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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVE WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

CONTESTING SCHOOL BOND ELECTIONS IN MISSOURI

The recent increases in the enrollments of our public schools has brought about an ever-pressing need for more and more educational facilities. As a result of this need, there has been a surge of school construction in Missouri. Most of this construction has been and will be financed by the sale of bonds authorized for issuance by elections of the qualified voters of the school districts.

Article VI, Section 26 (B) of the 1945 Missouri Constitution, as amended by the general election of November 4, 1952, provides as follows for the issuing of bonds by a school district.

> "Any county, city, incorporated town, or village, or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

Closely related to Section 26 (B) of Article VI is Section 26 (G) of Article VI which provides as follows:

> "All elections under this article may be contested as provided by law."

Section 26 (G) pertains to the contesting of all elections authorized under Article VI and would apply to all bond elections including school bond elections. Section 26 (G) is to the effect that there must be statutory enactments by the legislature providing the procedure for the contesting of any election authorized under Article VI before any of the elections authorized thereunder can be contested. It is a well-imbedded principle in the law that the right to contest an election of any kind is purely a statutory right, and the procedure prescribed by the statutes must be strictly followed.[1]

The problem in Missouri is that the legislature has not exercised the authority given to it by Section 26 (G), Article VI, of the 1945 constitution. There are no statutes in Missouri providing for, and setting forth the procedure to be followed in contesing a school bond election or any other election for the incurring of public indebtedness.

Many contestants of bond elections in Missouri, upon finding that there is no remedy at law available to them because of the failure of the legislature to act, have turned to the court of equity for relief. They have asked the equity court to take jurisdiction of the election contest to prevent the election from being carried by the fraud which the contestants allege occurred in the conduct of the election.

This sort of contention was advanced in *State* ex rel. *Wahl* v. *Speer*,[2] in which a proceeding was brought to compel the county court to issue certain court house construction bonds which had been authorized by a bond election. The county court refused to issue the bonds pending the outcome of a suit to contest the validity of the bond election. A Writ of Mandamus was issued compelling the county court to issue the bonds, and it was held that political affairs

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1. State *ex rel.* Wahl v. Speer, 284 Mo. 45, 223 S.W. 655 (1920); Groom v. Taylor, 235 Ala. 247, 178 So. 33 (1938); Patterson v. Crowe, 385 Ill. 514, 53 N.E.2d 415 (1944); Peel v. Boyle County, 301 Ky. 655, 191 S.W.2d 923 (1945); Clee v. Moore, 119 N.J.L. 215, 195 Atl. 530 (1937); Cundiff v. Jeter, 172 Va. 470, 2 S.E.2d 436 (1939).

2. Note 1, *supra.*

have always been held outside the sphere of equity, and a charge of fraud in the conduct of elections is insufficient to enable an equity court to entertain a contest. It was also stated that the election judges were the protectors of the rights of the people, and it was their duty to see that the elections were honestly carried out. When the election results are declared by the election judges, then the election cannot be re-examined judicially except where authorized by statute. The legislature, by not passing a statute, had apparently thought the protection of the election judges against fraud was enough.

In *Boney v. Sims*[3] a circuit court issued a decree in a school bond election contest which enjoined the school directors from taking any action to issue the bonds authorized by the election. The court declared the election null and void on the ground of fraud. It was held by the Missouri Supreme Court that in the absence of any legislative provisions for the contest of a school bond election, the circuit court did not have power to review and annul this election upon the ground that there was fraud committed by the officials holding the election.

Also in *Remington v. Flemington School District,*[4] and *Long v. Consolidated School District #7, Kingsville, Johnson County,*[5] the same question as to the right to contest a school bond election was decided. In both cases it was held that there was no right to contest such an election and in so holding relied on *Wahl v. Speer* and *Boney v. Sims, supra.*

State ex rel. *City of Clarence v. Drain, Judge,*[6] and *State* ex rel. *Jackson County v. Waltner, Judge,*[7] involved action brought in equity to contest municipal and county bond elections. The questions were stated as not involving the truth or falsity of the facts alleged in the petitions but were as to the jurisdiction of the circuit courts to hear the contest actions. The reason given for not allowing the election contests was that the contest suits would delay and maybe even defeat the financing involved in the elections.

In *Arkansas-Missouri Power Corporation v. City of Potosi*[8] a suit was brought to contest a municipal bond election. The Missouri Supreme Court, in refusing to allow the contest stated that:

> "the Missouri cases are, and the understanding of the bench and bar of this state is that the financing arrangements of Missouri counties, cities, and other political subdivisions cannot be interrupted by proceedings in equity enjoining the issuance of bonds upon a challenge of the vote by which they were authorized."

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3. 304 Mo. 369, 263 S.W. 412 (1924).
4. 22 S.W.2d 800 (Mo. App. 1929).
5. 331 Mo. 302, 53 S.W.2d 867 (1932).
6. 335 Mo. 741, 73 S.W.2d 804 (1934).
7. 304 Mo. 137, 100 S.W.2d 272 (1936).
8. 355 Mo. 356, 361, 196 S.W.2d 152, 155 (1946).

The latest case in Missouri involving an unauthorized election contest is *Nelson v. Watkinson*[9] which involved the contest of a school election to create enlarged school districts of three existing school districts. It was held that since there was no statutory provision for such an election to be contested the contest action could not be maintained.

In the absence of the right to contest school bond elections and other bond elections, attempts have been made to have the courts re-open the ballots and recount them to make sure the election results as certified by the election officials were the true result. Section 111.770 of *Missouri Revised Statutes*, 1949, passed pursuant to Article 8, Section 3 of the 1945 Constitution reads as follows:

> "In cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, election officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters, and received as evidence."

From the express language in this section it applies to all election contests. It might seem at first glance that the ballots, pursuant to this statute, could be opened, examined and counted even in a school bond election.

In *State* ex rel. *Miller, Circuit Attorney v. O'Malley, Circuit Judge*,[10] a grand jury was making an investigation into a special bond election. There was alleged fraud in the election and the grand jury wanted the ballots produced so that they could be examined.

The Missouri Supreme Court *en banc* in considering the statutory and constitutional provisions set out above, stated that:

> "A constitutional provision may be self-enforcing in part and not so as to another part. . . . Undoubtedly, the part of the section permitting the opening of the ballots in election contests is not self-enforcing in the sense that further provisions must be made by statute for such contests. But that part which provides for the use of the ballots as evidence in grand jury investigations, is self-enforcing and no legislative default can thwart it."

The court then goes on to say that:

> "The opening of the ballots in contests over bond elections is held to be unauthorized because the legislature has not provided for such contests—not because they are not 'elections' or 'contests' within the meaning of the constitution."

Therefore, in Missouri, since there cannot be a contest of a school bond election, there cannot be an opening or recounting of the ballots cast in such elections.

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9. 262 S.W.2d 872 (Mo. App. 1953).
10. 342 Mo. 641, 117 S.W.2d 319 (1938).

There are three cases in Missouri involving school elections and actions in equity in regard thereto which should be distinguished from the cases cited above.

The first case is *School District #61 v. McFarland.*[11] There a country school district held an election for the annexation to it of a part of a village school district. A temporary injunction was issued enjoining the country school district from taking over the territory of the village school district pursuant to the election, and this injunction was made permanent on appeal. It was held that the election was illegal and void. There was statutory authority for an election to annex a portion of a country school district to a village school district, but there was no statutory authority for an election to annex a portion of a village school district to a country school district. Since this election itself was not provided for by law, the result thereof could be enjoined from being put into effect.

In *Jacobs v. Cauthorn,*[12] a school election was held to vote on two propositions: (1) to increase the regular tax levy from 40c to $1.00 on the $100.00 valuation and (2) a 25c tax levy on the $100.00 valuation for the building and repair fund. Proposition number 1 passed by the necessary two-thirds, but on proposition number 2, the vote was 99 for and 84 against which did not give number 2 the necessary two-thirds majority. However, the election officials wrote a letter to the county court stating that a levy of $1.25 school tax on the $100.00 valuation was voted on and carried by the necessary two-thirds, and this amount of tax should be collected. An injunction was issued enjoining the assessment of the $1.25 school tax on the $100 valuation. The court in issuing the injunction stated that the assessment of the extra twenty-five cents was illegal since it did not pass by the necessary two-thirds, and also, the maximum levy under the statutes was $1.00 per $100.00 valuation. Regardless of the vote on the extra levy it could not be assessed and collected since it could not legally have been submitted to the voters in the first place.

An injunction for the collection of a school tax levy authorized by election was also asked for in *Peter v. Kaufmann.*[13] The contention was made that the tax levy would be used to pay off an illegal debt incurred by the school district since the school district was in debt more than the amount allowable by statute. The court, in holding that the levy was valid since it passed by the necessary two-thirds majority and did not violate any statutory or constitutional provision, did state that injunction would be the proper remedy when the tax levy is clearly void such as being without authority or in contravention of some constitutional or statutory provision.

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11. 154 Mo. App. 411, 134 S.W. 673 (1911).
12. 293 Mo. 154, 238 S.W. 443 (1922).
13. 327 Mo. 915, 38 S.W. 2d 1062 (1931).

In each of these cases there was no contest of the validity of the election on the grounds of fraud, but there were actions to enjoin the results of elections because the elections themselves could not legally be held, or because the propositions approved by these elections were illegal and thereby void.

In Missouri, the law as to all types of bond elections seems to be that there cannot be a contest of such elections without first having statutory enactment authorizing such a contest and the procedure set forth which is to be followed therein. Even though there is gross fraud alleged in the conduct of the election, once the election officials have certified the results, the election procedure is final, and an equity court cannot inquire into the election to determine the truth or falsity of the allegations of fraud. Although Chief Justice Ellison of the Missouri Supreme Court in writing the opinion of the court in *State* ex rel *Jackson County v. Waltner, Judge, supra,* states that the law affords other means of uncovering fraud in bond elections than by a contest of such an election in a court of equity, he does not go on and enumerate these other means. Also, it is very doubtful, from the cases above cited, that the election results could be declared null and void even if fraud is found in an election. The participants in the fraud could be punished, but the election might still be valid because of lack of authority for declaring it invalid.

In all elections in Missouri involving the incurring of public indebtedness, all citizens should be on guard to see that the election is legal in every respect, and that no fraud is committed in the conduct thereof. Any challenge should be made before the election is certified as final.

The rule in Missouri is that the right to contest an election is neither a common law right nor an equitable right but is purely statutory. Where there is no statute providing for this right, there cannot be an election contest. Once the election officials have certified the election results, the election is not subject to judicial review.

RICHARD DAHMS

DISCOVERY—PRODUCTION OF ATTORNEY'S WORK PRODUCTS

I. INTRODUCTION

An important question that frequently arises during the discovery processes[1] in the preparation of a law suit for trial is whether one party's attorney may inspect the work products that the opposing attorney has compiled. This paper is designed to discuss the limits to the right of inspection of evidence in the possession or under the control of an opponent.

1. The discovery process is employed by one attorney to seek the disclosure of facts, documents or other things, which are necessary to the party seeking the discovery, as a part of the cause of action pending. Rosenberger v. Shubert, 182 Fed. 411 (W.D. Mo. 1910).

II. History of the Right to Inspect Opponent's Evidence

Parties did not always have the right to inspect the opposing side's evidence before the time for trial.[2] The general rule at the early Common Law was that an adversary was entitled to keep to himself his own evidence. This rule was based on the theory of adversaries being true gamesters. However, during this same period, the chancery courts allowed opponents a limited right of inspection. Inroads were made on this common law rule, and by the early nineteenth century, the general rule of inspection was formulated, being fashioned after the equitable rule.

Early American courts were not faced with the problem of recognizing the common law rule of inspection.[3] This is mainly because state statutes were passed early which gave rise to the right of inspection, precluding recognition by the courts of the common law doctrine.

In 1807 territorial laws gave this right of inspection to the area that included what is now the state of Missouri.[4] Subsequent enactments by the Missouri legislature have kept this right continuous down to the present day.[5] Thus, bills of discovery are unknown due to the adoption of legislative acts which allow this remedy of inspection.[6]

III. Discovery Statutes Must be Considered Together

More than one rule in the federal jurisdiction bears on the problem of the production of documents and other evidence;[7] this is likewise true in the Missouri jurisdiction.[8] It is necessary that the rules and statutes, in each jurisdiction, be

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2. 6 Wigmore on Evidence § 1858 (1940).

3. A few decisions by these courts did apply the doctrine though, see note 11 of 6 Wigmore § 1858, *supra.*

4. 1 Terr. Laws, p. 111, § 12.

5. Statutes permitting inspection of opponent's evidence prior to the present statutes are: Act 1822, 1 Terr. Laws, p. 851, § 44; R.S. 1825, p. 631, § 37; Laws 1849, p. 98 §§ 2, 3; Laws 1889, pp. 190, 191; Laws 1917, p. 203; R.S. 1939, §§ 1075, 1076, 1079.

6. Bond v. Worley, 26 Mo. 253 (1858). Glaves v. Wood, 87 Mo. App. 92 (1901); Blanke v. St. Louis-Sonora Gold and Silver Min. Co., 35 Mo. App. 186 (1889).

7. Title 28 U.S.C.A. Rules 26, 26(b), 30(b) (d), 31 (d), 33, 34, and 45.

8. 492.280. "*Production of documentary evidence on taking of deposition*—Upon order of the court in which a cause is pending a subpoena may command the production of documentary evidence on the taking of a deposition and the court may also order a party to produce documentary evidence on the taking of a deposition.

"510.020. *Interrogatories to parties*—1. Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer, director, partner or managing agent thereof competent to testify in its behalf.

considered together and not separately because they create integrated procedural devices.[9] To look only to one statute, independently of the others, and interpret it alone might lead to inequalities in the discovery procedure which were never intended by the legislature. Thus, in a federal case, the rules applicable to this problem must be considered together; and, in a state case, the Missouri statutes applicable must be regarded together. This idea is bolstered in Missouri by *Clemens v. Witthaus*[10] which states that a party may not escape provisions of one discovery statute by attempting to use another such statute to accomplish the same purpose.

IV. The Scope Under the Federal Rules

Particulars of evidence may be obtained from a party through a resort to depositions, interrogatories or production of documents. The same end, that of receiving information from some documents in an opponent's file, may be obtained under any of the above three methods. These discovery processes are sanctioned in the Rules of Civil Procedure.[11]

"2. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within fifteen days after the delivery of the interrogatories, uless the court, on motion and notice and for good cause shown, enlarges or shortens the time.

"3. Objections to any interrogatories may be presented to the court within ten days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable.

"4. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

"510.030. *Production of documents, papers, tangibles*—Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may

"(1) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or

"(2) Order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, sampling, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

9. Hickman v. Taylor, 67 Sup. Ct. 385, 329 U.S. 495 (1947) is a case regarding the production of the attorney's work products under the Federal Rules, which are similar to the Missouri statutes under discussion. The opinion stated that the same basic problems would confront the court, regardless of which procedural device was being employed.

10. 360 Mo. 274, 228 S.W.2d 4 (1950). See also State *ex rel.* Thompson v. Harris, 335 Mo. 176, 195 S.W.2d 645, 166 A.L.R. 1425 (1946).

11. *Supra.*

The landmark case of *Hickman v. Taylor*,[12] a 1947 decision, takes up the problem under discussion here and places a broader interpretation on the code provisions than earlier cases had done. Several prior federal district court cases stated the Rules of Civil Procedure were designed to permit liberal examination and discovery, but they were not intended to allow one party to secure the results of the preparation for trial of another party.[13] It was also recognized that discovery could not be used for the purpose of finding the weak and strong points of an opponent's case.[14] However, the *Hickman* case allows a party, in good faith, and for sufficient cause,[15] to do just those things. It stated that public policy supports necessary and reasonable inquiries into the results of an opponent attorney's work products. The circumstances of each particular case would determine whether it would be permitted or not—a case by case approach. The court did not recognize the argument that these lawyer's work records were privileged attorney-client matters. It went on to say that the "time honored defense of 'fishing expeditions'" was not valid.[16] The *Hickman* case did limit this reaching into an opposing party's file though by allowing freedom from unnecessary intrusion, by requiring adequate reasons for such productions for inspection. The court said that preparation for cross-examination was not a sufficient reason for compelling such disclosures. But, as a result of this case, memoranda, briefs, communications or other writings prepared by a lawyer for use in a case which reflect mental impressions of one sort or another may be reached for inspection purposes.

However, the *Hickman* case does not mean that in all cases of this sort would such discovery be allowed. Where an inspection would work an undue hardship or injustice on a party, then it will be denied.[17] Where one party could have obtained such information equally as well as the other party, it will be denied.[18] Where one

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12. *Supra.*

13. McCarthy v. Palmer, 29 F. Supp. 585, 113 F.2d 721 (2d Cir. 1939); Piorkowski v. Socony Vacuum Oil Co., 1 F.R.D. 407 (M.D. Pa. 1940); Byers Theaters v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940).

14. Smith v. U.S., 57 F.2d 351 (W.D. Wash. 1932).

15. Title 28, Rule 34 of the Federal Rules of Civil Procedure expressly states that *good cause* must be shown when seeking to have the court order the inspection of evidence in another's possession. But the exact meaning of the term *good cause* cannot be derived. There has been much litigation in regard to this term. For the *liberal* view see: Herbst v. Chicago R.I. & P. R.R., 10 F.R.D. 14 (D.C. Iowa 1950); Atlanta Greyhound Corp. v. Lauritzen, 182 F.2d 540 (6th Cir. 1950). For the *strict* view see: Gebhord v. Isbrandtsen Co., Inc., 10 F.R.D. 119 (S.D. N.Y. 1950); Alltmont v. U.S., 177 F.2d 971 (3rd Cir. 1949).

16. The fact that the Rules of Civil Procedure permitted "fishing" for evidence had previously been stated by an Illinois Federal District Court in Golden v. Arcadia Mut. Casualty Co., 3 F.R.D. 26 (N.D. Ill. 1943).

17. U.S. v. 5 Cases, Etc., 9 F.R.D. 81 (D. Conn. 1949).

18. Klein v. Leader Elec. Corp., 81 F. Supp. 624 (N.D. Ill. 1949); Byers Theaters v. Murphy *supra.*

party has already obtained such information, it will be refused. Nor will it be permitted for purposes of delaying the adjudication of the case.[19]

The federal courts are now required to follow a most liberal construction of the rules in regard to inspection of work products. Thus, it seems as if the federal jurisdiction does not approach the matter of preparation for trials from the standpoint of litigants being true gamesters, as the old common law courts did. The federal theory evidently is that trials should not be games of deception.

V. The Scope Under the Missouri Statute

The Missouri statutes relating to the problem of discovery of opponent's work products are somewhat similar to the federal rules, but they are interpreted by the Missouri courts much differently. Although it has been stated by the Missouri Supreme Court that the discovery statutes are intended to be liberally construed,[20] the liberality has not reached that of the federal decisions construing the federal rules. In looking at the law in force in this state, it must be noted that federal decisions are not applicable, since the Missouri statutes do not authorize such broad discovery as the Federal Rules do.[21]

There are several basic limitations on the evidence sought to be discovered; the matter must be material,[22] there must be a good cause or reason shown,[23] the matter must not be privileged.[24] Another obvious limit to there being an inspection of such evidence is when the facts sought from such disclosure are already in petitioner's knowledge or where he has failed to show diligence in seeking to secure the information, or where he seeks it for mere convenience sake.[25] A further limit is that the matter sought must be admissible into evidence and must aid in the party's preparation for trial. It is not the purpose of inspection statutes to be beneficial to a litigant already in possession of all the facts, but it is for the benefit of a party who is not in possession of indispensable facts and who must look to the papers of his adversary for such knowledge.[26] All of the

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19. Brockaway Glass Co. v. Hartford-Empire Co., 2 F.R.D. 267 (W.D. N.Y. 1942).
20. State v. Withaus, 385 Mo. 1088, 219 S.W.2d 383 (1949).
21. State *ex rel.* Thompson v. Harris, *supra.*
22. State v. Hinoiosa, 242 S.W.2d 1 (Mo. 1951); Clemens v. Witthaus, 360 Mo. 274, 228 S.W.2d 4 (1950).
23. State *ex rel.* Bostelman v. Arnson, 235 S.W.2d 384 (Mo. 1950); this limitation of good cause is also expressly stated in Section 510.030.
24. Iron Fireman Corp. v. Ward, 351 Mo. 761, 173 S.W.2d 920 (1943); State *ex rel.* Chicago R.I. & P. R.R. v. Woods, 316 Mo. 1033, 292 S.W. 1033 (1927). For an excellent discussion of matters that are not permitted as proper subjects of discovery because they are privileged see 1954 WASH. L. Q. 100 (1954).
25. 195 S.W. 501, 503 (Mo. App. 1917).
(1935).
26. State *ex rel.* Laughlin v. Sartorius, 234 Mo. App. 798, 119 S.W.2d 471 (1938).

requests for an inspection and production of adversary's work are, of course, in the discretion of the trial judge.[27]

Unlike the federal view, the Missouri courts do allow the defense of "fishing expedition" to be used to defeat the request for products of documents for inspection. The supreme court has held that the trial judge cannot authorize a "fishing expedition" under the guise of discretion.[28] In an opinion by that court, en banc, in considering whether one could inspect the contents of another's safe deposit box in a bank, Judge Dalton said:

> "The mere fact of the institution of the law suit could not be 'good cause' for an unlimited inspection and search of the unknown contents of relator's safe deposit box. There was no substantial evidence from which an inference could be drawn that any documents or papers relating to the alleged fraudulent transfers were located in said safe deposit box. The evidence upon which the order for inspection was based *amounts to no more than mere guess, suspicion and conjecture* that the box might or could contain relevant and material evidence. The order was in excess of the jurisdiction of the respondent judge who entered the order." [Italics supplied.]

Thus, the Missouri law does not extend nearly as far as the federal law does in this respect. Attorneys handling a case in the Missouri courts, which are governed by the Missouri statutes, are more protected from prying opponents than are attorneys handling a case in the federal courts, which are governed by the more lenient federal rules. This state's judiciary has expressly stated in a case on this point that such *prying* into an adversary's preparation for trial is not allowed.[30]

The supreme court's most recent pronouncement on this subject was in *State of Missouri* ex rel. *Headrick v. Bailey*.[31] This decision allowed a tape recording taken by an attorney of a passenger shortly after a collision to the effect that she had sustained no injuries as a result thereof to be produced for inspection and transcription. In so ruling, the appellate court said that it is the burden of the one desiring the production to show good cause and the materiality of the matter in the trial court, and, once the order to produce has been granted, the other party in possession of the matter must overcome the presumption that the trial judge acted correctly. This burden was not sustained here, so the recordings were properly ordered produced. Thus, we see from this case that Missouri is fairly liberal with its interpretation of the matter of production for inspection.

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27. State *ex rel.* Missouri Pac. R.R. v. Hall, 324 Mo. 928, 27 S.W.2d 1027 (1930).
28. Cummings v. Witthaus, 358 Mo. 1088, 219 S.W.2d 383 (1949).
29. State *ex rel.* Bostelman v. Arnson, *supra.*
30. State *ex rel.* Laughlin v. Sartorius, *supra.*
31. 278 S.W.2d 737 (Mo. 1955).

However, Missouri courts have been reluctant to go to the extremes that the federal courts do. The exact reason for the difference in scope of the two jurisdictions is difficult to understand. One possible reason may be that the wording of the Missouri statutes, although basically the same, are different from the comparable Federal Rules in a vital respect. For instance, the Missouri statute, Section 510.030, allows production of things "not privileged, which constitute or contain evidence *material* to any matter involved in the action and which are in his possession. . . ." [Italics supplied] The corresponding federal rule, Rule 34, refers to Rule 26(b). Rule 26(b) states that "any matter, not privileged, which is *relevant* to the subject matter involved in the pending action. . . ." There is a well known difference between things *material* and things *relevant*. The former is of narrower construction, meaning something more or less necessary; the latter being the broader of the two words, meaning something applying to the matter in question. Thus, the Missouri statute's application of the word *material*, rather than the previously drafted federal rule's word *relevant*, denotes an intention for a more limited scope. However, this reason is weakened by the fact that the second paragraph of Missouri statute 510.030 contains the word *relevant* in describing the reason for entry onto land for inspection purposes. By the statute's use of both *material* and *relevant* the inference could possibly be drawn that there is no significant difference between the two words as used in the statute.

Another possible reason for there being a difference between the breadth of the discovery allowed in the Missouri and federal jurisdictions in the sentence in Federal Rule 26(b) which reads: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." The Missouri statutes contain no such provision. Furthermore, Missouri case law expressly states that discovery of matters not admissible in evidence cannot be had.[32] This reason clearly shows a difference between the applicable law in the two jurisdictions.

Another reason may be an inherent hesitancy in the Missouri courts to change the long established principle of not allowing one side to inspect his opponent's evidence freely.

VI. Conclusion

Missouri does allow *some* delving into the opponent's work product, but not to the extent that the federal courts do. However, we can safely say that there is a tendency for the Missouri courts to look at the matter of a trial not from the point of view of litigants being true gamesters, but more of an adversary tribunal where truth is the paramount purpose. The late Judge Conkling summed up this proposition in *State* ex rel. *Cummings v. Witthaus*[33] by stating:

32. Belding v. St. Louis Public Service Co., 205 S.W.2d 866 (Mo. 1947).
33. 358 Mo. 1088, 1099, 219 S.W.2d 383, 390 (1949).

"The end which litigation seeks is justice. Upon the judicial inquiring into the facts upon the trial of a cause in the court nisi the ascertainment of the truth is paramount. The search for the truth should proceed unhampered within constitutional and statutory limitations. It is the trend of modern practice in nearly every jurisdiction to so enlarge the scope of discovery provisions that the discovery procedures will be useful and practical implement in the search for and presentation of the truth. That is the spirit in which our New Code was conceived and implemented. The law frowns more and more upon ambush and delay and approves more and more candor and fairness between parties litigant. The modern discovery statutes and modern legal thinking have abrogated the old common law theory that litigation was a game wherein the litigants had a right to conceal and withhold 'their evidential resources.'"

IKE SKELTON, JR.

SEPARATION AGREEMENTS[1]

Today's volume of divorce cases gives rise to a problem of much importance in regard to property settlements and provisions for support and maintenance of the ex-wife and children. As is firmly established in our law, the husband remains responsible after divorce for the mainteance of his children and in many cases for the support of his wife. Divorces raise many problems involving the distribution of property belonging to the spouses. Satisfactory and just solutions to these problems are extremely important to the well-being of the parties involved. Valid, yet opposing interests arise. Divorced husbands whose financial circumstances change for the worse often seek reductions in alimony payments. Divorced wives seek increased payments or at least a maintenance of the status quo. Interwoven, and controlling, is the interest of the state in assuring that domestic responsibilities are upheld and enforced.

Missouri has to a degree provided by legislation for settling some of these problems. Statutes provide for the award of alimony and maintenance by the court to the wife and children of the dissolved marriage.[2] *Missouri Revised Statutes* §452.070 (1949), provides that the court may make such alterations in the allowance of alimony and maintenance as may be just. The power of the court to change alimony payments is a necessary and important instrument in its goal of justice. However, the fact that the court can change such payments is not always a desirable solution to the problems occasioned through divorce.

The most satisfactory solution in many cases lies with the use of the so-called separation agreement. This agreement may take the form of a property settlement or a settlement contract. It is a well-established device in Missouri law.

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1. For a discussion of separation agreements where separate maintenance is contemplated rather than divorce, see Ramsey, *Separate Maintenance in Missouri*, 12 MO. L. REV. 138 at p. 152 (1947). For another study of this problem on a nationwide basis, see Note, *Alimony Agreements as Limitations on the Court's Power to Modify Decrees*, 22 WASH. U.L.Q. 392 (1937).

2. MO. REV. STAT. §§ 452.070 and 452.110 (1949).

The scope of this comment is to outline the nature, advantages, disadvantages and use of these contracts.

Older Missouri cases looked with disfavor on settlement contracts. In *Speck v. Dausman*,[3] the court stated:

> "It is quite settled that contracts between husband and wife, so framed as to have effect only on condition that a divorce should be granted, are contrary to public policy, and will not be enforced by the courts. Their tendency is to interest the party to be benefited in procuring or permitting a divorce."

However, the case of *Schmieding v. Doellner*[4] held that agreements made pending divorce proceedings for the wife's support by the husband, if absolute and not dependent on the result of the divorce suit, were not invalid as acts tending to promote dissolution of marriages. Later cases have developed an extensive body of Missouri law on the matter of these agreements.

The most important and far-reaching Missouri case on this subject is *North v. North*,[5] decided by the Missouri Supreme Court in 1936. This case clarified Missouri's position and has formed the basis for all later decisions in this field. In the *North* case the husband and wife, in contemplation of divorce, entered into a written contract settling and adjusting their property rights between themselves. The husband bound himself to pay the sum of $500 each month so long as the wife remained unmarried or until her death. These provisions were incorporated in the decree. Some years later, in 1933, the husband filed a motion with the court asking that the decree be modified as to the amount of alimony awarded the wife on the ground that the changed financial condition of the husband warranted such action. The lower court sustained the husband's motion and reduced the allowance in the decree from $500 to $300 per month. The wife appealed the decision. The Supreme Court of Missouri reversed the lower court on the ground that the allowance made to the wife in the decree was, in effect, a approval of the contractual obligation of the husband and not an award of statutory alimony. Therefore, the award was not subject to modification. The court stated:

> "A modification of the decree would amount to a modification of the contract itself, which is not subject to revocation or modification except by consent of the parties thereto."

One of the important facets of this case is the manner in which the court distinguished a duty to pay "alimony", which is based on a decree, from a contractual obligation. The court emphasized that a husband's duty to support his wife ends at his death. The contract in the case called for payments to the wife

3. 7 Mo. App. 165, 168 (1879).
4. 10 Mo. App. 373 (1881).
5. 339 Mo. 1226, 1236, 100 S.W.2d 582, 588 (1936).

until her death or remarriage. Such payments could be enforced against the husband's estate as a contractual obligation, while a court, in decreeing alimony payments, can never award alimony past the husband's death.[6] The husband in the *North* case had contended, on the basis of prior decisions, that a contract between the husband and wife was not binding on the courts in a divorce action.[7] The earlier Missouri decisions appeared to stand for the proposition that the court was not required to notice the contract or agreement between the parties. But the court in the *North* case stated:

> "The law recognizes the right of husband and wife to contract between themselves, and in case of separation, to settle and adjust all their property rights, including dower, alimony, and support. Where such contracts are free from fraud, collusion, or compulsion, and are fair to the wife, the courts have no right to disregard them. . . ."[8]

The court was not disturbed by the fact that the contract called the payments to the wife "alimony". It held that the lower court's approval of the contract by decreeing to the wife the same allowance which the contract gave her did not convert such an allowance into alimony and thereby render it subject to future modification by the court.

The court, however, did not say what the result would be if the agreement did not purport to cover *all* the property rights of the parties. There is, as yet, no definite answer as to what the Missouri courts would do if the agreement were for support only and did not cover all the property rights of the spouses. In *Davis v. Davis*,[9] the court stated:

> "The controlling and decisive element in the North case, as in the case at bar, is that the parties solemnly entered into a contract for the settlement of *all* their property rights, including the amount to be paid to plaintiff monthly. . . ."

Then in *Alverson v. Alverson*,[10] the court, in deciding that the decree was for statutory alimony rather than an approval of a contractual relation between the parties, observed that the agreement in the *North* case covered all the property rights, and then said:

> "In the instant case there is no such situation. There was no settlement or adjustment of "all" the property rights of the parties growing out of the marital relation, but instead the agreement went no farther than to provide for the release of certain special obligations."

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6. North v. North, *supra*, 339 Mo. at 1235, 100 S.W.2d at 585.

7. Landau v. Landau, 71 S.W.2d 49 (Mo. App. 1934); Kinsella v. Kinsella, 60 S.W.2d 747 (Mo. App. 1933); Meyers v. Meyers, 22 S.W.2d 853 (Mo. App. 1929); Brown v. Brown, 209 Mo. App. 416, 239 S.W. 1093 (1922); Francis v. Francis, 192 Mo. App. 710, 179 S.W. 975 (1915).

8. Edmondson v. Edmondson, 242 S.W.2d 730, 736 (Mo. App. 1951); Summers v. Summers, 222 S.W.2d 514 (Mo. App. 1949).

9. 196 S.W.2d 447, 452 (Mo. App. 1946).

10. 249 S.W.2d 472, 476 (Mo. App. 1952).

However, the facts in the *Alverson* case presented several other considerations which were indicative of the court's intent to decree statutory alimony rather than approve a contract between the parties.

Since the *North* decision, Missouri law on the matter of separation contracts has been mainly a development of the theories set forth in that case. The bulk of later cases have been interpretive of the *North* case in relation to various fact situations.

In general, the attorney who prepares a separation contract must be aware of certain dangers which surround this particular phase of the law. The problem for the attorney is one of attaining a contract fair to both parties and yet sufficiently certain and definite so as to avoid litigation. Certain elements and factors which will arise in attempting to achieve such a contract deserve special mention.

Consideration

The problem of consideration in these contracts is significant. The case of *Rough v. Rough* stated:

> "There need be no other consideration to support such contract than the legal and moral duty of the husband to support the wife. . . ."[11]

In *Semon v. Ilgenfritz*,[12] it was held that the wife's relinquishment of support by the husband and her agreement to support a child was consideration for a note executed by the husband.

However, in *Johns v. McNabb*,[13] the Missouri Supreme Court canceled a settlement contract where the guilty wife was to convey her two-hundred acre farm to the husband for a recited consideration of $1 and other valuable consideration. The other recited consideration was the right to see her children and have them visit her on a half time basis when it did not interfere with their school attendance. The court said:

> "Under the terms and provisions of the written contract there was no mutual relinquishment of rights or transfers of interests of property."

The husband contended there was consideration not mentioned in the contract. His position was that he had a cause of action against the paramour of the wife and the true consideration was his promise to the wife that he would not sue Johns, the wife's lover. The court held the evidence sustained a finding that the husband's promise not to sue Johns was not the real consideration and affirmed the lower court's cancellation of the contract.

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11. 195 S.W. 501, 504 (Mo. App. 1917).
12. 223 Mo. App. 546, 26 S.W.2d 836 (1930).
13. 247 S.W.2d 640, 643 (Mo. 1952).

In *Bloss v. Bloss*,[14] the Missouri Supreme Court held a contract valid where the husband agreed to pay the wife $1675 and the wife agreed to join in conveying a farm worth at least $5600 to the husband's father. The court held the agreement was not void for lack of consideration or for fraud in view of evidence tending to show that the husband's father and mother had an equitable life estate in the farm and had a substantial interest in personal property located on the farm. The court recognized that the wife was *sui juris* and was represented by counsel.

Normally, such contracts would contain a promise by the wife that she would forever refrain from making any claim for alimony, support or maintenance of any kind. Often a provision would be included whereby the wife would promise to save harmless the husband from her debts contracted after a certain date.

Collusion

It is unfortunate, but true, that many divorces are the result of secret collusive agreements between the husband and wife. Collusion is a bar to divorce. There of course should be no collusion, and it is important that a property settlement agreement does not inadvertently indicate collusion where none exists. Missouri's early position was that a settlement contract itself was an indication of collusion and they were held invalid for that reason.[15] Later cases, however, recognized that the contracts were valid and in themselves no evidence of collusion.[16] Contracts which provide for collusive divorces will not be enforced. In the case of *In re Mean's Estate* the parties "agreed" to a divorce.[17] A settlement contract was entered but the husband died a few days before the divorce suit was to be heard. The wife attempted to enforce the contract against the husband's estate. However, evidence to the effect that the agreement was collusive was admitted and the court refused to enforce the agreement. In the case of *Gardine v. Cottey*,[18] a settlement contract containing a provision for an uncontested divorce if the wife should institute the action was held illegal, void and against public policy.[19]

In *Crane v. Deacon*,[20] the Missouri Supreme Court held that a party who sought to enforce a collusive agreement which was carried out in procuring a divorce decree would be denied relief. In that case the husband was attempting to

14. 251 S.W.2d 78 (Mo. 1952).
15. Speck v. Dausman, 7 Mo. App. 165 (1879).
16. Schmieding v. Doellner, 10 Mo. App. 373 (1881); Turpin v. Turpin, 128 S.W.2d 279 (Mo. App. 1939).
17. 284 S.W. 186 (Mo. App. 1926).
18. 360 Mo. 681, 230 S.W.2d 731 (1950).
19. Farrow v. Farrow, 277 S.W.2d 532 (Mo. 1955); Bloss v. Bloss, 251 S.W.2d 78 (Mo. 1952).
20. 253 S.W. 1068 (Mo. 1923).

enforce a promise by the wife to pay him a sum of money if he did not contest the divorce action.

In *McDonald v. McDonald*,[21] a divorce decree was set aside at the suit of the wife on the grounds the divorce was obtained by a collusive agreement. The court held that the statutory forerunner of *Missouri Revised Statutes* §452.110[22] did not prohibit a suit to set aside a divorce decree on the ground of fraud in its procurement.

As a precaution, the contract should recite that the parties have become or are about to be separated. The prospect of an immediate separation has been held a requirement for validity of such contracts.[23]

In *Johns v. Johns*,[24] the court stated that agreements for settlement of property interests between a discordant husband and wife, when fair and reasonable, are upheld by the courts, if made in prospect of an immediate separation; but that such agreements between parties living together amicably and without a present intention to separate are held to be against public policy and void for the reason that they tend to promote separation and divorce. The *North* case recognized that a husband and wife may contract between themselves, but also recognized the requirement that there be a separation before the property rights are settled. The court said:

> "The law recognizes the right of husband and wife to contract between themselves, and in case of separation, to settle and adjust all their property rights, including dower, alimony, and support."

But care should be exercised in avoiding a construction of the contract as one for separation. In the case of *Rough v. Rough*,[25] the court stated:

> "Agreements for separation, as such—that is, in respect to bringing about or perpetuating a *separation* of the husband and wife—are against public policy and will not be enforced. On the other hand, in so far as such agreements merely recognize as an existing fact that there is or soon will be a separation, and on this status provide for the maintenance of the wife during and because of the separation, such provisions for support and maintenance are valid and enforceable."

A resumption of marital relations will annul a separation contract or

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21. 175 Mo. App. 513, 161 S.W. 850 (1913).

22. Mo. Rev. Stat. § 452.110 (1949). Decree as to alimony only subject to review. "No petition for review of any judgment for divorce, rendered in any case arising under this chapter, shall be allowed, any law or statute to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as in other cases."

23. Hillenkoetter v. Hillenkoetter, 249 S.W. 428 (Mo. App. 1923); Speiser v. Speiser, 188 Mo. App. 328, 175 S.W. 122 (1915); Banner v. Banner, 184 Mo. App. 396, 171 S.W. 2 (1914).

24. 204 Mo. App. 412, 222 S.W. 492 (1920).

25. 195 S.W. 501, 503 (Mo. App. 1917).

agreement.[26] In effect, a reconciliation is an indication of the parties' repudiation of the contract and their intent to separate. However, in *Johns v. Johns, supra,* where the parties continued to live in the same house together and occupied the same bed for a few days pending removal to different quarters it was held the contract remained valid where the intent to separate never changed.

Provisions for Support of Children

Even though the husband and wife may contract concerning their own rights they cannot make an agreement that would be binding on the court insofar as the rights of their children are concerned. The court always can make whatever modifications in a decree it deems necessary for the support of children.[27] One course open to the husband in attempting to achieve a measure of certainty in his obligation is to obtain a promise on the part of the wife to support the children from the amounts paid to her, and to save the husband harmless. Obviously, if the court should order the husband to pay, in the event of a default by the wife, he would have to pay the amount called for. But the husband would have a contractual remedy agaist the wife for the amount he was injured thereby.

Unfairness, Fraud, Duress and Coercion

Care should be taken to avoid any indication of unfairness, fraud, duress or coercion in the contract. Any one of these factors may cause a court to refuse to enforce a separation contract or declare it void.[28] One effective way to nega-

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26. Harrison v. Harrison, 201 Mo. App. 465, 211 S.W. 708 (1919).

27. Mo. REV. STAT. §§ 452.070 and 452.110 (1949). Maxey v. Maxey, 203 S.W.2d 467 (Mo. 1947) [where agreement provided for alimony for wife and maintenance for children, without setting separate amount for each, the agreement was modified by court]; Cervantes v. Cervantes, 239 Mo. App. 932, 203 S.W.2d 143 (1947); Hayes v. Hayes, 75 S.W.2d 614 (Mo. App. 1934); Landau v. Landau, 71 S.W.2d 49 (Mo. App. 1934).

28. *Fairness*: Banner v. Banner, 184 Mo. App. 396, 171 S.W. 2 (1914) [Contract valid if made in prospect of immediate separation and if fair]; Speiser v. Speiser, 188 Mo. App. 328, 175 S.W. 122 (1915) [Post-nuptial separation contracts will be enforced where reasonable and fair.]; Luedde v. Luedde, 240 Mo. App. 69, 211 S.W.2d 513 (1948) [Stipulation of parties, when approved by court and embodied in judgment entered under court's direction, becomes merged in judgment and is viewed as having been found by court as a fair settlement.]

Fraud: Gilsey v. Gilsey, 195 Mo. App. 407, 193 S.W. 858 (1917) [Fraud is defense to action on settlement contract.] For a good discussion of fraud in procuring settlement contracts see: Gardine v. Cottey, 360 Mo. 681, 230 S.W.2d 731 (1950).

Duress: *In re* Mean's Estate, 284 S.W. 186 (Mo. App. 1926) [Settlement contracts obtained through duress are void.]

Coercion: Van Fleet v. Van Fleet, 253 S.W.2d 508 (Mo. App. 1952) [Where judge told wife to reach agreement with husband on amount of alimony payments. Held: *not* coercion.]

tive a possibility of a claim based on one of these defenses is to include in the contract a recital to the effect that both parties were represented by counsel of their own choice. It may be desirable to attach a schedule of the husband's property at the time the contract was entered so there is an available record of the representations made by the husband. Should the husband have misrepresented the true extent of his property it would then be easier to prove. On the other hand, the husband has proof that he represented the true state of his affairs in the event of a later claim of fraud.

Flexibility in Payments

In the preceding portions of this comment the main concern has been one of fixing the contractual payments so they could not be modified by the court at a later time. It is often desirable to provide for flexibility in the amounts of periodic payments in order to protect the husband and wife in periods of income fluctuation. One of the most satisfactory methods of accomplishing this end is by tying the periodic payments to a percentage of the husband's income. There may be reason to provide for certain minimum and maximum limits within which the percentage figure would move. In the case of *Goodwin v. Goodwin*,[29] the agreement provided for payments by the husband of $200 per month and in addition, 25 per cent of the amount by which his gross income exceeded $6000 per year. However, in this case a dispute arose over the manner of determining "gross income", which necessitated a later compromise agreement. In *Moran v. Moran*,[30] the contract provided:

> "It is further agreed in the event the actual income of the party of the second part shall increase or decrease from his income as of January 1, 1947, during the term of this agreement, the monthly payments shall be increased or decreased at the rate of Twenty Per Cent (20%) of such change."

Federal income tax problems must be kept in mind when fixing the amounts and methods of payment.

Incorporation of the Agreement into the Decree

In attempting to determine to what extent the contractual agreement should be incorporated into the decree itself it is well to review the changing position of the Missouri courts. In the earlier cases the feeling was that the court could ignore the agreements of the parties if it desired. In *Brown v. Brown*,[31] the court said:

29. 277 S.W.2d 850 (Mo. App. 1955).
30. 286 S.W.2d 389, 391 (Mo. App. 1956).
31. 209 Mo. App. 416, 421, 239 S.W. 1093, 1094 (1922).

> "The stipulation of the parties in the instant case with reference to alimony was merely advisory. Whilst an agreement between the parties for alimony and a division of their property will, in the absence of fraud or imposition, generally be adopted by the court, yet the embodying in the decree for divorce such provisions for alimony is just as much the judicial finding and judgment of the court as the granting of the divorce. . . ."[32]

Then, in *North v. North, supra,* the Missouri Supreme Court adopted the view that courts could not disregard property settlement contracts entered by the parties. Thus, when the court incorporates into the decree the provisions of a contract between the parties it does not change the obligation from a contractual one to one based on statutory alimony.

> "The fact that the court approved the contract by decreeing to the wife the same allowance which the contract gave her does not convert such allowance into alimony and thereby render it subject to future modification, although the decree calls it alimony."[33]

Then in *Alverson v. Alverson,*[34] the St. Louis Court of Appeals said where an instrument settles all property rights, the fact that the court writes into the decree the same allowance as provided in the agreement does not convert the allowance into statutory alimony but is a judicial approval of the contract. However, if the instrument merely suggests, when an award is made, that it be made in the recommended amount it is then actually statutory alimony and subject to modification by the court. In the *Alverson* case the parties prepared a written stipulation in which it was agreed, "subject to the approval of the court," that in the event the court granted the wife a divorce the husband would pay certain amounts. The court held that the decree was one for statutory alimony rather an approval of a contract between the parties. The decree provided:

> "It is further ordered, adjudged and decreed by the court that the plaintiff have and recover of the defendant, as and for alimony, the sum of $100.00 per month, *until the further order of the court,* . . ." (Emphasis added).

Obviously, the court's reference in the decree to its further orders was an indication that it did not look on the payments as a contractual obligation.

At times it has been thought desirable to provide for enforcement of these agreements by conditional issuance of execution on the divorce decree. This

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32. *Accord*: Kinsella v. Kinsella, 60 S.W.2d 747 (Mo. App. 1933); Landau v. Landau, 71 S.W.2d 49 (Mo. App. 1934); Hayes v. Hayes, 75 S.W.2d 614 (Mo. App. 1934).

33. North v. North, *supra,* 339 Mo. at 1235, 100 S.W.2d at 587; Poor v. Poor, 237 Mo. App. 744, 167 S.W.2d 931 (1945); Summers v. Summers, 222 S.W.2d 514 (Mo. App. 1949); Allcorn v. Allcorn, 241 S.W.2d 806 (Mo. App. 1951).

34. 249 S.W.2d 472, 474, 476 (Mo. App. 1952).

was done to avoid the necessity of bringing an action on the contract. Such a provision is fraught with danger for the draftsman. The court in the *Alverson* case stated:

> ". . .but what is more conclusive of its (the court's) intention to enter a decree for statutory alimony is the fact that it then went on to provide, without objection from the parties, that in default of the payment of any of the installments, 'execution issue therefor'. If defendant's obligation had been meant to depend on contract, plaintiff's remedy upon default would have been by action on the contract, and not by execution, which could only be sued out upon a judgment previously obtained."

Then in 1954, the same court in *Wesson v. Wesson* again construed such a provision as an indication of the intent of the parties and of the court to enter a decree for statutory alimony. The court there said:

> "When plaintiff applied for the issuance of an execution she was taking the position that she had a judgment for the amount of the allowance. That position is wholly inconsistent with the position she must necessarily take on this appeal, namely, that the judgment constituted nothing more than a judicial approval of a contractual obligation."[35]

This language in the *Alverson* and *Wesson* cases indicates that Missouri courts distinguish between a judgment for the payment of an amount of money and a "judgment" which is merely a judicial approval of a contractual obligation. The judgment for the payment of money arises from the court's authority to decree statutory alimony and may be enforced as such. However, where there is a contractual obligation it does not merge with the decree of the court. Thus, the enforcement of the contractual obligation is limited to actions on the contract.

In *Edmondson v. Edmondson*,[36] the court said:

> "In other words, the statutory power of the court to make orders touching the alimony and maintenance of the wife and to modify the same on a showing of changed conditions is now construed not to authorize a judgment, without the consent of the parties, for alimony in lieu of the lawful agreement of the parties therefor, nor any modification of the contractual obligations of the parties."

In the *Edmondson* case the parties had entered a valid contractual agreement covering property division and future support for the wife. The Kansas City Court of Appeals held the contractual agreement precluded the divorce court, without the consent of the parties, from entering a valid decree for alimony.

Conclusion

In conclusion it may be said that a property settlement agreement, when properly drafted and covering all the property rights of the parties, can be one of the most valuable tools a lawyer can have to achieve satisfactory results in settling rights of divorced spouses. They provide a means by which both the husband and wife can protect their financial interests and at the same time take into account the interest of the state in seeing that its citizens are held to their responsibilities.

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35. 271 S.W.2d 214, 217 (Mo. App. 1954).
36. 42 S.W.2d 730, 735 (Mo. App. 1951).