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Recent Cases

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ADVERSE POSSESSION—SUFFICIENCY OF CONDUCT TO AMOUNT TO POSSESSION

Marvel v. Barley Millroad Homes, Inc.[1]

Plaintiff and defendant were owners of adjoining land. In an equitable action for declaratory judgment, and to remove cloud on title,[2] "legal ownership" of .63 acre of "stream and woodland" lying between their respective parcels was held to be in plaintiff by having "established open, notorious and hostile possession of the disputed property for a period of more than twenty years." Defendant's predecessor in title had conveyed by deed on May 25, 1916, certain other adjoining land to the plaintiff's predecessor, the .63 acre not being described therein, but thought to be included by the plaintiff's predecessor. No fence was constructed on the actual boundary line, although there was an oral agreement prior to the conveyance to do so. The court accepted plaintiff's evidence to the effect that a fence (which separated the grantor's land from that claimed by plaintiff) was built in 1916 pursuant to the agreement on an erroneous line.

The court held the following acts to warrant a holding that title was in the plaintiff: (1) Plaintiff's predecessor, persuant to an agreement with neighbors, laid out a bridle path on the disputed property over which plaintiff, plaintiff's predecessor (plaintiff's father), and defendant's predecessor had ridden;[3] (2) the "use" of the property "including an agreement. . .to erect a fence, [and] the erection of a fence" on the disputed line,[4] while no fence was on the line mentioned

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1. 104 A.2d 908 (Del. Ch. 1954).

2. There seems little question as to equitable jurisdiction. On declaratory judgments in general, see DEL. CODE ANN., tit. 10, § 6501 (1953), and with respect to title to realty, see notes 68 A.L.R. 110 (1930); 50 A.L.R. 42 (1927); 19 A.L.R. 1124 (1922); 12 A.L.R. 52 (1921). On suits to quiet title in adverse possessor, see Jackson v. Wax, 20 Del. Ch. 93, 171 Atl. 755 (1934); Shaw, *Equity Jurisdiction to Remove Cloud on Title by Adverse Possession*, 90 U. OF PA. L. REV. 475 (1942), citing authorities; 3 AM. LAW OF PROP. § 15.2 n. 3 (1952). The court (note 1 *supra* at 914) raises the only doubt saying such issues are generally tried at law. See Green v. Cowgill, 30 Del. Ch. 345, 61 A.2d 410 (1948); DEL. CODE ANN., tit. 10, §§ 6503, 369 (1953); Notes 87 A.L.R. 1218 (1933); 68 A.L.R. 119 (1930); 12 A.L.R. 72 (1921). Generally also, see 3 AM. LAW OF PROP. §§ 13.16, 18.65 n. 123 (1952). But see, Wolfman v. Jablonski, 99 A.2d 494 (Del. Ch. 1953).

3. Apparently such use for *neighborhood* amusement stopped in 1924, and ceased *entirely* in 1930, upon the death of the plaintiff's father, see note 1 *supra* at 910.

4. The fence did not (at least at time of this suit) completely separate the land in question from other lands of defendant and his predecessors. It ran at an angle to and stopped 12-14 feet north of the northern fence line of property to the south of the lands of plaintiff and defendant. Whether this opening existed was controverted, and the court placed emphasis on there being "a post on the

in the deed; (3) the hauling of fallen trees from the disputed land; (4) the posting of the land against hunting; (5) "the efforts to establish a game preserve" on the land;[5] and (6) "the use of property generally by plaintiffs and their predecessors in title in the same manner as the adjoining property of plaintiff's" was used.[6] These six items amount to "ownership by right of possession" of the land in dispute although "there are no improvements, no occupancy by the claimants, and no tilling of the soil."[7]

"Adverse possession" is generally used as a "convenient ellipsis for such possession as will ripen into title through the running of the statute of limitations."[8] Presently[9] its basis[10] is a statutory[11] denial[12] to an owner of his action of ejectment[13] where a certain number of years have passed since his cause of

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line separating the disputed property from the property of the owner of the land to the south, in line with a post at the end of the line separating the disputed property from property of defendant." Plaintiff claimed a gate to be at this point. Defendant claimed that the fence line turned at this point to the west forming a 12-14 feet wide lane into another part of his property. 104 A.2d 908 at 910-911 (Del. Ch. 1954).

5. Not further described in the opinion, nor reference made to when such efforts were made. In fact the only dates mentioned occurred with reference to note 3, *supra*, and note 7, *infra*.

6. 104 A.2d 908 at 912 (Del. Ch. 1954). With reference to (6) no indication is given as to what use plaintiffs made of adjoining property, nor as to what use was made by other owners in the vicinity of their property (except, of course, the bridle paths). See note 7 *infra*.

7. The court holds defendant's predecessor to have been divested of his title as of 1936, and that acts of entry by him or his agents for water from a stream thereon for his stock could not affect possession of plaintiff's predecessors since these acts apparently occurred in 1937-1938.

8. Fuller, *Adverse Possession, Occupancy of Another's Land Under Mistake as to Location of a Boundary*, 7 ORE. L. REV. 329, n. 2 (1928). The phrase was apparently first used by Lord Mansfield in Taylor *d.* Atkyns v. Horde, 1 Burr. 60, 119 (1757); Bordwell, *Seisin and Disseisin*, 34 HARV. L. REV. 592, 717, at 623, n. 326 (1921).

9. Historically, see 3 AM. LAW OF PROP. § 15.1; Ballantine, *Title By Adverse Possession*, 32 HARV. L. REV. 135 (1918); Bordwell, *Disseisin and Adverse Possession*, 33 YALE L. J. 141 (1923); 4 TIFFANY, REAL PROPERTY §§ 1132-1133 (3d ed. 1939).

10. The underlying purpose of the statutes is differently interpreted. See, for example 3 AM. LAW OF PROP. § 15.2 n. 1, p. 759 (1952), and compare with Ballantine (*op. cit. supra* note 9, at p. 143) in respect to the statutes of the several states: ". . .under our crude conveyancing and recording systems this doctrine is indispensable to just titles."

11. For a good survey and comparison of the English and U.S. statutes with their varying requirements, see Taylor, *Titles to Land by Adverse Possession*, 20 IA. L. REV. 551, 738 (1935).

12. The Delaware statute (DEL. CODE ANN. tit. 10, § 7901) reads: "No person shall make an entry into any lands, tenements, or hereditements, but within twenty years next after his right or title to the same first descended or accrued." See also DEL. CODE ANN. tit. 10, § 7902. Many states have differently worded statutes, with added provisions, Taylor, *op. cit. supra*, note 11. The instant case refers to no statute.

13. Ballantine, *op. cit. supra* note 9 at pp. 193-140 (especially notes 20 and 22).

action arose, at the same time extinguishing his title and creating non-record[14] title in the "adverse possessor" by operation of the common law.[15]

"The essential elements of adverse possession probably reduce themselves to three. (1) Possession must be entered into and maintained for the statutory period. (2) The possession must operate to give the owner of the land a cause of action [or the power of securing one by mere demand].[16] (3) The possession must be 'unaccompanied by any recognition, express or inferable from circumstances, of the right' of the owner."[17]

Certainly there is no easy definition of possession.[18] Two general meanings, however, seem agreed upon and pertinent: "(1) Possession as the *facts which initiate* legal control. . . [usually called] 'de facto possession', 'physical possession', or 'actual possession'. . . . (2) Possession as the *facts which must accompany* a continuing legal control as, for example, in the statement that an adverse possessor must *continue* in open, notorious,[19] etc., possession. . . . [usually expressed] 'actual possession', or to say in regard to a person's factual

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14. See Ferrier, *The Recording Acts and Titles by Adverse Possession and Prescription*, 14 CALIF. L. REV. 287 (1926).

15. See 3 AM. LAW OF PROP. § 15.2 n. 3 (1952); Ballantine, *op. cit. supra*, note 13; TIFFANY, *op. cit. supra*, note 9, § 1134 n.12.

16. This entire quoted passage comes from Fuller, *op. cit. supra* note 8, at pp. 329-330, and the bracketed material is Fuller's own modification expressed in his note 3, p. 330.

17. Element (3) comes from 2 TIFFANY, REAL PROPERTY § 503 (2d ed. 1920), as adapted by Fuller, *op. cit. supra* note 8, at p. 330, n. 4. Generally see 3 AM. LAW OF PROP. § 15.2, pp. 762-763: "Adverse possession must necessarily mean any wrongful possession which subjects the wrongdoer to the action of ejectment, since the running of the statute barring the real owner's right to maintain that action and nothing else whatever, brings his title to an end, making the possessory title of the wrongdoer, which was established against everyone else when the wrongful possession started, good also against the former rightful owner." The Delaware courts have held: "Twenty year's possession is a title,"; Arron Peery's Lessee v. Joseph Burton, 1 Del. Cases 28, 29 (1794); "Such adverse possession must be exclusive; hostile to the right of ownership of all others; continued so for at least twenty years, and must be marked by definite and distinct boundaries [although not necessarily fences];" Inskeep v. Shields, 4 Del. 345, 346 (1845); elements exist when "Possession relied on has been open, notorious, exclusive and held by fixed and definite boundaries, . . . has been held under claim of right and has, therefore, been hostile . . . and has continued for, at least, 20 years. . . ." Delaware Land and Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 16 Del. Ch. 410, 440, 147 Atl. 165, 178 (1929).

18. See generally, Bingham, *The Nature and Importance of Legal Possession*, 13 MICH. L. REV. 535, 623 (1915); Shartel, *Meanings of Possession*, 16 MINN. L. REV. 611 (1932); 3 AM. LAW OF PROP. § 15.3 (1952).

19. 3 AM. LAW OF PROP. § 15.3, p. 769 (1952) discusses well this use of *notorious*, "The implication that there must be notoriety of possession so as to acquaint the owner thereof before the statute starts to run is quite untenable if possession in fact exists, because the owner has the right to maintain ejectment against such possessor, and the statute starts to run as soon as the cause of action accrues." See also Fuller, *op. cit. supra*, note 8, at 330 n. 4.

relation to a thing, that he is '*in* possession', or '*has* possession', . . ."[20] In each case the nature of the land in dispute is important, i.e., to what "possession" does it admit.[21] The court's proposed test that if "one goes on the land and uses it openly and notoriously, as owners of similar lands use their property, to the exclusion of the true owner"[22] he has done enough, is generally accepted.[23] But their statement, "He must intend to hold the land for himself. . . . It is the intention that guides the entry and fixes its character", seems unsound.[24] The real crux of the problem is: Have the plaintiff and his predecessors done anything which has given defendant and his predecessors an action of ejectment continuously from 1916 until 1936, intention being immaterial.[25]

Building of the fence on the wrong line would perhaps[26] "initiate legal control" but its continued existence is insufficient to exhibit continued control for the statutory period.[27] Laying out and frequent use of the bridal path would seem to give continuing rise to an action of ejectment[28] in defendant and his predecessors but this use apparently stopped in 1930, and alone would be insufficient. Unfortunately the court does not indicate when the other acts of plaintiff and his predecessors took place. If these acts did not take place between 1930 and 1936, apparently defendant had no cause of action in ejectment during this period on which the statute could run. If done within this period they are more like isolated trespasses than acts for which an owner *must* bring ejectment or lose his ownership.[29]

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20. Shartell, *op. cit. supra* note 18, at 612-613, n. 3.

21. Shartell, *op. cit. supra* note 18, at 614 *et seq.* at 619, ". . . acts and events are significant only because, and only to the extent that, our legal order makes them significant. . . . In any particular problem it may be necessary to consider the competing claims of other capable individuals, . . . and the public peace, the public welfare, and perhaps many other ends or interests of society. . . . Even where act and intent are significant . . . they do not tell the whole story. . ."

22. Note 1 *supra* at 911.

23. 3 AM. LAW OF PROP. § 15.3, pp. 765-767, especially n. 4, p. 766.

24. 3 AM. LAW OF PROP. § 15.2, at 762, ". . . the statute runs against the owner's right of action in ejectment from the time the wrongdoer took possession irrespective of his mental attitude."

25. See note 24, *supra, id.*, §§ 15.3, p. 765; 15.4, p. 774; 15.5, p. 786, n. 1. Fuller, *op. cit. supra,* note 8, at 330, n. 3.

26. However, the fence in question (if built under the agreement of the parties) being the southern one-half, was erected and maintained by the *defendants* and *their predecessors,* note 1, *supra* at 910. Apparently the court had an easier basis for decision than under the doctrine of adverse possession. See DEL. CODE ANN., tit. 25, § 1106, "If any line, or boundaries are ascertained and fixed by agreement of parties they shall not be disturbed by any commission as between the parties. . . ."; and Lindsay v. Springer, 4 Har. 547, 4 Del. 547 (1847). Note that "possession" to the mutually set line would seem to be of a different type than the *continuous* "possession" required of an adverse possessor.

27. See 3 AM. LAW OF PROP. § 15.3 b *"Marking Limits of Occupancy or Use,"* p. 770.

28. But see Doe *ex dem* Standifier v. Styles, 185 Ala. 550, 64 So. 345 (1914).

29. 3 AM. LAW OF PROP. § 15.3, p. 767, n. 8 (1952).

It would seem, that in holding the acts of plaintiff and his predecessor to amount to adverse possession for the requisite period, the court aligned itself with jurisdictions[30] finding "adverse possession" to exist without first having established from the facts sufficient initiation or continuance of control to say that the claimant was ever *possessed* of the land.[31]

JOHN F. STAPLETON

CONTRACTS—THE LEGAL EFFECT OF A GRATUITOUS ORDER

Wolters Village Management Company v. The Merchants and Planters National Bank[1]

The defendant, a general contractor, entered into a contract with the subcontractor, Central Electric Company, whereby it agreed to pay $60,500 in return for certain electrical work. Thereafter Central wrote to the defendant saying, "We wish to extend an assignment of all moneys" to the building project "to Merchants and Planters National Bank, Sherman Texas. . . . All checks for gross amount of contract $60,500 shall be made jointly payable to the Merchants and Planters National Bank and Central Electric Company." The defendant agreed to do so by accepting and signing the letter.

The subcontractor showed this letter to the plaintiff bank named in the letter and received a loan of $20,000. The defendant made none of the checks jointly payable; they were all made payable solely to the order of Central, and some were negotiated by Central to creditors or for cash, and no part of these amounts was applied to the bank loan. Central defaulted on its payments to the plaintiff. The plaintiff brought an action against the defendant to recover the unpaid balance of the loan. The court considered the letter in question to be merely a request for permission to assign the contract rights of Central to the plaintiff.

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30. See 1954 ANNUAL SURVEY OF AMERICAN LAW 755, n. 27, 30 N.Y.U. L.Rev. 755 (1954).

31. For a brief summary of Missouri law concerning adverse possession (with extensive law review citations) see Eckhardt and Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri* § 97 (especially note 33), 23 V.A.M.S. 81. Since 1951 see 17 Mo. L. REV. 103-07, 401 (1952) and 18 Mo. L. REV. 380-1 (1953). For some idea of how the Missouri court might rule in similar cases see Barker v. Allen, 273 S.W.2d 191 (Mo. 1954), although the property is residential. Earlier Missouri cases are exemplified by Davis v. Alexander, 183 S.W. 563 (Mo. 1915) which quotes many cases, including (with favor at p. 569) McCabe v. Bruere, 153 Mo. 1, 5, 54 S.W. 450, 451 (1899), ". . . if the adjacent property owners each occupied up to a line, but neither so maintaining it against what might be discovered to be the true line, the possession of neither is adverse to the other."

1. 223 F.2d 793 (5th Cir. 1955).

It did not constitute an assignment of the subcontractor's interest. However, the court held that it did constitute a valid contract between the defendant and Central of which the plaintiff was a donee beneficiary and which the plaintiff could enforce.

The soundness of the court's decision must rest on the proper interpretation of the letter in question. Under the original contract, Central had a right to receive $60,500 for the proper performance of its work. The defendant consented to Central's assignment of such rights. Such consent was unnecessary and was of no legal significance.[2]

Moreover, the letter itself did not amount to an assignment of Central's contract rights. The fact that Central asked for permission to make an assignment of its rights indicates that it contemplated further action before an assignment would be made. In order to have a valid assignment it is necessary that one transfer a right to a third person. Obviously further action was contemplated in this case, namely the securing of a loan from the plaintiff before any assignment was to be made. The mere fact that a creditor gives his debtor authority to pay to another person does not make the other an assignee.[3]

All that remains in Central's letter to the defendant is an order directing the defendant to make checks jointly payable to the order of the plaintiff and Central. Is then the legal effect of Central's order to the defendant to make the checks jointly payable a contract for the benefit of the plaintiff bank? A mere promise by one person to another for the benefit of a third person will not sustain an action by the third person.[4] It has been held that a bank's promise, made after a deposit, to the holder of the deposit certificate to pay the proceeds to another is not supported by sufficient consideration and the third party has no cause of action in the absence of a delivery of the certificate to the third person prior to the death of the promisee.[5] An employer's promise to pay insurance premiums for his employees is merely a gratuitous promise and unenforceable by the employee's beneficiaries.[6] A promise by a bank to a merchant that the bank should pay on checks as an overdraft is not supported by sufficient consideration and the payee of a check in such circumstances has no cause of action against the bank.[7]

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2. Moore v. Gariglietti, 228 Ill. 143, 81 N.E. 826 (1907); Sickles v. Lauman, 185 Iowa 37, 169 N.W. 670 (1918); RESTATEMENT, CONTRACTS § 151 (1932).

3. Holbrook v. Payne, 151 Mass. 383, 24 N.E. 210 (1890); Structural Gypsum Company v. National Commercial Title & Mortgage Guaranty Co., 105 N.J. Eq. 424, 148 Atl. 199 (1929).

4. Myerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94 (1927); Hicks v. Hamilton, 144 Mo. 495, 46 S.W. 432 (1898); 12 AM. JUR. 842, § 289.

5. Clark v. Young, 246 Ala. 529, 21 So.2d 331 (1944).

6. Myerson v. New Idea Hosiery Co., *supra* note 4.

7. Farmers and Merchants Bank v. Talley, 222 Ala. 442, 132 So. 871 (1930).

Central gave nothing in exchange for the defendant's making the checks jointly payable to itself and the plaintiff. It certainly did not contemplate relinquishing its rights to the proceeds until it had received a loan from the plaintiff. It was a gratuitous promise on the part of the defendant. As a result, there is only one contract involved and that is the original contract between Central and the defendant, of which the plaintiff was not made a beneficiary and which therefore should not be enforceable by the plaintiff.

ELDEN STERNBERG

DOMESTIC RELATIONS—DIVORCE—RECRIMINATION AND COMPARATIVE FAULT IN MISSOURI

Eikermann v. Eikermann[1]

In this case the trial court awarded a divorce to the wife on the ground of indignities. There was evidence that her husband forced her to have an abortion, did not support her and cursed her and their children. The decree was reversed on appeal and a divorce awarded to the husband on evidence that the wife had refused intercourse, had committed adultery and had cursed her husband. The opinion of the St. Louis Court of Appeals did not mention the familiar Missouri doctrine of recrimination. It stated:[2]

> "The equities appear to have been with the plaintiff [husband] and from all of the foregoing it seems that the cross bill should have been dismissed and the decree granted to him."

Very briefly, the doctrine of recrimination denies a divorce decree to a spouse who has given the other grounds for divorce. It allows a divorce only to one who is an *innocent* and injured party.[3]

In this case the evidence was so strong on both sides that the trial court awarded a divorce to the wife on the testimony while the appellate court awarded a divorce to the husband on the record. It seems that there could scarcely be imagined a clearer case of recrimination, yet there was no allusion to that doctrine.

The development of recrimination in Missouri is an interesting example of a judicial attempt to stretch the facts of particular cases so as to arrive at just and equitable results without disturbing precedents which date from the opinions of an old English ecclesiastical justice[4] who did not fully understand the nature

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1. 283 S.W.2d 391 (Mo App. 1955).
2. *Ibid*, p. 395.
3. Hoffman v. Hoffman, 43 Mo. 547 (1869); 27 C.J.S. 623.
4. Lord Stowell in Forster v. Forster, 1 Hagg. Con. 144 (1790); Proctor v. Proctor, 2 Hagg. Con. 292 (1819).

of the Roman and ecclesiastical doctrine he was expounding. It must be admitted that they are largely justified by archaic Missouri statutes[5] based on the same misconceptions.

In an excellent and scholarly discussion of the history of the problem,[6] J. G. Beamer, speaking of this ancient canon law defense,[7] said:[8]

> "In Roman times . . . the doctrine was never used to prevent a divorce because divorce was a matter entirely within the discretion of the parties concerned, and . . . the principle was applied . . . only as an equitable means of dividing up the common property. . . . Later, under the canon law, recrimination was still used only as a means of allowing the wife to continue in the enjoyment of the common property. It did not prevent absolute divorce because absolute divorce was unknown to the canon law. The English ecclesiastical courts . . . were powerless even to use the doctrine to prevent the wife from being turned out into the streets, much less as a defense to absolute divorce which could be granted only by Parliament. In the parliamentary cases . . . it was a discretionary rather than a peremptory bar, and one to be invoked only when justified. . . . And in the early American cases the ecclesiastical law was applied under wholly dissimilar circumstances, with the result that a new and fundamentally different doctrine of recrimination came into being."

Beamer goes on to point out that the doctrine has three possible sociological justifications:[9]

> "The first is that it tends to hold the family together; the second, that it serves as a check upon immorality; the third, that it protects the property rights of the wife."

It seems that these justifications are largely refuted by the facts of the typical divorce case. First, a family which is sociologically dead cannot be pre-

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5. MO. REV. STAT. (1949):
Sec. 452.010 enumerates the grounds for divorce and says: ". . . the *injured* party. . .may obtain a divorce. . . ."
Sec. 452.020. Cross-bill of defendant. ". . . if the court shall be satisfied that the defendant is the *injured* party, it shall enter judgment divorcing the defendant from the said plaintiff, as prayed in the answer."
These sections as originally enacted referred to "the innocent and injured party." In 1849 they were amended, omitting the word "innocent." They have always been construed as unchanged by this omission. See Hoffman v. Hoffman, 43 Mo. 547, 549 (1869).
Sec. 452.090. "In all cases where the proceedings shall be ex parte, the court shall, before it grants the divorce, require proof of the good conduct of the petitioner, and be satisfied that he or she is an *innocent and injured* party."

6. Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 KAN. CITY L. REV. 213 (1942).

7. *Ibid.* Recrimination, collusion, connivance and condonation were the four classic canon law defenses. They are still recognized.

8. *Id.* at 243.

9. *Id.* at 249.

served by court action. Second, by denying relief the court may actually encourage immorality. Third, statutes have given married women virtual equality in property rights.

Recrimination in Missouri stems from the case of *Ryan v. Ryan.*[10] There the court discussed but did not answer the question as to whether a recriminatory offense must be "in bar", that is, precisely the same or of equal gravity.

In *Nagel v. Nagel*[11] the court faced that issue squarely:[12]

> "It cannot, with reference to the rights of the injured party, be said that adultery is a more heinous offense, or one of greater moral turpitude, than others enumerated in the act, for the effect of each is the same, as they severally entitle the party injured to a divorce."

The court held squarely that any statutory ground for divorce does constitute a recriminatory offense. These precedents were followed by all the early Missouri Supreme Court decisions.[13] The last of the early opinions in *Hoffman v. Hoffman*[14] said:[15]

> "If both parties have a right to a divorce, neither party has."

This rule, literally interpreted, required blind obedience without consideration of the intolerable marital situations involved in many cases. For many years this rule was apparently followed to the letter[16] and our courts still give it complete lip service.[17]

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10. 9 Mo. 539 (1845).
11. 12 Mo. 53 (1848).
12. *Id.* at 56.
13. See Doyle v. Doyle, 26 Mo. 545 (1858).
14. 43 Mo. 547 (1869).
15. *Id.* at 549.
16. Straley v. Straley, 221 Mo. App. 1136, 298 S.W. 110 (1927); Coons v. Coons, 236 S.W. 358 (Mo. App. 1922); Ellebrecht v. Ellebrecht, 243 S.W. 209 (Mo. App. 1922); Jones v. Jones, 208 Mo. App. 632, 235 S.W. 481 (1921); Harris v. Harris, 223 S.W. 771 (Mo. App. 1920); Nolker v. Nolker, 208 S.W. 128 (Mo. App. 1919); Elder v. Elder, 186 S.W. 530 (Mo. App. 1916); Hogsett v. Hogsett, 186 S.W. 1171 (Mo. App. 1916); Shearer v. Shearer, 189 S.W. 592 (Mo. App. 1916); Speiser v. Speiser, 188 Mo. App. 328, 175 S.W. 122 (1915); Bethel v. Bethel, 181 Mo. App. 601, 164 S.W. 682 (1914); Gruner v. Gruner, 183 Mo. App. 157, 165 S.W. 865 (1914); Collett v. Collett, 170 Mo. App. 590, 157 S.W. 90 (1913); Barth v. Barth, 168 Mo. App. 423, 151 S.W. 769 (1912); Wallner v. Wallner, 167 Mo. App. 677, 150 S.W. 1082 (1912); Libbe v. Libbe, 157 Mo. App. 701, 138 S.W. 685 (1911); Miles v. Miles, 137 Mo. App. 38, 119 S.W. 456 (1909); Wells v. Wells, 108 Mo. App. 88, 82 S.W. 1103 (1904); Coe v. Coe, 98 Mo. App. 472, 72 S.W. 707 (1903); Lawlor v. Lawlor, 76 Mo. App. 637 (1898); Morrison v. Morrison, 62 Mo. App. 299 (1895).
17. Garton v. Garton, 246 S.W.2d 832 (Mo. App. 1952); Cody v. Cody, 233 S.W.2d 777 (Mo. App. 1950); Chapman v. Chapman, 230 S.W.2d 149 (Mo. App. 1950); Chamberlain v. Chamberlain, 230 S.W.2d 184 (Mo. App. 1950); Thompson

However, there is a growing tendency in decisions of the past forty years, by ignoring or stretching the facts or by ignoring the doctrine itself, to evade its harsh results.

One method quite commonly employed by the appellate courts is to hold that the evidence is sufficient to support a finding that one spouse was not guilty of serious marital misconduct when the contrary facts virtually scream from the record.

The Supreme Court has spoken only once on the question in the past eighty-seven years. The results in *Andris v. Andris*[18] were similar to the *Eikermann* case.[19] The husband sought a divorce on grounds of general indignities. The trial court gave him a divorce. The St. Louis Court of Appeals reversed the decree on the ground that the husband was not an innocent party and therefore not entitled to a divorce.[20] But the Supreme Court affirmed the decree of the trial court, surely a clear case of recrimination if responsible and qualified judges can differ so completely on the interpretation of the evidence on the record. The Supreme Court, apparently content to let sleeping dogs lie, did not mention recrimination.

There are at least three recent cases from the intermediate courts of appeal which abandon all pretense of applying recrimination and espouse the doctrine of comparative rectitude, the balancing of the equities which is so familiar in other equitable actions.

Kolaks v. Kolaks[21] affirmed a divorce awarded to the wife. The facts were that she would often fly into a rage, hit her husband with dishes, that she threatened him with a butcher knife, a pistol and a rifle, told the children not to mind him, and threatened to kill him while asleep. One of the children testified that it was "six of one and half a dozen of the other," that the father was as much to blame as the mother. The trial court said in the record:[22]

> "It is difficult for a court to decide the issues in this case, as it is hard to determine from the evidence who is the guilty party and who is the innocent and injured party. If I did not feel that because of the public being an interested party [sic], I would not grant either party a divorce."

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v. Thompson, 84 S.W.2d 990 (Mo. App. 1935); Miles v. Miles, 54 S.W.2d 741, (Mo. App. 1932); Lawson v. Lawson, 44 S.W.2d 191 (Mo. App. 1931); Cherry v. Cherry, 225 Mo. App. 998, 35 S.W.2d 659 (1931); Tebbe v. Tebbe, 223 Mo. App. 1106, 21 S.W.2d 915 (1929); Schumacher v. Schumacher, 14 S.W.2d 519 (Mo. App. 1929).

18. 343 Mo. 1162, 125 S.W.2d 38 (1938).
19. Eikermann v. Eikermann, *supra* note 1.
20. Andris v. Andris, 234 Mo. App. 48, 109 S.W.2d 707 (1937).
21. 75 S.W.2d 600 (Mo. App. 1934).
22. *Id.* at 603.

Thus prima facie admitting the existence of recrimination, the trial judge proceeded to give the wife a divorce. The appellate court sustained the decree, saying:[23]

> ". . . that whatever wrongful conduct defendant may have indulged in against plaintiff, was due to plaintiff's harsh and cruel treatment of defendant throughout the years of their married life."

The court here seems to be advancing a theory of provocation. Of course, if the innocent spouse's misdeeds are reasonably provoked by his mate's misconduct, then his conduct is legally justified and cannot be used as a recriminatory defense.[24] The vast majority of recriminatory suits involve mutual indignities. In any such case it is a simple matter for the court to hold that the actions of the spouse with whom it sympathizes were provoked by the guilty party, thus effecting a judicial repeal of recrimination.

Pickett v. Pickett[25] was a case of mutual indignities in which a decree for the the husband was sustained in these words:[26]

> "No thoughtful person can read this record without being convinced that this elderly couple, probably ill mated and ill matched in the beginning, have quarreled and each resented the conduct and conversation of the other for so long a time that it is now utterly impossible for them to live together as man and wife, or have the slightest degree of respect for each other. The defendant has stated that she will not live with plaintiff. *Under such circumstances society is not benefited by the court requiring of them the impossible* [emphasis added]. Of course, the decree cannot stand unless the plaintiff is the innocent and injured party. No good purpose would be served by attempting to point out in detail all of the conflicts in the evidence. We have set out the salient facts, and sufficient to say we conclude they show *a preponderance of the evidence in favor of plaintiff* [emphasis added], and especially in view of the deference to the trial court's findings to which they are entitled, the testimony as a whole justified the decree as rendered."

The inconsistencies on the face of this excerpt speak for themselves. The court's logic has become hopelessly ensnarled in its quest for a happy ending.

Politte v. Politte[27] was a case of mutual indignities. The facts were a sordid story of arguments, vile language, fights, beatings and police court. The record established virtually beyond question that the husband had used physical violence on more than one occasion. Yet the court sustained a decree for him, saying:[28]

> ". . . plaintiff has, *by a preponderance of the evidence* [emphasis added], established facts which prove that he was the injured party and

23. *Ibid.*
24. Garton v. Garton, 246 S.W.2d 832 (Mo. App. 1952).
25. 150 S.W.2d 587 (Mo. App. 1941).
26. *Id.* at 590.
27. 230 S.W.2d 142 (Mo. App. 1950).
28. *Id.* at 148.

that he has not been guilty of such indignities as would preclude a decree in his favor."

It is quite obvious even to the casual observer that in a very large proportion of modern divorce cases, neither spouse is actually innocent.[29] It has been said:[30]

"... as matters stand a fair case may be made out that the innocent spouse is rapidly becoming a myth."

A judicial separation is no solution to this problem in Missouri. The wife, in a proceeding for separate maintenance, cannot prevail unless she proves facts which would entitle her to a divorce if that were the relief she was seeking.[31]

Scheer v. Scheer[32] indicated four factors severely limiting the application of recrimination, factors which may be applied in virtually any case to reach the desired result. First, the plaintiff's conduct need not be letter-perfect and above reproach to entitle him to a divorce. Second, plaintiff's occasional outbursts are excused if they are provoked by defendant's wrongful conduct. Third, recriminatory conduct must be such as to entitle defendant prima facie to a divorce. Fourth, plaintiff must be guilty of a continuous course of conduct connoting settled hate and a manifestation of alienation and estrangement; proof of mere occasional acts or words will not suffice to constitute indignities.

There are at least four other comparable modern cases to this same general effect,[33] or a total of ten cases cited herein. Thus it seems that although the doctrine of recrimination still stands on our books and still receives lip service, it is presently subject to considerable judicial erosion.

Such a development is long overdue and is much to be encouraged, particularly in the absence of remedial legislation. Recrimination is an anachronism dating from an era when the courts lacked the social consciousness and realistic approach to human problems which we hope they employ today. The threat of alleging recrimination can be used as a means of coercion by an unscrupulous spouse, thereby precluding an impartial consideration of the equities involved. As Beamer eloquently phrases it:[34]

"It is in the case in which only one of the parties is willing to make a sacrifice to obtain his freedom that this undercover, immoral situation is inadequate, and the refusal of the courts and legislatures to take a

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29. Bradway, *The Myth of the Innocent Spouse*, 11 TULANE L. REV. 377 (1937).

30. *Id.* at 384.

31. Brady v. Brady, 71 S.W.2d 42 (Mo. App. 1934).

32. 238 S.W.2d 865 (Mo. App. 1951).

33. McCormack v. McCormack, 238 S.W.2d 858 (Mo. App. 1951); Rankin v. Rankin, 17 S.W.2d 381 (Mo. App. 1929); Wehrenbrecht v. Wehrenbrecht, 200 Mo. App. 452, 207 S.W. 290 (1918); Willett v. Willett, 196 S.W. 1058 (Mo. App. 1917).

34. Beamer, *op. cit., supra* note 6, p. 214.

realistic view of the situation works a hardship on the party who has the greater respect for the law and wishes to live within its confines."

Beamer continues:[35]

". . . the doctrine of recrimination, as outlined by the appellate courts, does not obtain in actual practice. It is common knowledge that most divorce suits are not contested, and that in the few which are, recrimination is seldom mentioned. The result is that our divorce courts operate upon unsound foundations, contempt for the law and for the courts is bred in the minds of the people, the parties themselves are forced to conceal matters which should be decided by an impartial tribunal, and a petty form of blackmail is encouraged."

The reason most often advanced to sustain the doctrine is the clean hands maxim of equity.[36] Yet, in England, the jurisdiction to which we trace the trouble, the Matrimonial Causes Act of 1857 gave the trial judge discretion to grant a divorce in such cases. It has been liberally interpreted and has found favor with both the bar and the laity.[37]

Though any complete survey of the matter is beyond the scope of this note, it seems that at least eighteen states and the District of Columbia have adopted the mitigating influence of the doctrine of comparative fault to some extent by statute or by the process of "judicial legislation."[38]

An excellent discussion of the considerations involved may be found in the opinion of Traynor, J. in a recent California case.[39] He stated that the court[40]

". . .is clothed with a broad discretion to advance the requirements of justice in each particular case."

He enunciated four major considerations to guide this exercise of judicial discretion:[41] 1. The prospect of reconciliation; 2. The effect of the marital conflict upon the parties; 3. The effect of the marital conflict upon third parties; 4. Comparative guilt.

This precedent was followed in a later case[42] where the court upheld a decree granting divorces to both parties. The court said:[43]

"The trial court was justified in concluding that the legitimate objects of the marriage had been destroyed, that its continuation was seriously

35. *Id.* at 252.
36. *"The 'Reasons' for the Doctrine of Recrimination in Divorce,"* 26 COL. L. REV. 83 (1926).
37. *Id.* at 86.
38. See 170 A.L.R. 1076 (1947); 159 A.L.R. 734 (1945); 152 A.L.R. 336 (1944); and 27 C.J.S. 624. These states are Ark., Cal., Ida., Ia., Kans., Ky., La., Mich., Minn., Neb., N. Mex., Okla., Ore., Pa., Tex., Utah, Wash., and Wyo.
39. DeBurgh v. DeBurgh, 39 Cal.2d 858, 250 P.2d 598 (1952).
40. *Id.* at 606.
41. *Ibid.*
42. Mueller v. Mueller, 282 P.2d 869 (Cal. 1955).
43. *Id.* at 870.

impairing plaintiff's health and threatening defendant's health, and that it involved an atmosphere of bitterness and hatred in the home that was clearly deleterious to the interests of the children."

Although statistics are obviously not available, it is a matter of common knowledge to practising attorneys and trial judges throughout our state that a very large proportion of the divorces granted in Missouri today would be denied if recrimination were enforced. It constitutes perhaps the most hypocritical area of our law. The recent judicial tendency to avoid it is highly desirable from the standpoint of justice to the individual parties and overall benefit to society. In the absence of remedial legislation it is the wisest and most realistic solution to a vexing problem.

FRED H. MAUGHMER, JR.

PROPERTY—FIXTURES—GAS TANK ON CONCRETE BLOCKS

Bastus v. McCurdy[1]

A contract for the sale of a farm was entered into between the plaintiffs as buyers and the defendants as sellers. A modern house was situated on the farm. It was equipped with a hot-water heater, space heater, refrigerator, and cook stove, all of which operated on Butane gas. The gas was stored in a 500 pound tank, located some distance from the house and resting upon concrete blocks placed on top of the ground. The tank was held in place by its own weight and was not otherwise affixed to the realty. The gas was transmitted from the tank to the various appliances in the house through an underground copper tube that entered the basement and then branched out up through the floor of the house to the appliances.

At the time of the sale of the property, the defendants represented the house to the plaintiffs as a modern house with gas heat and gas hot-water heater. Upon vacating the premises after consummation of the sale, the defendants removed from the premises the gas tank, space heater, and hot-water heater. The plaintiffs brought an action for damages for the removal of the tank and water-heater, the space heater having been returned by the defendants. The jury in the trial court returned a verdict for the plaintiffs and the defendants appealed from a judgment entered thereon.

The St. Louis Court of Appeals sustained the defendants' appeal and reversed the judgment for the plaintiff below, stating that there was no instruction given by the trial court requiring the jury to find that the defendant intended

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1. 266 S.W.2d 49 (Mo. App. 1954).

that the gas tank and hot-water heater become a part of the realty at the time they were installed by the defendants. Because of this error the case was remanded for a new trial. This case has not come up to the appellate level again and no other determination has been made in Missouri as to whether such gas tanks as were involved are realty or personalty.

Gas tanks of the type involved in the Bastus case are a relatively new technological advancement in the field of suburban and rural living. Tanks of the size involved in the *Bastus* case are generally used in conjunction with several gas operated appliances or with a gas central heating unit. If the gas tank in the *Bastus* case had been small in size and capacity, and used merely to supply a cooking stove or a refrigerator which was taken when the vendor vacated the premises, it clearly would have been personalty and subject to removal by the vendor upon his vacating the premises after sale. However, in the *Bastus* case the tank was large in size and capacity and supplied gas for the heating unit of the house as well as for the other gas appliances which were to be left with the house.

There have been only two cases decided in the United States at this time which involve the property status of gas tanks of the type involved in the *Bastus* case. These cases involve different factual situations and circumstances than those involved in the Bastus case and, therefore, cannot be relied upon as authority for determining whether the gas tanks are realty or personalty.[2]

It is generally held that whether a particular thing is a fixture and a part of the realty or a mere chattel is a mixed question of law and fact, and a question for the jury to decide from all the evidence.[3] The criteria applied in Missouri, as

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2. Holicer Gas Company, Inc. v. Wilson, 45 So.2d 96 (La. App. 1950); Edwards v. S. & R. Gas Co., 73 So.2d 590 (La. App. 1954). In both cases gas dealers had placed gas tanks of the type involved in the Bastus case on land under a lease arrangement with the owner of the premises, who agreed to pay the gas dealer a certain annual rental for the gas tank and to purchase his gas from the gas dealer. In each case the land owner sold the land to a third party who claimed title to the gas tanks as being a part of the realty and passing with the conveyance to him. Each case arose when the gas dealer brought an action to recover the gas tank or the value thereof.

In the Holicer decision, it was held that the gas dealer could not remove the gas tank or recover the value thereof because it had become a part of the realty and passed with the land to the purchaser as a part of the realty. In the Edwards case, the same court overruled its earlier decision and held that the gas dealer could enter and remove the gas tank because the owner of the land had not paid for or acquired title to the tank and could not pass title of the tank to the purchaser of the land even though it could be considered under Louisiana law an "immovable." It was stated that before the chattel could become a part of the realty, there had to be unity of title in that the title to the chattel and to the realty had to be in one and the same person at the time of the annexation of the chattel to the realty. Since the owner of the land did not have title to the gas tank, the gas tank could not become a part of the realty.

3. Grand Lodge of Masons v. Knox, 27 Mo. 315 (1858); Elliott v. Black, 45 Mo. 372 (1870). See also Goodin v. Elleardsville Hall Ass'n., 5 Mo. App. 289 (1878); O'Brian v. Jamison, 9 Mo. App. 545 (1881).

elsewhere, in determining whether a chattel has become a fixture are annexation, adaption, and the intention of the person annexing at the time of the annexation, with intention being the most important element.[4]

Annexation refers to the physical attachment of the thing to the land and can be either actual or constructive.[5] The general rule is that, absent any agreement between the parties, all fixtures whether actually or constructively annexed to the realty, pass with the conveyance of the realty.[6]

Adaption refers to the fixture being regularly used in the use and occupancy of the realty to which it is actually or constructively annexed. In *Smyth Sales Corporation v. Norfolk Building and Loan Assn.*,[7] it was held that an oil burning heating unit consisting of burner, fuel pump and a fuel tank located outside the house, was so adapted to the premises that it had become a part of the realty and could not be removed therefrom. Other cases have held that oil heating systems consisting of oil burners located inside the building and fuel tanks located outside the building were so adapted to the premises as to constitute a part thereof.[8]

The last and most important element of a fixture is the intention of the person annexing the article to the realty at the time of the annexation.[9] In the

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4. Matz v. Miami Club Restaurant, 127 S.W.2d 738 (Mo. App. 1939).

5. Moller-Vandenboom Lumber Co. v. Boudreau, 231 Mo. App. 1127, 85 S.W.2d 141 (1935) (stating that immovability of the object is not the sole test of whether it has become a fixture.); Banner Iron Works v. Aetna Iron Works, 143 Mo. App. 1, 122 S.W. 762 (1909) (stating that whether in a particular instance the article became part of the realty and a fixture is not determined altogether, or even principally, by the mode in which it is attached to the building or land, and whether the attachment is slight or strong, or whether the article can be removed readily without damage to the freehold); United Pacific Ins. Co. v. Cann, 276 P.2d 858 (Calif. App. 1954) (holding that portions of equipment not attached to the land but which are used with and essential to the other portions attached to the land constitute a unit and are constructively annexed); Hunt v. Mullanphy, 1 Mo. 361, 14 Am. Dec. 30 (1825).

6. Slater v. Dowd, 53 S.E.2d 598 (Ga. App. 1949).

7. 184 Atl. 204 (N.J. Apps. 1939); See also Atlantic Die Casting Co. v. Whiting Tubular Products, Inc., 337 Mich. 414, 60 N.W.2d 174 (1953) (holding as the rule that whatever is affixed to a building by an owner to facilitate its use and occupation in general becomes a part of the realty. The court held that certain gas heating equipment was necessary to the purpose to which the realty was adapted and it became a fixture upon its annexation to the property. The court also held that when the purchaser accepted the building, he had every reason to believe that the gas heating equipment was a fixture to the building).

8. Gar Wood Industries, Inc. v. Colonial Homes, Inc., 305 Mass. 41, 24 N.E.2d 767 (1940). See also Nicklas v. Pickford, 289 N.Y. Supp. 174, 160 Misc. 254 (Sup. Ct. 1936); Kain v. Coble, 132 N.J.L. 315, 40 A.2d 350 (1945), *affirmed* 133 N.J.L. 314, 44 A.2d 212 (1945).

9. Banner Iron Works v. Aetna Iron Works, *supra* note 2 (Stating that the principal criterion is the intention with which the owner of the land or building put the material into the building or on the land—whether his purpose was to make it permanently a part of the land or tenement. If he had this purpose when he made the annexation, then, though it is fastened to the freehold only slightly, and may be displaced without injury to the freehold, it usually will be treated as a fixture.).

Bastus case the question as to the annexor's intent at the time he annexed the gas tank to the realty was held to be a jury question and the plaintiff's case failed because there was no instruction which required the jury to find the annexor's intention.[10] Early Missouri cases[11] have held that the party making the annexation must intend to make the article a permanent accession to the freehold and that this intention can be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, such as vendor—vendee, mortgagor—mortgagee, or landlord—tenant, and the policy of law applicable thereto, the structure and mode of the annexation and the purpose and use for which the annexation has been made. Other tests for the determination of the annexor's intent have been adopted by other courts.[12]

The intention of the party annexing does not have to be that the annexation shall be perpetual, but rather that the intention shall be that the article is to be annexed until worn out, until the purpose to which the land is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.[13]

It must be remembered, however, that even though intention is the most important element the existence of intention alone without the presence and existence of the other elements is not enough to transform a mere chattel into a fixture.[14]

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10. Note 1, *supra*, pages 51, 52: "In determining the intention of the person making the annexation, the court or jury is not bound by his testimony on the point, nor by his secret or undisclosed purpose, but may decide the issue from his acts and conduct and the surrounding facts and circumstances." It was also stated that there need not be any direct testimony on the question of intent as the jury may make its own findings on this issue from a consideration of the facts and circumstances in evidence.

11. The State Savings Bank v. Kercheval, 65 Mo. 682 (1877) (The court stated that on the grounds of public policy, many things are regarded as chattels in controversies between landlords and tenants which would unquestionably be held as fixtures as between vendor—vendee or mortgagor—mortgagee.); Thomas v. Davis, 76 Mo. 72 (1882). See also M. P. Moller, Inc. v. Wilson, 8 Cal.2d 31, 63 P.2d 818 (1937); Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 216 Ind. 573, 25 N.E.2d 444 (1940). In Warrington v. Hignutt, 3 Terry 274, 31 A.2d 480 (Del. Super. 1943). The court stated that the relationship of the annexor to the land at the time of the annexation must be considered in determining the annexor's intent, when the article annexed to the land can be removed and utilized as well elsewhere.

12. Nelse Mortensen & Co. v. Treadwell, 217 F.2d 325 (9th Cir. 1954) (intention which a normal owner of realty would have in bringing the chattel upon the property); M. P. Moller, Inc. v. Wilson and Citizens Bank of Greenfield v. Mergenthaler Linotype Co., *supra* note 11, where courts stated that the test is that it must appear from the nature of the article that if it is used for the purpose for which it was designed, it would naturally and necessarily be annexed to and become a permanent and integral part of the realty.

13. Pritchard Petroleum Co. v. Farmers Co-Op Oil and Supply Co. of Conrad, 117 Mont. 467, 161 P.2d 526 (1945).

14. Loan v. Gregg, 55 Mo. App. 581 (1874).

Pennsylvania and some other states have adopted a rule pertaining only to articles used in trade or manufacture and which is very different from the Mis-

A Missouri court[15] at a very early date decided that annexation by a fee-simple owner gives rise to a strong presumption that the intention in making the improvements was to make them permanent.

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souri rule as to articles used for private purposes. This rule simply stated is that whether fast or loose, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490 (1841); Appeal of Defense Plant Corp., 350 Pa. 520, 39 A.2d 713 (1944); *affirmed* R.F.C. v. Beavers County, Pa., 328 U.S. 204 (1945); *In re* Taylor and Dean Manufacturing Co., 136 F.2d 370 (3rd Cir. 1943).

These cases hold that all chattels placed in an industrial establishment for permanent use and necessary to the operation of the plant, become fixtures and hence a part of the real estate, regardless of whether or not they are physically attached thereto. They regard all machinery necessary for the operation of the factory and to make it a going concern as a part of the freehold.

Missouri in Hunt v. Mullanphy, *supra* note 5, in 1825 took the position that all articles annexed to land for trade or manufacture were of a personal character, if they could be removed without violence to the land. This view was based on public policy to encourage trade and manufacture. However, in 1909, in Banner Iron Works v. Aetna Iron Works, *supra* note 5, the court stated that in the case of machinery, the adaptability of the article to the work or business of the place has to be considered. If the thing furnished was necessary to that work or business or necessary to the purpose for which the building was designed and used, or was a convenient accessory, or commonly employed in connection with such business, then the intention of the proprietor of the business to annex the article permanently to the realty could be inferred.

In U.S. v. Becktold Co., 129 F.2d 473 (8th Cir. 1942), the Federal District Court stated that it is well established by controlling Missouri decisions that where machinery is placed in a building and the land, building and machinery are used together as a factory or plant, the machinery is a part of the realty.

In Green v. Shamrod, 185 S.W.2d 41 (Mo. App. 1945), the defendant contended that the same rule the court had stated in the Becktold case was the Missouri law. The court rejected the contention and stated that the Missouri rule is that where a building is erected for, or permanently adapted, or devoted to, a particular purpose, anything annexed to the building for the carrying out of that purpose may be considered as accessory to the realty itself, while such articles annexed merely for the purpose for which the building happens at the time to be used are not to be so regarded. The court held that the building involved might well, or better, be used for other commercial purposes, and that the equipment involved was merely installed for use in the business for which the building happened at the time to be used.

In Stockton v. Tester, 273 S.W.2d 783 (Mo. App. 1954), the court stated that articles annexed to the realty by a tenant for the sole purpose of enabling the tenant to carry on his business are trade fixtures and are removable by the tenant. Even though a fixture is particularly adapted to a particular type of building, this does not in itself make it irremovable. It is only where the article is so placed as to make the building itself peculiarly adapted and more usable for the type of business that the article is not removable.

It would seem from these decisions that Missouri has not adopted as strict a view toward trade fixtures as Pennsylvania. Missouri holds that trade fixtures will only be considered a part of the realty when the building itself is usable for only one particular purpose, and the articles annexed aid in that purpose, or where the articles annexed change the character of the building so that it can only be used for one purpose and no other. Articles annexed to further the purpose to which a building is temporarily put would not be a part of the realty.

15. Tyler v. White, 68 Mo. App. 607 (1897).

The gas tank in the *Bastus* case meets all the elements of a fixture. It was constructively although not actually annexed to the land. It was adapted to the use made of the land as it furnished the gas supply for the several gas appliances which passed with the realty to the purchasers. From all the tests as to the intention of the annexor, which have been enumerated above, it seems that the sellers' intent, when they placed the gas tank on the land, was to make the gas tank a permanent part of the realty. Had not the instruction requiring that the jury find the intention of the annexor been omitted below, it seems certain that the Court of Appeals would have affirmed the trial court's decision, which held the gas tank a part of the realty.

RICHARD DAHMS

TORTS—HUMANITARIAN DOCTRINE—COUNTERCLAIM BASED ON PLAINTIFF'S PRIMARY NEGLIGENCE

Seiler v. W. H. Powell Lumber Company[1]

This was an action for personal injuries sustained when an automobile owned and driven by plaintiff collided with a truck owned by defendant. The collision occurred in the westbound lane of a two-lane state highway in St. Louis County. Plaintiff's car was traveling east and the defendant lumber company truck was west-bound. Plaintiff contended that she had pulled sharply to the left and into the west bound lane immediately prior to the collision because the defendant's truck was approaching in her lane. Plaintiff also testified that a gravel truck coming from behind her pulled up beside her on her right and prevented her from turning to the right to avoid the collision. The defendant's evidence, supported by several eyewitnesses, was to the effect that defendant's driver was never out of his proper lane and that the accident occurred by reason of plaintiff's attempt to pass this same gravel truck when the defendant's truck was so close that a collision could not be avoided. Plaintiff submitted her cause of action to the jury solely on the humanitarian doctrine, and the defendant submitted its counterclaim for damage to the truck on two theories of primary negligence, that of plaintiff's excessive speed and plaintiff negligently passing when the way ahead was not clear of approaching traffic. The jury found in favor of the defendant both on the petition and counterclaim and awarded the defendant one thousand dollars damages, from which plaintiff appealed. The St. Louis Court of Appeals held that where plaintiff submitted her case under the humanitarian rule, the trial court's instruction which submitted the defendant's counterclaim on plaintiff's primary negligence to the jury, and did not refer to plaintiff's humanitarian case, did not submit issue of plaintiff's contributory negligence to the jury and was proper.

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1. 283 S.W.2d 929 (Mo. App. 1955).

The well known doctrine of last clear chance is based on the social policy of not denying recovery to the negligent plaintiff if the negligent defendant is the last responsible actor in having an opportunity to avoid the accident after plaintiff is in a position of imminent peril.[2] Under the Missouri humanitarian doctrine, as under the last clear chance doctrine generally, instructions which raise the issue of contributory negligence are erroneous, since the social policy on which the doctrine is founded demands that when a humanitarian case is submitted, contributory negligence becomes a foreign issue.[3] Though there has been some conflict,[4] it is now established that the proper defenses to a humanitarian case are either a refutation of one or more of the necessary elements of the humanitarian case, or a showing that the plaintiff's injury was the sole cause of his injury.[5]

It being agreed that contributory negligence has no place in a case submitted solely on the humanitarian doctrine, the question in this case is whether the defendant's counterclaim based on plaintiff's primary negligence injects contributory negligence into the case? General language in a number of Missouri cases would seem to indicate that it is improper to present the primary negligence of the plaintiff to the jury in any form.[6] But such statements are *dicta* in cases where no counterclaim on plaintiff's primary negligence is in issue. The two Missouri cases which deal directly with the problem here considered are in irreconcilable conflict.[7]

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2. In early American cases involving last clear chance situations, courts insisted on explaining the doctrine in terms of fault, and thus spun the web of proximate cause which has entangled decisions down to the present day. The better approach would seem to be to consider "last clear chance" an exception to the rule of contributory negligence, based on the proposition that the last responsible actor should be held liable for the injury. Unfortunately, Missouri courts have not clearly indicated on which theory our humanitarian doctrine rests. McCleary, *The Basis of the Humanitarian Doctrine Reexamined*, 5 Mo. L. REV. 56 (1940); PROSSER, TORTS § 52 (2d ed. 1955).

3. McCall v. Thompson, 348 Mo. 795, 155 S.W.2d 161 (1941); Byrnes v. Poplar Bluff Printing Co., 74 S.W.2d 20 (Mo. 1934); Wolfson v. Cohen, 55 S.W.2d 677 (Mo. 1933); Silliman v. Munger Laundry, 329 Mo. 235, 44 S.W.2d 159 (1931); McElwee v. Curtis-Wright Corp., 70 Fed. Supp. 97 (D.C. Mo. 1947); Johnston v. Brewer, 40 Cal.App.2d 583, 105 P.2d 365 (1940); Donald v. Heller, 143 Neb. 600, 10 N.W.2d 447 (1943).

4. Millhouser v. Kansas City Public Service Co., 331 Mo. 933, 55 S.W.2d 673 (1932).

5. McGrath v. Meyers, 341 Mo. 412, 107 S.W.2d 792 (1937); Doherty v. St. Louis Butter Co., 339 Mo. 996, 98 S.W.2d 742 (1936); Borgstede v. Waldbauer, 337 Mo. 1205, 88 S.W.2d 373 (1935); Cooper v. Kansas City Public Service Co., 233 Mo. App. 229, 116 S.W.2d 212 (1938).

6. Bucks v. Hamill, 358 Mo. 617, 216 S.W.2d 423 (1948); Zickefoose v. Thompson, 347 Mo. 579, 148 S.W.2d 784 (1941); Robinson v. Kansas City Public Service Co., 345 Mo. 764, 137 S.W.2d 548 (1939); Lynch v. Baldwin, 117 S.W.2d 273 (Mo. 1938); Ritz v. Cousins Lumber Co., 227 Mo. App. 1167, 59 S.W.2d 1072 (1933); Gray v. Terminals Co., 331 Mo. 73, 52 S.W.2d 809 (1932).

7. Hangge v. Umbright, 119 S.W.2d 382 (Mo. 1938); State *ex rel.* Grisham v. Allen, 344 Mo. 66, 124 S.W.2d 1080 (1939); discussed briefly by Mr. Becker in 4 Mo. L. REV. at 409 (1939).

The court in the principal case quotes at length from the opinion in *Hangge v. Umbright*[8] and seems to follow the reasoning of that case. In both cases the court noted the extreme care with which the instructions were framed, so as to avoid any mention of contributory negligence or of the plaintiff's humanitarian case. The case of *State* ex rel. *Grisham v. Allen*,[9] holding that a counterclaim based on plaintiff's primary negligence is improper because it allows the jury to consider an issue of contributory negligence, seems unduly restrictive. As is pointed out in the principal case, to follow the doctrine of *State* ex rel *Grisham v. Allen*[10] to its logical extreme would be to deny the defendant the right to counterclaim in a case where the plaintiff relies on the humanitarian doctrine.

It has been observed that the Missouri courts have already converted the "last clear chance" doctrine into a "no chance" doctrine so far as defendants are concerned,[11] and it is exceedingly questionable that the defendant should be further confined. It seems that we shall make progress toward a workable policy in this area only through decisions such as the one in the principal case. To deny the propriety of the defendant's counterclaim here would be to further restrict an already harrassed defendant and to encourage a "race to the courthouse" type of law in automobile collision cases.

G. ANDY RUNGE

TORTS—NUISANCE—MAINTENANCE OF POND TO ATTRACT MIGRATORY BIRDS

Andrews v. Andrews[1]

Plaintiff owned and occupied land contiguous to that of the defendant. The plaintiff's only source of income was from farming and cultivating his premises which he has continued to do since 1945, the time of his purchasing the land. Prior to 1949 the crops of the plaintiff were never bothered but in that year the defendant constructed upon his land an artificial pond located approximately 400 feet from that of the plaintiff. During 1951-'52, the defendant placed lame wild geese, food and bait on the pond to attract the wild geese as they flew south from Canada. Immediately thereafter large numbers of geese came to the pond and used it as a base from which they set upon the land of the plaintiff and destroyed his crops and fields. The first winter, there were 200 geese, the second 1200 geese, and the

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8. Hangge v. Umbright, *supra* note 7.
9. State *ex rel.* Grisham v. Allen, *supra* note 7.
10. *Ibid.*
11. See Ch. J. Ellison's dissent in Perkins v. Terminal R.R. Assoc., 340 Mo. 868, 102 S.W.2d 915 (1937); also 119 A.L.R. 1085 (1939).

1. 242 N.C. 382, 88 S.E.2d 88 (1955).

third 3000 geese. The amount of crops devoured were in the amounts of $48, $105, and $1343 respectively. The plaintiff alleged that the defendant knew of the nature of wild geese to seek food from neighboring lands and, after repeated requests by the plaintiff that the defendant stop baiting the pond and informing him of the results, the defendant continued to bait the pond. It was proved that geese multiply in a geometric progression and that accordingly 7,500 geese will arrive this year and 20,000 the next year. The plaintiff sought to have the defendant enjoined from maintaining a nuisance and to answer in damages for the loss the plaintiff has sustained. The defendant demurred to the petition and from a judgment sustaining the demurrer the plaintiff appealed. On appeal the Supreme Court of North Carolina reversed the lower court and stated the plaintiff had a cause of action.

The defendant contended that there was no cause of action because the geese are wild and therefore he does not own them and further that he had not been negligent in the construction or maintenance of his pond. The supreme court in reversing the lower court did so upon the basis of tort liability designated as private nuisance *per accidens*, or, in fact,[2] and that negligence did not have to be alleged as it was not essential in order that an act constitute a nuisance.[3]

Justice Parker, in a dissenting opinion, cited *Sickman v. U.S.*[4] in which there were similar facts, the case containing dictum to the effect that the Federal government would not be liable in damages for the trespass of migratory birds because they are animals *ferae naturae;* therefore the United States had no ownership in such birds.

The plaintiff in the present case relied upon an ancient maxim, *sic utere tuo ut alienum non laedas*, meaning so to use your own as not to injure another's property. This maxim lies at the foundation of the law of nuisance and accordingly, while everyone has the right to use his property as he sees fit, this right is subject to the implied obligation of every owner or occupant of property to use it in such a way that it will not unreasonably interfere with the enjoyment of

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2. Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953). A private nuisance *per accidens*, or, in fact, becomes a nuisance by reason of its location or the manner in which it is constructed, or maintained, or operated; see also 39 AM. JUR. § 11, p. 290 and annotations in 35 A.L.R. 95 (1925) and 51 A.L.R. 1215 (1927).

3. Swinson v. Cutter Realty Co., 200 N.C. 276, 156 S.E. 545 (1931), in which it states that while the same act or ownership may constitute negligence and at the same time become a nuisance per accidens, and be practically inseparable, yet the latter may be created, or maintained, or operated without negligence. See also Bollinger v. Mungle, 175 S.W.2d 912 (Mo. App. 1943).

4. 184 F.2d 616 (7th Cir. 1950), a case in which the plaintiff owns land located along the westerly side of Horseshoe Lake State Game Preserve in Illinois. The action for damages as a result of crops being destroyed by the geese was brought under the Federal Torts Claims Act which permits suit against the government for the negligence of a federal employee. However, the suit was dismissed because there was no negligence on the part of a federal employee.

other property owners in the use of their property.[5] The defendant contended that it was lawful for him to construct an artificial pond on his land because it was a lawful use of his land, but the courts have held repeatedly that even though an act or a structure was lawful when made or erected, if for any reason it later becomes or causes a nuisance, the legitimate character of its origin does not justify its continuance as a nuisance.[6]

Due to the lack of any case exactly on the facts it is necessary to look at analogous situations. In *Holden v. Lewis*,[7] the defendant kept a hive of bees which repeatedly crossed to the adjoining property owned by the plaintiff and stung, menaced, and harassed the plaintiff so as to inconvenience and deprive them of the reasonable enjoyment of their property. The court held that the keeping of bees was not a nuisance per se but that the keeping of an unreasonable number in an unreasonable place may be.[8] The court further said:[9] "The difference between a business which, no matter how it is conducted, is a nuisance per se as to certain location and surrounding, and a business which is being so conducted as to become a nuisance, lies in the proof, not in the remedy. In the former, the right to relief is established by averment and proof of the mere act, in the other, proof of the act and its consequences is necessary."

Certainly the keeping of geese on one's land is not a nuisance per se, but it cannot be denied that the plaintiff has established an unreasonable injury to his property on the alleged facts.

An important factor that has influenced the courts, in deciding that an act constitutes a nuisance *per accidens*, has been prior knowledge on the part of the defendant of the propensity of certain acts to result in harm or unreasonable annoyance. Two cases in Missouri[10] emphasize the fact that damages were allowed on the basis of nuisance where a dog bit a person after the defendant had knowledge of the vicious propensity of the dog. Both cases emphasized the keeping of the dog *after knowledge* of the vicious propensity constituted a nuisance. In the present case, it is alleged that the defendant knew of the propensity of wild geese to feed on neighboring land and, after the plaintiff had told the defendant of the destruction each year, he had knowledge. Therefore, it seems to follow

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5. 66 C.J.S. § 8, p. 740.

6. Waidlick v. City of Manhatten, 150 Kan. 34, 90 P.2d 1104 (1939); 66 C.J.S. § 9, p. 747; further what constitutes a nuisance is thoroughly defined in Taylor v. Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724 (1944); see also 155 A.L.R. 54 (1945).

7. 33 Del. Co. 458 (Pa. 1945).

8. Case cites Arkadelphia v. Clark, 52 Ark. 23 (1889).

9. *Supra* n. 7 at 460.

10. Speckman v. Kreig, 79 Mo. App. 376 (1899), a case in which the plaintiff was bitten by the dog while delivering chickens at the barn of the defendant's in accordance with the defendant's directions; Patterson v. Rosenwald, 222 Mo. App. 973, 6 S.W.2d 664 (1928).

that the continuance of baiting the pond and attracting geese constituted a nuisance.

Another Missouri case, *Rhodes v. A. Moll Grocer Co.*,[11] involving the maintenance of a parking lot which the court determined to be a nuisance, the court said that the plaintiff's allegations of noxious fumes and gases, dirt, and unreasonable noise as a result of the automobiles using the lot stated a cause of action. Evidence was introduced showing that as many as sixty-two automobiles used the lot at one time and that the sidewalks were made hazardous thereby by such traffic entering and leaving the lot. This clearly sets forth the view that the use of one's land in a seemingly lawful manner may become an unlawful use.[12]

Also the defendant in the present case contended that he had no control or possession of these geese, that they were animals *ferae naturae*, and as such he could not be liable for their trespasses. This is an untenable position which is exemplified in the cases of *Tushbant v. Greenfield's Inc.*[13] and *Jacques v. National Exhibit Co.*[14] In the former a restaurant owner was sued on the basis of maintaining a nuisance in as much as his customers during rush hours lined up in front of the restaurant and thereby blocked the ingress and egress of an adjoining building. The court held this to constitute a nuisance. In the latter case the defendant company operated a puppet show in their display window which attracted large numbers resulting in the doorway of an adjoining business being obstructed. This constituted a nuisance.

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11. 231 Mo. App. 751, 95 S.W.2d 837 (1936).

12. *Id.* at 841, the court said: "We recognize the doctrine that the owner of property has the right to exercise exclusive dominion over it and to devote it to such lawful uses as will best subserve his private and personal interests and purposes, so long as he does not unduly and unlawfully infringe on the corresponding and equal legal rights of his neighbor in the enjoyment and use of his property in the lawful, usual, customary and reasonable manner, to which such property is adaptable." Further: "When an owner of property puts his property to such use as to violate the legal rights of his neighbor by creating a nuisance which tends to destroy the value of the neighbor's property, endanger his neighbor's health, and detract from the enjoyment of a home, ... We think the border line between lawful and unlawful use has been crossed."

13. 308 Mich. 626, 14 N.W.2d 520 (1944), relief given was that the restaurant owner had to provide someone to see the lines were orderly and did not obstruct any doorways. Also see Annotation in 2 A.L.R.2d 437 (1948) on *Attracting People in such numbers as to obstruct access to the neighboring premises, as Nuisance.*

14. 15 Abb. N.C. (N.Y.) 250 (1884).

It would not be said that the operation of a puppet show or restaurant is a nuisance per se but they became nuisances *per accidens* by the circumstances which resulted from their operation. In neither case did the defendant control or possess any of the people that congregated before their place of business but nonetheless a nuisance was created. It logically follows that it is not necessary that one control or possess that which constitutes the nuisance. In the case at bar the defendant did not own the migratory birds but he did own the pond which initiated the nuisance by attracting the wild geese.[15]

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15. See annotation in 2 A.L.R.2d 437 (1948).