. Royal Ins. Co., 111 F. 2d 667 (1940), 130 A.L.R. 812 (1941); Bland v. Bregman, 123 Conn. 61, 192 Atl. 703 (1937); Lang v. Dupuis, 382 Ill. 101

(not appurtenant to other land) to do a particular act that would otherwise have been unlawful upon the land of another, the main distinction between them being that the former is a mere permission revocable at will,[9] whereas the latter is an irrevocable right existing against the members of the community generally, as well as the owner of the land, to protect the enjoyment of such right.[10] A profit a prendre in gross, however, as defined by Tiffany, ". . . involves a power to acquire, by severance or removal from another's land, some thing or things previously constituting a part of the land, or appertaining thereto . . ."[11] and this personal power (not appurtenant to other land)[12] exists against the community in general, as well as the owner of the premises. The distinguishing feature of an easement (and also a license) is the absence of a right to participate in the soil or product of it in which there is supposeable value.[13]

Missouri, although not labelling them as such, recognizes rights that at common law would be called profits a prendre.[14] The *American Law Institute Restatement of Property* states that the law as to profits and easements is the same, and includes profits within the term "easement."[15] However, the great majority of juris-

---

46 N.E. 2d 21 (1943); Minnesota Valley Gun Club v. Northline Corporation, 207 Minn. 126, 290 N.W. 222 (1940); Boone v. Stover, 66 Mo. 430 (1877); Latimer v. Hess, 183 S.W. 2d 996 (Tex., 1944); 3 TIFFANY, REAL PROPERTY § 829, p. 401 (3d ed. 1939).

8. Wooldridge v. Smith, 243 Mo. 190, 147 S.W. 1019, 40 L.R.A. (N. S.) 752 (1912); Power v. Dean, 112 Mo. App. 288, 86 S.W. 1100 (1905); Saratoga State Waters Corporation v. Pratt, 227 N. Y. 429, 125 N.E. 834 (1920); Richards v. Trezvant, 185 S. C. 489, 194 S.E. 326 (1937); 3 TIFFANY, REAL PROPERTY § 756, p. 200, § 758, p. 203 (3d ed. 1939).

9. *Supra* note 7; Power v. Dean, 112 Mo. App. 288, 86 S.W. 1100 (1905); Desloge v. Pearce, 38 Mo. 588 (1866); Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484 (1857); CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 17, 21 (2d ed. 1947).

10. *Supra*, note 8.

11. TIFFANY, REAL PROPERTY § 839, p. 427, § 483, p. 433 (3d ed. 1939). *Accord* U. S. v. 1,070 Acres of Land, in Houston County, Ga., 52 Fed. Supp. 373 (M. D. Ga. 1943). See 25 ORE. L. REV. 217 (1946) for a discussion on the law of profits a prendre.

12. *Supra*, notes 6 and 11.

13. U. S. v. 1,070 Acres of Land, in Houston County, Ga., 52 F. Supp. 378 (M. D. Ga. 1943); Louis Pizitz Dry Goods Co. v. Penney, 241 Ala. 602, 4 So. 2d 167 (1941); Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); Wooldridge v. Smith, 243 Mo. 190, 203, 147 S.W. 1019 (1912); Anderson v. Gipson, 144 S.W. 2d 948 (Tex., 1940); 3 TIFFANY, REAL PROPERTY § 840, p. 429 (3d ed. 1939).

14. In Boone v. Stover, 66 Mo. 430 (1877), the court called a "right to take minerals" from the land of another a "license" and because it gave a "usufruct" of the land itself the court treated it as an assignable incorpereal hereditament. It should not be material that the court called it a "license" rather than a "profit." Probably the reason Missouri courts do not speak in terms of "profit" was the early statutory mining license act of 1875. Mo. STAT. ANN. §§ 14783-4; Mo. REV. STAT. §§ 444.010-.020 (1949), and cases thereunder. But a "right to take minerals" [Boone v. Stover, *supra*] must be distinguished from "an estate in the minerals themselves" [Gordon v. Park, 219 Mo. 600 (1909)]. 3 TIFFANY, REAL PROPERTY § 846, p. 437 (3d ed. 1939).

15. RESTATEMENT, PROPERTY § 450, Special Note (1944).

dictions[16] and almost all the text writers[17] recognize the distinctions between profits a prendre and easements as set forth above.

It is not clear whether the Missouri court treated the fishing rights in question as an easement in gross or as a license, merely holding that the rights were personal and neither assignable nor inheritable, and, since both Matson and Knepel were deceased many years before the time of this suit, the court did not find it necessary to determine the revocability of the personal, "non-inheritable" rights.[18] A few jurisdictions treat fishing rights as a license;[19] others treat them as an easement in gross.[20] The great majority of courts, however, hold fishing rights to be a profit a prendre in gross on the theory that it constitutes a taking of a part of the soil from the water.[21]

Missouri, by statute, has abolished the common law requirement of technical words of inheritance to convey an estate in fee simple,[22] and in the absence of the words "heirs and assigns" it is presumed that the grantor intends to convey all of his estate.[23] Profits a prendre, constituting an *estate* in the land itself,[24] may be in fee,

---

16. Baker v. Kenney, 145 Iowa 638, 124 N.W. 901 (1910); Trimble v. Kentucky River Coal Corporation, 235 Ky. 301, 31 S.W. 2d 367 (1930); St. Helen Shooting Club v. Mogle, 234 Mich. 60, 207 N.W. 915 (1926); Minnesota Valley Gun Club v. Northline Corporation, 207 Minn. 126, 290 N.W. 222 (1940); Council v. Sanderline, 183 N. C. 253, 111 S.E. 365 (1922), 32 A.L.R. 1527 (1924); Saratoga State Waters Corporation v. Pratt, 227 N. Y. 429, 125 N.E. 834 (1920); Boatman v. Lashley, 23 Ohio St. 614 (1873).

17. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 65, 67 (2d ed. 1947); GODDARD, EASEMENTS (8th ed. 1921); JONES EASEMENTS §§ 1, 40, 41, 49, 52 (1898); TIEDMAN, AMERICAN LAW OF REAL PROPERTY § 424, p. 613 (4th ed. 1924); 3 TIFFANY, REAL PROPERTY § 840, pp. 429, 430 (3d ed. 1939); 2 WASHBURN, REAL PROPERTY §1227, p. 274 (1902); WARVELLE, REAL PROPERTY 19 (1896).

18. *Supra,* note 14.

19. Boyd v. Colgan, 126 Kan. 497, 268 Pac. 794 (1928); Beach v. Morgan, 67 N. H. 529, 41 Atl. 349 (1894).

20. Schultz v. Carter, 153 Va. 730, 151 S.E. 130 (1930).

21. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); Baker v. Kenney, 145 Iowa 638, 124 N.W. 901 (1910); Hill v. Lord, 48 Me. 83, 99, 100 (1861) (dictum) (regarding seaweed); Minnesota Valley Gun Club v. Northline Corporation, 207 Minn. 126, 290 N.W. 222 (1940); Council v. Sanderlin, 183 N. C. 253, 111 S.E. 365 (1922), 32 A.L.R. 1527 (1924); Albright v. Cortright, 64 N. J. 330, 45 Atl. 634 (1900); Tinicum Fishing Co. v. Carter, 61 Pa. St. 21 (1869); Anderson v. Gipson, 144 S.W. 2d 948 (Tex. 1940); Peers against Lucy, 4 Mod. 362 (1793); 17 AM. JUR., *Easements,* § 6, p. 928; 3 TIFFANY, REAL PROPERTY § 839, p. 427 (3d ed. 1939); 2 WASHBURN, REAL PROPERTY § 1227, p. 275 (6th ed. 1902). See Greisinger v. Klinhart, 282 S.W. 473 (Mo. Ct. of App. 1926), holding that the "right of the public to fish in private waters cannot be claimed by custom," and cases cited thereunder.

22. MO. REV. STAT. p. 119, § 2 (1835); Tygard v. Hartwell, 204 Mo. 200 (1907).

23. The current statute, MO. REV. STAT. § 442.460 (1949), is the same as MO. REV. STAT. § 3496 (1939), and reads as follows: "The term 'heirs,' or other words of inheritance, shall not be necessary to create or convey an estate in fee simple, and every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear, or be necessarily implied in the terms of the Grant."

for life or for years.[25] It therefore would seem that if Missouri recognized the law of profits, the above statute would apply in the present case to give the holder of the fishing rights an estate in fee, and the absence of the words "heirs and assigns" would not affect the transferability of such an interest.[26] It would appear to be within the policy of the statute to apply it also to easements.[27] An easement is an interest in land[28] (an incorporeal hereditament)[29] (and has been held to constitute an estate in land)[30] and may be made to endure in perpetuity.[31] In most jurisdictions, however, an easement in gross is of such a personal nature that it is not transferable ". . . even though the instrument creating it conveys it to the grantee and his heirs and assigns forever;"[32] therefore it would appear that the absence of the words "heirs and assigns," the reason given by the court in the present case, or an application of the above statute, would not affect the transferability of such an interest. But since Missouri, unlike most jurisdictions, allows an easement to include a participation in the profits of the soil, a good argument could be made for applying the statute and permitting an easement in gross to be transferable.[33]

The Missouri Supreme Court relied heavily on the absence of the words "heirs and assigns" in holding that the fishing rights reserved were personal rights, but in jurisdictions having a statute like that previously discussed, the presence or absence of the words "heirs and assigns" would by no means tend to show that the rights and privileges reserved were intended to be merely personal.[34] If the fishing rights

---

24. *Supra,* note 5. But see RESTATEMENT, PROPERTY § 9 (1944), which does not consider either a profit or an easement as an estate.

25. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); 3 TIFFANY, REAL PROPERTY § 839, p. 428 (3d ed. 1939).

26. *Cf.* Painter v. Pasadena Land and Water Co., 91 Cal. 74, 27 Pac. 539 (1891).

27. Salem Capital Flour Mills Co. v. Stayton Water-Ditch and Canal Co., 33 Fed. 146 (Cir. Ct. D. Ore. 1887); applies such a statute to an easement, creating an easement in fee; Cleveland, C., C. & St. L. Ry. v. Griswold, 51 Ind. App. 497, 97 N.E. 1030 (1912); Miller v. Miller, 91 Kan. 1, 4, 136 Pac. 953, 954, L.R.A. 1915A, 671, Ann. Cas. 1917A, 918 (1913); Luttropp v. Kilborn, 186 Wis. 217, 202 N.W. 368 (1925).

28. Traylor v. Parkinson, 355 Ill. 476, 189 N.E. 307 (1934); Saratoga State Waters Corporation v. Pratt, 227 N. Y. 429, 125 N.E. 834, 839 (1920).

29. TIEDEMAN, AMERICAN LAW OF REAL PROPERTY §§ 422, 423, p. 612 (4th ed. 1924).

30. Oates v. Town of Headland, 154 Ala. 503, 45 So. 910, 911 (1908); Eliot v. Carter, 29 Mass. (12 Pick.) 436, 440 (1832).

31. 3 TIFFANY, REAL PROPERTY § 839, p. 428 (3d ed. 1939).

32. 17 AM. JUR., *Easements* § 11, p. 932; *supra,* note 4.

33. *Supra,* note 27; *cf.* Oates v. Town of Headland, 154 Ala. 503, 45 So. 910, 911 (1908); 3 TIFFANY, REAL PROPERTY § 761, p. 212 (3d ed. 1939), favoring the inheritability and assignability of easements in gross. The following articles are in favor of the transferability of easements in gross: 12 U. OF CHI. L. REV. 276 (1945); 22 CHI-KENT L. REV. 239 (1944); 22 MICH. L. REV. 521 (1924); 32 YALE L. J. 813 (1923).

34. Presbyterian Church of Osceola, Clarke County v. Harken, 177 Iowa 195, 158 N.W. 692 (1916); Dennis v. Wilson, 107 Mass. 591 (1871); Stoutimore v. Quincy, Omaha & Kansas City R.R., 215 Mo. App. 194, 256 S.W. 121 (1923); 3 TIFFANY, REAL PROPERTY § 759, p. 206, 207 (3d ed. 1939).

in question were found to touch and concern the retained land the court would be justified in holding such rights to be appurtenant,[35] in which case the fishing rights could not be transferred separate from the retained land,[36] and an attempt to transfer them separately would merely be null and void and by the better view would not extinguish the appurtenant rights.[37] At the time of this suit the defendants owned the tract of land retained by Knepel and ought to have fishing rights if the reservation created a profit a prendre appurtenant or in gross, an easement in gross if transferable, or an easement appurtenant.

LEONARD A. O'NEAL

REAL PROPERTY—TENANCY BY THE ENTIRETY—CONVEYING FREE OF INCOME TAX LIEN AGAINST HUSBAND

Hutcherson v. United States[1]

H and *W* owned realty in Kansas City as tenants by the entirety. Marital trouble arose and *H* filed suit for divorce. After *H* filed suit for divorce the Collector of Internal Revenue filed notice of a tax lien of $109.61 for unpaid taxes assessed against *H*, individually, under 26 U.S.C.A. § 3670, "If any person liable to pay any tax neglects or refuses to pay same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Two weeks later *H* and *W* in accordance with a property settlement agreement conveyed the property to a straw party. Three weeks after the conveyance, *W* obtained a divorce from *H* and two days later the straw party conveyed the property to *W*. *W* instituted this suit against the United States to quiet title and cancel the lien filed by the Collector of Internal Revenue.

The United States contended that it had a valid lien, attaching at the time notice was filed, upon *H*'s interest and rights in property held by *H* and *W* as tenants by the entirety, subject to being defeated in the event W survived *H*. *Held:* Neither the estate by the entirety nor the rents or profits therefrom are subject to an income tax lien for *H*'s delinquent income taxes and *H* and *W* by their joint mutual act may convey free and clear of existing debts of either regardless of their nature or source.

---

35. *Cf.* Moore v. Crose, 43 Ind. 30 (1873); Whitelaw v. Rodney, 212 Mo. 540, 549, 550 (1908). The law as to easements appurtenant and profits a prendre appurtenant is the same. 3 TIFFANY, REAL PROPERTY § 761, p. 212, § 843, pp. 433, 434 (3d ed. 1939).

36. Moore v. Crose, 43 Ind. 30 (1873); McKenna v. Brooklyn Union Elevated R.R., 184 N. Y. 391, 77 N.E. 615 (1906); 3 TIFFANY, REAL PROPERTY § 761, pp. 213, 214 (3d ed. 1939).

37. 165 Broadway Building, Inc. v. City Investing Co., 120 F. 2d 813, 820 (C.C.A. 2d Cir. 1941); McKenna v. Brooklyn Union Elevated R.R., 184 N. Y. 391, 77 N.E. 615 (1906); CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND 89 (2d ed. 1947); 20 HARV. L. REV. 136 (1906). *Contra,* Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. 20, 14 L.R.A. 300 (1891).

1. 92 F. Supp. 168 (W. D. Mo. 1950).

The principal case is the first case in Missouri which specifically states tenants by the entirety can convey property held by the entireties free of existing separate debts. Whether or not this is logically and legally sound depends upon the nature of a tenacy by the entirety at comon law and the effect of so-called married women's statutes upon such tenancy.[2]

The conception of tenancy by entireties at common law, disregarding the husband's *jure uxoris,* was that the husband and wife took property conveyed to them as one person, each holding the whole of it because they were in law one person, one flesh and blood, a unity resulting from their marriage relation.[3] As a result of this concept of the unity of the husband and wife, each spouse became owner of the entire estate. Both were seized of the entirety and neither could sever the union of interest without the assent of the other.[4] Neither husband nor wife had a separate interest in the estate that could be aliened.[5] There could be no partition of the estate and it was dissolved upon the disolution of the marriage.[6] This pure concept of tenancy by entirety was perverted by the husband's *jure uxoris.*

The husband's *jure uxoris* was a marital right which gave him the absolute and exclusive right of control, use and possession of the wife's property during coverture.[7] He had the power to do as he pleased with the wife's property in complete disregard to her wishes, subject only to the possibility that she would outlive him.[8] If the wife survived the husband, she resumed control over her property, but during coverture the right to rents, profits, possession, use and control was in the husband.[9] The basis of this right was the idea that husband and wife were one, with the wife being merged in the husband and he holding the rights of both.[10]

---

2. For a case discussion of tenancy by the entirety and the effect of married women's acts, *compare* Stifel's Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918) and Fairclaw v. Forrest, 130 F. 2d 829, 76 App. D. C. 197, 143 A.L.R. 1154 (1942), *cert. denied,* 318 U. S. 756, (1942) *with* Hiles v. Fisher, 144 N. Y. 306, 39 N.E. 337, 30 L.R.A. 305, 43 Am. St. Rep. 762 (1895) and Ganoe v. Ohmart, 121 Ore. 116, 254 Pac. 203 (1927). For a discussion of the disposition of property held by the entireties when one spouse murders the other, see Note, 13 Mo. L. REV. 463 (1948). For a discussion of dower in estates by the entirety, see Note, 13 Mo. L. REV. 321 (1948).

3. *E.g.,* Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613, 63 A.L.R. 231 (1929); Stifel's Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); See Russell v. Russell, 122 Mo. 235, 237, 26 S.W. 677 (1920).

4. Hurd v. Hughes, 12 Del. Ch. 188, 109 Atl. 418 (1920); Samuel v. Frederick, 262 S.W. 713 (Mo. 1924); See note 3 *supra.*

5. Sheldon v. Waters, 168 F. 2d 483 (C.C.A. 5th 1948); Blenard v. Blenard, 185 Md. 548, 45 A. 2d 335 (1945); See note 4 *supra.*

6. Russell v. Russell, 122 Mo. 235, 26 S.W. 677 (1894).

7. Stifel's Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); 41 C.J.S. § 34, p. 462; See Amopolis Banking and Trust Co. v. Neilson, 164 Md. 8, 10, 164 Atl. 157, 158 (1933).

8. See, *e.g.,* Licker v. Guskin, 265 Mass. 403, 407-408, 164 N.E. 613, 615, 63 A.L.R. 231, 234 (1929).

9. See *e.g.,* Annapolis Banking and Trust Co. v. Neilson, 164 Md. 8, 11, 164 Atl. 157. 159 (1933).

10. Stifel's Brewing Co. v. Saxey, 273 Mo. 159, 201 S.W. 67 (1918); See Fairclaw v. Forrest, 130 F. 2d 829, 833, 76 App. D. C. 197, 143 A.L.R. 1154, 1159 (1942), *cert. denied,* 318 U. S. 756 (1942).

The effect of *jure uxoris* upon a tenancy by the entirety at common law was that the husband could convey the property to a third party, preventing the wife from enjoying the possession and use of the property during their joint lives.[11] If the wife survived the husband, she, by the incident of survivorship, became entitled to the property upon his death. Creditors of the husband could attach the rents and profits of the land to the exclusion of the wife for satisfaction of his debts.[12]

Married women's acts were passed in virtually every state to secure to the married woman the enjoyment of her personal and real property.[13] The effect of these acts upon tenants by entireties has not been uniform. Some jurisdictions held the acts abolished tenancy by entireties.[14] Massachusetts held the acts were not applicable to tenants by the entirety.[15] Other jurisdictions, following the lead of New York, held that a tenancy by the entirety under the act was an estate where neither husband nor wife, without the assent of the other, could dispose of any part of the estate so as to affect the right of survivorship in the other, and the husband and wife were tenants in common as to the rents, profits, use and possession.[16] Probably in the majority of the jurisdictions in which tenancies by the entirety exist the married women's acts abolished the husband's *jure uxoris* and raised the wife, in the eyes of the law, to the same position as that of husband, thus entitling her to take and hold property in her own right free from the control formerly exercised by the husband.[17]

The effect of married women's acts on the rights of the separate creditors of the spouses who hold property as tenants by the entirety has varied in accordance with

---

11. Fairclaw v. Forrest, *supra* note 10.

12. *E.g.*, Raptes v. Passas, 259 Mass. 37, 155 N.E. 787 (1927); Hall v. Stephens, 65 Mo. 670 (1877).

13. See *e.g.*, Hiles v. Fisher, 144 N. Y. 306, 314, 39 N.E. 337, 339 (1895); Bloomfield v. Brown, 67 R. I. 453, 462, 25 A. 2d 354, 359, 141 A.L.R. 170, 177 (1942).

14. First National Bank of Birmingham v. Lawrence, 212 Ala. 45, 101 So. 663 (1924); Swan v. Walden, 156 Cal. 195, 103 Pac. 931 (1904); Whyman v. Johnston, 62 Colo. 461, 163 Pac. 76 (1917); Lawler v. Byrne, 253 Ill. 194, 96 N.E. 892 (1911); Fay v. Smiley, 201 Ia. 1290, 207 N.W. 369 (1926); Appeal of Garland, 126 Me. 84, 136 Atl. 459 (1927); Semper v. Coates, 93 Minn. 76, 100 N.W. 662 (1904); Helvis v. Hoover, 11 Okla. 687, 69 Pac. 958 (1902), McNeeley v. South Penn. Oil Co., 52 W. Va. 616, 44 S.E. 508 (1903); Perrigo v. Richardson's Estate, 229 Wis. 426, 282 N.W. 585 (1938).

15. See *e.g.*, Licker v. Gluskin, 265 Mass. 403, 407, 164 N.E. 613, 615, 63 A.L.R. 231 (1929).

16. Branch v. Polk, 61 Ark. 388, 33 S.W. 424 (1895); Hiles v. Fisher, 144 N. Y. 306, 39 N.E. 337 (1895); Zanzomio v. Lanzonico, 24 N.J. Misc. 153, 46 A. 2d 565, 166 A.L.R. 964 (1946); Ganoe v. Ohmart, 121 Ore. 116, 254 Pac. 203 (1927).

17. U. S. v. Nathanson, 60 F. Supp. 193 (E. D. Mich. 1945); Fairclaw v. Forrest, 130 F. 2d 829, 76 App. D. C. 197, 143 A.L.R. 1154 (1942), *cert. denied*, 318 U. S. 756 (1943); Hurd v. Hughes, 12 Del. Ch. 188, 109 Atl. 418 (1920); Ohio Butterine Co. v. Hargrove, 79 Fla. 458, 84 So. 376 (1920); Chandler v. Cheney, 37 Ind. 391 (1871); Annapolis Banking and Trust Co. v. Neilson, 164 Md. 8, 164 Atl. 157 (1933); Stifel's Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); Beihl v. Martin, 236 Pa. 519, 84 Atl. 953, 42 L.R.S. (N. S.) 555 (1912); Bloomfield v. Brown, 67 R. I. 453, 25 A. 2d 354 (1942).

the different interpretations placed upon the act by various jurisdictions. In Massachusetts because married women's acts are not applicable to tenancy by the entirety, the situation is the same as at common law. The husband has the right to possession use, rents and profits during coverture, which may be subjected to the rights of creditors. The husband may convey the property subject to the right of the wife's survivorship but the wife can not convey her interest nor subject her interest to the claims of her creditors.[18]

In New York and jurisdictions which follow the New York view, creditors of the husband may subject his interest to attachment and sale.[19] The purchaser of the husband's interest in such a case becomes a tenant in common with the wife, entitled to an undivided one-half interest in the possession and use of the premises including the residence, during the wife's lifetime, and to the fee of the whole if the husband survives the wife.[20] If the wife survives the purchaser, she, by the incident of survivorship, takes the fee. The basis of this rule has been stated to be that the married women's acts were to give the wife the right to control and convey her property and not to give her the right to control the husband's interest.[21] In these jurisdictions the husband and wife could not convey free of the rights of separate creditors of either spouse.[22]

In jurisdictions where the effect of the acts have been to abolish the husband's *jure uxoris*, raising the wife to be his equal in the eyes of the law, creditors of the husband or wife alone are denied access to property held as tenants by the entirety,[23] the reason being that neither spouse is considered as having any separate interest in an estate by the entireties which is subject to attachment or levy.[24] These jurisdictions have reasserted and perfected the common law conception of a tenancy by the entirety without the modifying effects of the husband's *jure uxoris*. Likewise the income, use and possession of the estate by the entirety is also exempt from the reach of the separate creditors of the husband and wife.[25]

The reasoning behind these decisions is based upon the proposition that the married women acts were enacted to prevent the husband from depriving the wife of the right of enjoyment and use of her property. Thus to permit the husband's creditors to levy upon and sell the husband's interest in the property would not be

---

18. Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613, 63 A.L.R. 231 (1929).
19. Moore v. Denson, 167 Ark. 134, 268 S.W. 609 (1924). See note 16 *supra*.
20. *Cf.*, Infante v. Sperber, 187 Misc. 9, 61 N. Y. S. 2d 76 (Sup. Ct. 1946).
21. See Hiles v. Fisher, 144 N. Y. 306, 315, 39 N.E. 337, 339 (1895); Ganoe v. Ohmart, 121 Ore. 116, 121, 254 Pac. 203, 205 (1927).
22. Finnegan v. Humes, 252 App. Div. 385, 299 N. Y. Supp. 501 (4th Dep't 1937); *aff'd*, 277 N. Y. 682, 14 N.E. 2d 389, Hiles v. Fisher, 144 N. Y. 306, 39 N.E. 337 (1895).
23. Bloomfield v. Brown, 67 R. I. 453, 25 A. 2d 354, 141 A.L.R. 170 (1942); See Brinker v. Brinker, 227 S.W. 2d 724, 728 (Mo. 1950).
24. See note 5 *supra*.
25. Lomax v. Cramer, 202 Mo. App. 365, 216 S.W. 575 (1919); Kingman v. Banks, 212 Mo. App. 202, 251 S.W. 499 (1923).

giving effect to the acts for it would deprive the wife of the enjoyment of her property the same as if the husband had conveyed it to a stranger.[26]

In these jurisdictions creditors of the debtor's spouse have advanced two contentions against the rule preventing them from reaching the debtor's interest in the tenancy by the entirety, namely, that to withhold the debtor's interest from them is to deny them their rights, and that the debtor spouse can defraud his creditor by creating a tenancy by the entirety. The courts have answered the first contention by declaring that if the debt existed before the creation of the tenancy by the entirety, the property was not the basis for the credit extension, and if the debt arose after the tenancy existed, the creditor is presumed to have notice of the character of the estate which limits his right to reach it;[27] or that the only rights that the creditors have are those given them by the law and the law gives them no right to take the wife's property for the husband's debts.[28] In answer to the second contention, the courts have stated that if a tenancy by the entirety is created for such a purpose it can be set aside as fraudulent.[29]

Missouri adopted the majority view in *Stifel's Brewing Co. v. Saxy*.[30] There, *H* and *W* held realty as tenants by the entirety. *H* became indebted to the plaintiff. Then *H* transferred his interest to *W*; she sold the property and with the proceeds purchased the present property in her own name. Plaintiff had obtained a judgment against *H*, and sought to subject, to the satisfaction of his judgment, the property purchased with the proceeds from the sale of the estate held by the entireties at the time *H* incurred the debt. The court held that a tenancy by the entirety could not be held for the individual debts of *H* saying, "where a judgment and execution thereon are against a husband alone . . . such judgment and execution cannot affect in *any* way property held by the entirety, nor can it affect any supposed separate interest of the husband therein, for he has no separate interest." (emphasis added). Development of the law on tenants by the entirety in Missouri since this decision has been consistent with it.

In *Samuels v. Fredrick*,[31] *H* gave *X* a blank deed which *H* had signed authorizing *X* to sell property owned by *H* and *W* as tenants by the entirety. *W* told *X* the property was not for sale. *H* and *W* moved to California. *X* sold the property and forged *W*'s signature. The court held the deed was void, because neither *H* nor *W* could convey any interest in a tenancy by the entirety without the consent of the other.

In *Goldberg Plumbing Co. v. Taylor*,[32] plaintiff sued to enforce a mechanic's lien. Against the wishes of *W*, *H* had a heating unit installed in their home owned

26. *E.g.*, Chandler v. Cheney, 37 Ind. 391 (1871); Stifel's Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918).
27. Hurd v. Hughes, 12 Del. Ch. 188, 109 Atl. 418 (1920).
28. Annapolis Banking and Trust Co. v. Neilson, 164 Md. 8, 164 Atl. 157 (1933).
29. Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920).
30. 273 Mo. 159, 201 S.W. 67 (1918).
31. 262 S.W. 713 (Mo. 1924).
32. 209 Mo. App. 98, 227 S.W. 900 (1922).

by the entireties. The court held *H* had no interest in a tenancy by the entirety that could be subjected to a mechanic's lien.

Plaintiff tried to garnish rents from property held by the entirety to satisfy *H's* separate debts in *Kingman v. Banks.*[33] The court held that rents and profits of a tenancy by the entireties were not subject to attachment for the debts of *H* alone.

H's attorney filed a lien for attorney's fees upon a $750 insurance settlement resulting from a fire on property held by the entireties, in *Hartford Fire Ins. Co. v. Bleedorn.*[34] The court held that neither spouse had the power to subject an estate by the entireties to a lien.

It seems clear that an estate by the entireties is not subject to a lien for the separate debt of either spouse in Missouri.

Jurisdictions which give the same interpretation to married women's acts as Missouri, with the exception of Pennsylvania, have uniformly held that creditors of either *H* or *W* alone can not have a lien against an estate by the entireties.

Pennsylvania, following the decision in *Biehl v. Martin,*[35] holds that the expectancy of survivorship of either spouse may be the subject of a lien, but this lien is enforceable only when the expectancy ripens into a realized fact and it may be extinguished by the alienation of the estate by the joint act of *H* and *W*, or by the predecease of the debtor.

In the principal case, the government's contention was based upon the theory that the expectancy of survivorship was a right to property of *H* within the meaning of the statute and therefore subject to an income tax lien. This contention was also advanced by the government in *Shaw v. U.S.,*[36] where the United States asserted a lien on property held by the entirety, for taxes which were assessed against *H* individually. The court rejected the government's claim for a lien on the property stating that a tenancy by the entirety was not subject to a lien in Michigan.[37]

If the government's contention had been upheld, it would have been in contradiction to the expressed language of the court in *Stifel's Brewing Co. v. Saxy.* The subject of the lien for which the government contended could only have been the bare expectancy of survivorship in *H*. Because the expectancy of survivorship in either spouse may be destroyed either by a joint mutual conveyance by *H* and *W* or by death, it follows that the government's contention for a lien was invalid, because the subject of the lien had been destroyed by the conveyance from *H* and *W* to the straw party. It is submitted that the decision in the principal case is logically sound and a step further in pronouncing the law on tenants by the entirety consistent with the development of the theory and reasoning of such law in Missouri.

ROBERT P. KELLY

33. 212 Mo. App. 202, 251 S.W. 449 (1923); Lomax v. Cramer, 202 Mo. App. 365, 216 S.W. 575 (1919) (personalty may be held as tenants by the entirety).
34. 235 Mo. App. 286, 132 S.W. 2d 1066 (1939).
35. 236 Pa. 519, 84 Atl. 953, 42 L.R.S. (N. S.) 555 (1912).
36. 94 F. Supp. 245 (W. D. Mich. 1939) [first published 1951]
37. *Cf.* U. S. v. Nathanson, 60 F. Supp. 193 (E. D. Mich. 1945).

TORTS—LIABILITY OF AN OCCUPIER OF LAND TO A BUSINESS VISITOR INJURED BY ACTS OF AN INDEPENDENT THIRD PERSON

Hughes v. St. Louis National League Baseball Club[1]

The plaintiff stepped from the grandstand at Sportsman's Park in St. Louis after a baseball game. She had taken about three steps toward a playing field exit when a boy engaged in "horseplay" with other boys ran into her, causing plaintiff to fall and break her arm. This boy was one of a group of eight to ten boys allowed on the field following games to secure employment picking up seat cushions. *Respondeat superior* was not pleaded, but the plaintiff based her case on the alleged negligence of the defendant in not warning the plaintiff of the dangerous condition created by the conduct of the boys or in not taking steps to correct it. The Supreme Court of Missouri remanded the case because of failure to instruct the jury that the defendant must have known, or had reasonable opportunity to know, that the boys were creating a dangerous condition before a duty on defendant's part would arise to warn or make safe.

The general liability of an occupier of land is ordinary care under the circumstances to prevent injury to his "business invitees."[2] This liability includes affirmative acts of negligence and also dangerous conditions which the defendant could have known of in the exercise of ordinary care. The rule of ordinary care applies alike to the private occupier and the occupier of land held out to the public;[3] but because of factors such as the conduct of patrons, the business conducted the benefit bestowed by patrons, and the public character of the enterprise, liability is broader where the occupier invites the public.[4] Because of this broader liability where a pub-

---

1. 359 Mo. 993, 224 S.W.2d 989 (1949), *reversing* 218 S.W. 2d 632 (Mo. App. 1949).

2. Porchey v. Kelling, 353 Mo. 1034, 185 S.W.2d 820 (1945); Stevenson v. K.C. Southern Ry., 348 Mo. 1216, 159 S.W.2d 260 (1941); Paubel v. Hitz, 339 Mo. 274, 96 S.W.2d 369 (1936); Glaser v. Rothschild, 222 Mo. 180, 120 S.W. 1 (1909); RESTATEMENT, TORTS § 343 (1934): "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the posssesor is a public utility."

3. Anderson v. K. C. Baseball Club, 231 S.W.2d 170 (Mo. 1950); Hudson v. K. C. Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942); Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W.2d 1025 (1928); 52 AM. JUR., *Theaters, Shows, Exhibitions & Public Resorts*, § 44 (1936).

4. Klaman v. Hitchcock, 181 Minn. 109, 231 N.W. 716 (1930); Hudson v. K. C. Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942); Paubel v. Hitz, 339 Mo.

lic utility or other possessor of land holds land out to the public for entry for business purposes, a dangerous condition may include the acts of third persons.[5] Such a doctrine does not appear to be applicable to the private occupier inasmuch as the reported cases deal exclusively with lands held out to the public.

The occupier who holds land out to the public for entry as business patrons is definitely not an insurer,[6] but his liability is predicated on his knowledge, either actual or constructive, of the conduct creating the dangerous condition. The relationship between the occupier and the third person, if not constituting a basis for *respondeat superior,* is therefore immaterial; and he may be a person outside the premises,[7] an invitee,[8] an employee outside the scope of employment,[9] a licensee,[10] or a trespasser.[11] Defendant has been held to know, or to have had reasonable opportunity to know of the conduct, in these fact situations: employees off duty playing ball,[12] boys playing on a high board at defendant's swimming pool,[13] boys shooting into theatre with "BB" guns,[14] a drunk patron pushing people at a skating rink,[15] a wrestler thrown from the ring by his opponent,[16] and a jitterbugging marine.[17] Defendant has been found not to know of the condition in the exercise of reasonable care, and therefore not liable, in these fact situations: a

---

274, 96 S.W.2d 369 (1936) (This case describes the degrees of ordinary care at page 282: "Generally speaking, the legal duties imposed on the possessor increase or decrease with the beneficial interest of the possessor in the presence of the other on the premises; and, as a corrollary, corresponding shifts occur in the legal rights of the party on the premises."); Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W.2d 1025 (1928); Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N.W.2d 680 (1949); See Note, 98 A.L.R. 558 (1935).

5. RESTATEMENT, TORTS § 348 (1934): "A public utility or other possessor of land who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the land for such a purpose for bodily harm caused to them by the accidental, negligent or intentional harmful acts of third persons or animals if the possessor by the exercise of reasonable care could have
(a) discovered that such acts were being done or were about to be done, and
(b) protected the members of the public by
(i) controlling the conduct of the third persons, or
(ii) giving a warning adequate to enable them to avoid the harm without relinquishing any of the services to which they are entitled to receive from a public utility."

6. Klaman v. Hitchcock, 181 Minn. 109, 231 N.W. 716 (1930); Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W.2d 1025 (1928); Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N.W.2d 680 (1949); See Note, 142 A.L.R. 868 (1943).

7. Central Theatres, Inc. v. Wilkinson, 154 Fla. 589, 18 So. 2d 755 (1944).
8. Murphy v. Winter Gardens & Ice Co., 280 S. W. 444 (Mo. App. 1926).
9. Easler v. Downie Amusement Co., 125 Me. 334, 133 Atl. 905 (1926).
10. Edwards v. Hollywood Canteen, 27 Cal. 2d 802, 167 P. 2d 729 (1942).
11. Brodie v. Miller, 24 Tenn. App. 316, 143 S.W. 2d 1042 (1940).
12. Easler v. Downie Amusement Co., 125 Me. 334, 133 Atl. 905 (1926).
13. Hill v. Merrick, 147 Ore. 244, 31 P.2d 663 (1934).
14. Central Theatres, Inc. v. Wilkinson, 154 Fla. 589, 18 So.2d 755 (1944).
15. Martin v. Philadelphia Gardens, Inc., 348 Pa. 232, 35 A.2d 317 (1944).
16. Duskiewiez v. Carter, 52 A.2d 788, 115 Vt. 122 (1947).
17. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729 (1946).

shooting in defendant's amusement hall,[18] a wrestler jumping from the ring,[19] a patron pushed down by a crowd,[20] a crowd in a store,[21] and boys pushing a linoleum over onto plaintiff.[22]

The principal case recognized the duty of an occupier of land to exercise reasonable care to prevent injury to his "invitee,,' and that this duty, in the case of an occupier holding his land out to the public for business purposes, includes preventing injury to the "invitee" by third persons, whose conduct the defendant knows or should know is creating a "dangerous condition."

WILLIAM W. SHINN

TORTS—NEGLIGENCE—ILLEGAL PARKING—OBSTRUCTING THE VISION OF ONCOMING TRAFFIC

Domitz v. Springfield Bottlers, Inc.[1]

Two trailers belonging to the defendant bottling corporation were parked at the southwest corner of the intersection of two streets which crossed at right angles. The trailers were parked so close to the corner as to violate (decided by way of dictum) the following Joplin ordinance: ". . . No vehicle shall so occupy any street so as to unnecessarily interfere with or interrupt the free passage of other vehicles or hold up traffic." While the trailers were so parked, two cars approaching each other at right angles reached the intersection simultaneously and, to avoid colliding, both drivers veered, one of whom struck the plaintiff as she was stepping up to the curb at the northwestern corner of the intersection, causing serious injuries. She brought this suit against the driver of the car which struck her and the defendant corporation. The trial court dismissed the suit against the defendant corporation as showing no cause of action and Mrs. Domitz appealed. The supreme court reversed the judgment and remanded the case, holding that there were facts sufficient to go to the jury on the theory of common law negligence.

It is a frequent irritation with the urban motorist to have otherwise clear intersections made blind by vehicles parking too near the corner. And that there is a real danger from such parking is demonstrated by this and many other cases. Many cities have recognized this danger by prohibiting parking near the corner of intersections.

The problem of a duty owed by the defendant to the plaintiff is passed over briefly; after a short discussion the court concludes the subject by observing, "It is common knowledge that 'blind' intersections are points of danger for the traveling public." However, both cases cited by the court in support of this conclusion relied

---

18. Brodie v. Miller, 24 Tenn. App. 316, 143 S.W.2d 1042 (1940).
19. Wiersma v. City of Long Beach, 41 Cal. App.2d 8, 106 P.2d 45 (1940).
20. Master v. Alsina, 15 So.2d 660 (La. App., 1943). *Compare* Tuttle v. Kline's, Inc., 230 Mo. App. 230, 89 S.W.2d 675 (1935) *with* Myers v. K. C. Junior Orpheum, 228 Mo. App. 840, 73 S.W.2d 313 (1934).
21. F. W. Woolworth & Company v. Conboy, 170 Fed. 934 (C.C.A. 8th 1909).
22. Noonan v. Sheridan, 230 Ky. 162, 18 S.W.2d 976 (1929).

1. 359 Mo. 412, 221 S.W.2d 831 (1949).

solely on violation of parking ordinances for duty and breach,[2] rather than basing their decisions on a common law duty, as in the instant case. In fact, nearly all of these cases substitute violation of an ordinance in place of working out common law negligence,[3] though the general tenor is that use of the ordinance merely facilitates solving the duty problem and does not exclude application of common law principles of duty and breach.[4]

The "question is then, were the actions of Flynn and Mink in driving their cars into the intersection . . . such independent acts or causes as to render the negligence of the defendant company remote?"[5] It is the question of causation which mostly concerns this and other courts when faced with cases of this type. Most courts assert that the act of the driver who actually strikes the plaintiff is intervening and independent, but go on to say that the driver of the parked vehicle which obstructed the party's vision could foresee such danger and hence there is proximate cause.[6]

The broad basis for decisions which refuse to hold the owner of the parked vehicle liable is also causation; such cases hold that the obstruction caused by the defendant's parked vehicle is a condition and not a cause of the subsequent accident.[7] It appears then, that while no courts have trouble holding that there is a duty owed—either from common law foreseeability, statutory violation, or both—the few cases that do deny liability do so on the broad ground of causation.

Twice in the principal case there is mentioned the possibility of a hitherto vaguely recognized idea perhaps best described as the exception of reasonable necessity. That exception may be stated as follows: Whenever a driver parks his vehicle in such a way as to block the vision of an oncoming car or pedestrian, or both, and an accident ensues from such blocking of vision, then the driver of the

---

2. Millbury v. Turner Center System, 274 Mass. 358, 174 N.E. 471 (1931); Kuba v. Nagel, 124 S.W.2d 597 (Mo. 1939).

3. Whelan v. Bigelow, 33 Cal. App.2d 717, 92 P.2d 952 (1939); Winsky v. DeMandel, 204 Cal. 107, 266 Pac. 534 (1928); Millbury v. Turner Center System, *supra*, n. 2 (leading case in this general field); Kuba v. Nagel, *supra*, n. 2; Marchl v. Dowling, 157 Pa. Sup. 91, 41 A.2d 427 (1945); Taber v. Bauer, 173 Wash. 96, 21 P.2d 1028 (1933).

4. McKay v. Hedger, 149 Cal. App. 266, 34 P.2d 221 (1934); Reliable Transfer Co. v. May, 70 Ga. App. 613, 29 S.E.2d 187 (1944); Williams v. Grier, 68 Ga. App. 863, 26 S.E.2d 698 (1943); these first three cases find negligence under the ordinance, but go on to indicate that common law negligence is also present. However, in Hansen v. Houston Elec. Co., 41 S.W.2d 77 (Tex. 1931), a duty was found solely on common law grounds of foreseeability of the risk—but there was no applicable ordinance.

5. Instant case, 359 Mo. at 415.

6. RESTATEMENT, TORTS § 447 (1934); Whelan v. Bigelow, *supra*, n. 3; McKay v. Hedger, *supra*, n. 4; Winsky v. DeMandel, *supra*, n. 3; Reliable Transfer Co. v. May, *supra*, n. 4; Williams v. Grier, *supra*, n. 4; Blessing v. Welding, 266 Ia. 1178, 286 N.W. 436 (1939); Brey v. Rosenfeld, 50 A.2d 911 (Me. 1947).

7. Pullen v. Ga. Stages, Inc., 62 Ga. App. 592, 9 S.E.2d 104 (1940); Cain v. Ga. Power Co., 53 Ga. App. 483, 186 S.E. 229 (1936); Baker v. Cities Serv. Oil Co., 321 Ill. App. 142, 52 N.E.2d 284 (1943); Walker v. Ill. Com. Tel. Co., 315 Ill. App. 553, 43 N.E.2d 412 (1942); Powers v. Standard Oil Co., 98 N. J. Law 730, 119 Atl. 273 (1923).

parked vehicle will be liable for resulting injuries, *unless* there is a reasonable necessity for parking such vehicle at that particular place. This exception seems to furnish the underlying explanation for most or all of the cases seemingly contra to the majority holdings;[8] at least there are various innuendoes to that effect in several of the decided cases.[9]

THOMAS B. MOORE

8. Cain v. Ga. Power Co., *supra,* n. 7 (bus stopping at a regular bus stop); Baker v. Cities Serv. Oil Co., *supra,* n. 7 (truck unloading gasoline); Walker v. Ill. Com. Tel. Co., *supra,* n. 7 (truck unloading telephone poles); Powers v. Standard Oil Co., *supra,* n. 7 (truck unloading gasoline); Galuppi v. City of Youngstown, 55 O. App. 331, 9 N.E.2d 739 (1936) (city water truck actually in use); Brey v. Rosenfeld, 72 R.I. 28, 48 A.2d 177 (1946) (truck unloading cement).

9. Galuppi v. City of Youngstown, *supra,* n. 8 (in denying that use of water truck was a nuisance); Brey v. Rosenfeld, *supra,* n. 8 (". . . whether defendant was making a reasonable and necessary use of the sidewalk . . ." Defendant was parked on sidewalk unloading cement); Hansen v. Houston Elec. Co., *supra,* n. 4 (not a regular bus stop); Taber v. Bauer, *supra,* n. 3 (focal point of decision apparently was whether or not parking of truck in that location was reasonably necessary).