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Recent Cases

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CORPORATIONS—EFFECT OF MERGER OR CONSOLIDATION ON CRIMINAL PROSECUTIONS

United States v. United States Vanadium Corporation[1]

While criminal proceedings were pending against each of them, a Delaware corporation, a West Virginia corporation and a New York corporation merged with their parent corporation and were dissolved. Thereupon the United States District Court for the District of Colorado dismissed the criminal proceedings. On appeal the Circuit Court for the Tenth Circuit affirmed as to the Delaware and West Virginia corporations but reversed as to the New York corporation.

In view of the proposition that, absent statutory exceptions, a corporation upon dissolution ceases to exist for all purposes[2], the court was faced with the sole problem of determining whether there were statutory exceptions which would allow the survival of criminal proceedings pending at the time of dissolution.

A corporation may be held criminally responsible apart from the guilt or innocence of its officers[3]. A criminal prosecution of a natural person abates upon his death, and if the analogy of death and dissolution is extended to this situation along with the tendency of strict statutory construction in respect to criminal prosecutions[4], it would seem that there must be either express statutory criminal provisions or a strong public policy for survival of criminal prosecutions of corporations.

The Delaware "saving" statutes use the terms "suits" in one sentence, "any action, suit or proceeding" in another sentence[5] and "any action or proceeding pending" in still another section[6].

The Tenth Circuit in *United States v. Safeway Stores*,[7] had previously held

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1. 230 F.2d 646 (10th Cir. 1956).
2. Moss v. Kansas City Life Ins. Co., 96 F.2d 108 (8th Cir. 1938); Mackland Inv. Co. v. Ferry, 341 Mo. 493, 108 S.W.2d 21 (1937).
3. United States v. St. Louis Dairy Co., 79 F. Supp. 12 (E.D. Mo. 1948).
4. Alamo Fence Company v. United States, 240 F.2d 179 (5th Cir. 1957); State v. Dougherty, 358 Mo. 734, 216 S.W.2d 467 (1949).
5. DEL. CODE ANN. tit. 8, § 278 (1953).
6. *Id.* at § 261.
7. 140 F.2d 834 (10th Cir. 1944). This case also involved the question of survival of a criminal prosecution of a dissolved Delaware corporation but differed in that indictments had not been returned prior to dissolution.

that "suits", as used in one section of the Delaware statute[8], does not include criminal prosecutions. The Sixth Circuit in *United States v. Line Material Co.*[9] said that even though the words "actions, suits or proceedings" are used in a later sentence in the same section, the dominating term of the section is "suits" which, taken along with the expressed purpose for prolonging the corporation's life, means the section refers to matters civil in nature. Moreover, substitution of defendants is not a characteristic of a criminal prosecution, hence, a civil proceeding alone is referred to in a section providing for substitution in "any action or proceeding pending" against corporations consolidated or merged[10].

However, the Seventh Circuit in *United States v. P. F. Collier & Son Corporation*[11] held that even though "suits" and "actions" may reasonably refer to cases civil in nature, the addition of the term "proceeding" in the Delaware statute presents a combination which is well near inclusive of all forms of litigation. The expression "criminal suit" may be unnatural and awkward[12] but

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8. DEL. CODE ANN. tit. 8, § 278 (1953): "All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed."

9. 202 F.2d 929 (6th Cir. 1953). This case involved the question of a criminal prosecution of a Delaware corporation which, after indictment, was merged and dissolved.

10. DEL. CODE ANN. tit. 8, § 261 (1953). "Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted as if such consolidation or merger had not taken place, or the corporation resulting from or surviving such consolidation or merger may be substituted in its place."

11. 208 F.2d 936, 40 A.L.R.2d 1389 (7th Cir. 1953). In this case the question was survival of a criminal proceeding against a Delaware corporation which dissolved prior to the information being filed.

12. Patterson v. Standard Acc. Ins. Co., 178 Mich. 288, 144 N.W. 491, 51 L.R.A.(N.S.) 583 (1913) See also State *ex rel.* Rothwell & Co. Inc. v. Superior Court for King County, 111 Wash. 63, 189 Pac. 556 (1920), where, in an action for a writ of prohibition, the court held the words "action, suit or proceeding commenced and pending" in the code when liberally construed as required by the code include any proceeding commenced and pending in court which in its proper disposition calls for the decision of questions of fact, and do not merely contemplate law actions. In United States v. Auervach, 68 F. Supp. 776 (S.D. Cal. 1946) it was held that "proceeding" within Price Control Extension Act of 1946 included "criminal prosecution." In Alamo Fence Company v. United States, 240 F.2d 179 (5th Cir. 1957), it was held that the "power to settle the affairs" of the corporation and "for this purpose" to "defend judicial proceedings" in a Texas dissolution statute permitted continuing a criminal prosecution against a dissolved Texas corporation.

"criminal proceeding" is a commonplace characterization. The Federal Rules of Criminal Procedure, it was said[13], often refer to criminal prosecutions as "criminal proceedings".

The court in the principal case concludes, somewhat reluctantly, that it will adhere to its earlier decision in the Safeway case, since the circuits are not in agreement as to the construction of the Delaware sections. The West Virginia dissolution section[14] is not unlike the Delaware sections and received the same construction in the principal case. The Delaware and West Virginia statutes, as they have been construed, permit the continuation of civil remedies upon merger and consolidation but do not permit the continuation of criminal prosecutions.

A United States District Court in New York had held[15] that the words "action or proceedings then pending" in a section of the New York Stock Corporation Law[16] which commences with concern for "rights of creditors" and concludes with a provision for the substitution of the consolidated [new] corporation for any constituent corporation refers to both civil and criminal proceedings. In this conclusion it was aided by a general construction statute which states: ". . . Actions are of two kinds: civil and criminal."[17] The court in the principal case also approves of the argument that since it is the policy of New York to allow the dissolved corporation to pursue its rights and remain suable for its debts and obligations for a certain period, it is also the public purpose of New York to allow the community to vindicate any crime the corporation may have committed prior to dissolution[18].

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13. United States v. P.F. Collier & Son Corporation, supra *note* 11 at 939.

14. WEST VA. CODE § 3095 (1955).

15. United States v. Cigarette Merchandisers Assoc., Inc., 136 F. Supp. 214 (S.D. N.Y. 1955). In this case the issue was survival of a criminal proceeding against a New York corporation which dissolved as a result of consolidation after the indictment was returned.

16. N. Y. STOCK CORPORATION LAW § 90 (1951): "The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending."

17. N.Y. GENERAL CONSTRUCTION LAW § 11-a (1950).

18. Dialectical definitions which discriminate against the community at large should not be indulged. Shayne v. Evening Post Pub. Co., 168 N.Y. 70, 61 N.E. 115 (1901); Grier v. Kansas City, 286 Mo. 523, 228 S.W. 454 (1921).

A distinction may be made between merger and consolidation for some purposes[19], but for the purpose of survival of criminal prosecutions there should be little or no distinction.

In Missouri, as in most jurisdictions, the separate existence of all corporation parties to a merger or consolidation, except the surviving or new corporation, ceases. Generally statutes specifically allow the survival of some remedies after dissolution. Therefore the same basic problem could arise in Missouri and other jurisdictions and would call for statutory construction of the pertinent statutes. There are no known Missouri cases deciding the precise question here involved.

Section 507.100 of the *Missouri Revised Statutes*[20] probably is not applicable because the judgment will go against "the last board of directors, in a representative capacity, although the members of the board were not joined in the action"—a result clearly not relevant to a criminal proceeding. Section 351.565[21] appears to cover remedies upon which no court action or proceedings have been instituted at the time of dissolution and is therefore inapplicable to the situation presented by the principal case. Section 351.450,[22] however, is pertinent and states that "any claim existing or action or proceeding pending by or against any of such [merged or consolidated] corporations may be prosecuted to judgment as if such merger or consolidation had not taken place." In that respect it is not unlike section 261 of the Delaware code. "Proceeding" may be broad enough to include criminal prosecutions; the Delaware statute was so construed

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19. Dodier Realty & Inv. Co. v. St. Louis Nat. Baseball Club, Inc., 361 Mo. 981, 238 S.W.2d 321 (1951).

20. Mo. Rev. Stat. § 507.100 (1949). "4. When a corporation has been sued and served with process or has appeared while in being, and is thereafter dissolved or its charter forfeited, the action shall not be affected thereby and any judgment obtained shall have the effect of a judgment against the last board of directors, in a representative capacity, although the members of the board were not joined in the action."

21. Mo. Rev. Stat. § 351.565 (1949). "The dissolution of a corporation either by the issuance of a certificate of dissolution by the secretary of state, or by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if suit or other proceeding thereon is commenced within two years after the date of such dissolution. Any such suit or proceeding by or against the corporation may be prosecuted or defended by the corporation in this corporate name."

22. Mo. Rev. Stat. § 351.450 (1949). "(5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any of such corporations shall be impaired by such merger or consolidation."

in the *Collier* case, but not in the cases from the Sixth and Tenth Circuits. Both statutes allow the alternative of substituting the new or surviving corporation in place of the dissolved corporation. The *Line Material* case said this substitutionary alternative clearly indicated that the Delaware statute included only civil proceedings. Unlike the Delaware statute, the Missouri statute states that "any claim existing . . . may be prosecuted to judgment." These additional words are commonly used when referring to civil proceedings and would seem to exclude criminal proceedings.

Section 351.450(5) of the *Missouri Statutes* uses other language fairly referable only to civil proceedings. It states, for example, "neither the rights of creditors nor any liens . . . shall be impaired by such merger or consolidation." Again "such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated." There is the further provision that an "action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place" (a provision similar to one in the Delaware statute). On the other hand, almost identical language is found in New York's section 90; yet the New York statute was construed to allow survival of criminal proceedings.

However, neither Delaware nor Missouri has New York's general construction statute construing "action" to include both civil and criminal proceedings.

ROBERT E. LUSK

FEDERAL TAXATION—NET WORTH COMPUTATION UPON A FAMILY GROUP BASIS AS A MEANS OF ASCERTAINING NET INCOME

Lias v. Commissioner of Internal Revenue[1]

The court in the principal case, involving imposition of a fraud penalty, decided that net worth computation was properly applied upon a family group basis as a means to the ascertainment of the taxpayer's net income for income tax purposes where taxpayer so conducted his affairs and those of a group as to make it impossible to identify the individual ownership of assets, where the commissioner established with meticulous detail the computation of the revenue agents and where the testimony of taxpayer was evasive, contradictory and unresponsive.

In a typical net worth prosecution, the government, having concluded that the taxpayer's records are inadequate as a basis of determining income tax liability, attempts to establish an opening net worth or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in

1. 235 F.2d 879 (4th Cir. 1956).

the taxpayer's net worth for each succeeding year during the period under examination by calculating the difference between the adjusted net value of the taxpayer's assets at the beginning and end of the years involved. The taxpayer's non-deductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the government claims the excess represents unreported taxable income. In addition it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of conduct, the likely effect of which would be to mislead or to conceal.[2]

The net worth computation is closely scrutinized by the courts since there is a great deal of danger in its use. The danger seems to lie in placing too great a burden upon the taxpayer and relieving the government of a corresponding burden. The court in the *Holland* case[3] discusses this problem:

> While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.

The above power in the courts to scrutinize evidence offered by the Government would seem a sufficient safeguard to the taxpayer, without destroying the potent weapon permitted by the net worth computation in establishing taxable income from undisclosed sources when all other efforts fail.

The net worth method has some general characteristics that should be noted:

1. Net worth increases must be attributable to taxable income. There must be evidence supporting the inference that defendant's net worth increases are attributable to currently taxable income. Proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. Any other rule would burden the Government with investigating the many possible non-taxable sources of income, each of which is as unlikely as it is difficult to disprove.

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2. Spies v. United States, 317 U.S. 364 (1943).
3. Holland v. United States, 348 U.S. 127, 135 (1954).

2. The burden of proof in a fraud penalty remains on the government. The *Holland* case clearly indicates this by stating[4] "The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. . . . A final element necessary for conviction is willfulness." But there can be an inference of willfulness by conduct.

The net worth system was utilized to corroborate direct proof of specific unreported income in the *Capone*[5] and *Guzik*[6] cases.

3. An assumption in the use of the net worth computation is that most assets are derived from a taxable source. This inference can be rebutted by the taxpayer.

The use of the net worth method of computation was clearly established by the *Johnson* case[7] in which the court approved of the use of the net worth theory to support the inference that the taxpayer, owner of a vast and elaborately concealed network of gambling houses upon which he declared no income, had indeed received unreported income in a substantial amount. The *Holland* case reaffirmed the method. There the Government's opening net worth computation showed defendants with a net worth of $19,152.59 at the beginning of the indictment period. Shortly thereafter defendants purchased a hotel, bar and restaurant. Within three years, during which they reported $31,265.92 in taxable income, their apparent net worth increased by $113,185.32. The *Holland* case decided that the Government is not limited to using the net worth theory in a situation where the taxpayer has no books or where his books are inadequate. It therefore widened the net worth theory as established by the *Johnson* case, and now for the first time, in the *Lias* case, the court applies the theory to the family group situation.

In the *Lias* case the taxing authorities faced an unusual problem in attempting to ascertain the accuracy of the petitioner's income tax returns. During the taxable years involved he received income from five partnerships, in which he and his brother, John, were partners, and from seven corporations of which he and members of his family were record owners. The revenue agents ascertained that the taxpayer carried on many large cash transactions as to which no records were kept by him. He stated repeatedly to the agents that all assets, regardless of whether they were in the names of his wife, brother, mother-in-law or brother-in-law, were his to do with as he saw fit. He was unable to identify the source of funds used to acquire various assets. He refused to furnish a net worth statement. Corporate dividends were not paid in accordance with stock record ownership. Stocks of record were not in the names of the true owners.

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4. *Id.* at 137.
5. Capone v. United States, 51 F.2d 609 (7th Cir. 1931).
6. Guzik v. United States, 54 F.2d 618 (7th Cir. 1931).
7. United States v. Johnson, 319 U.S. 503 (1943).

Bank accounts and assets other than cash were shifted from one name to another. The Tax Court[8] found that "The petitioner so conducted his own affairs and those of the 'Lias Group' as to make it impossible to identify the individual ownership of assets." Faced with this situation the revenue agents made a net worth computation on the Lias family group as a whole. They then allocated to the wife, brother, and other members of the family the amounts of net income in which they had paid income tax. The balance of the net income shown by the net worth computation they allocated to taxpayer. The taxpayer offered no evidence whatsoever to support his claim that the amount was savings of accumulated cash. The revenue agents, despite detailed search, were unable to uncover any evidence of substantial savings of cash. The taxpayer conclusively established to the Commissioner of Internal Revenue, when his returns for the years up to 1941 were under consideration, that he had no funds whatsoever.

The court said the determination of what part of the income of the group is income of the individual is a problem of presumption and proof. The Tax Court found that the assets involved belonged to the taxpayer, so the income attributable to the taxpayer would be that amount of total income remaining after the rest of the family group's income was determined. An examination of the income statements of the individuals constituting the family group would indicate the amount they received. To this point the determination was presumptively correct.[9] The matter was then opened wide before the Tax Court. None of the rest of the family group appeared to claim that their receipts were in excess of that amount taxed to them. Taxpayer offered no documentary proof, while the Government produced much proof. On the basis of this the court in the *Lias* case said that it could not say that the conclusions of the Tax Court were clearly erroneous.

The Tax court in its decision which was affirmed by the *Lias* case stated:[10]

> While the consolidated family net worth technique does not appear to have been resorted to heretofore, we think its use is permissible as embraced within the scope of the net worth technique in civil cases of the character under consideration and involving the complexities and unprecedented circumstances presented. In our opinion no substantial injury results to the petitioner. Extraordinary situations require the adoption of unusual methods to resolve them. Mindful of the pitfalls inherent in any net worth method, we approve the respondent's use of the consolidated net worth method in the instant proceedings.

The Tax Court in the above statement aptly expresses the desirability and necessity for the net worth method of computation, even where applied to a group situation.

RAYMOND M. ASHER

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8. 24 T.C. 280 (1955).
9. Helvering v. National Grocery Co., 304 U.S. 282 (1938).
10. 24 T.C. 280, 311 (1955).

MALICIOUS PROSECUTION—BY ACTION TO COLLECT DEBT KNOWING OF DISCHARGE IN BANKRUPTCY

Gore v. Goreman's Inc.[1]

This was an action to recover damages, actual and punitive for malicious prosecution in attempting to enforce the collection of a judgment debt which had been discharged in bankruptcy. Plaintiff, now a resident of Kansas, owed defendant $463.46 which was brought to a judgment. Plaintiff filed a petition in bankruptcy and this judgment was discharged in that proceeding. Defendant then sought to recover a second judgment on the debt in the justice of peace court of Wyandotte County, Kansas. Under this suit, "garnishee's summons" was issued and plaintiff was harassed and forced to retain counsel to obtain a release. Defendant took all these actions with full knowledge that the judgment debt was discharged in bankruptcy and now defends solely on the ground that a discharge was not an extinguishment of the debt but a mere bar to legal enforcement which is waived unless pleaded. The court rejected this contention, holding that under the Bankruptcy Act, 11 United States Code Annotated section 35, a discharge "released" the debtor completely, and awarded thirty-five dollars actual damage and one thousand dollars punitive damages to plaintiff.

The major elements of malicious prosecution are (1) malice and (2) want of probable cause.[2] Since malice was apparent, the decision rested on the want of probable cause, which in turn rests on the nature and effect of a discharge in bankruptcy.

The courts have uniformly held that a discharge in bankruptcy of the debtor does not satisfy the debt, but merely releases the legal obligation to pay.[3] The moral obligation remains and is sufficient consideration to enforce a new promise to pay.[4] It has often been held that the discharge must be pleaded to raise an effective bar to a subsequent suit.[5] No court but the bankruptcy court is bound to take notice of the discharge unless it is pleaded.[6] It appears, then, that the discharge is a mere bar and not a complete extinguishment of the obligation.

The courts also have held that the bankruptcy court had no jurisdiction to adjudge the effect of a discharge.[7] In the case of *Seaboard Small Loan Co. v.*

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1. 143 F. Supp. 9 (W.D. Mo. 1956).
2. 54 C.J.S. *Malicious Prosecution*, § 1.
3. Donnell v. England, 345 Mo. 726, 137 S.W.2d 471 (1940).
4. Davis v. Burke, 188 S.W.2d 765 (Mo. App. 1945). The court did say that the promise had to be express, positive and unconditional.
5. *In re* Innis, 140 F.2d 479 (7th Cir. 1944), *cert. den.* 322 U.S. 736 (1944); Fidelity Union Casualty Co. v. Hanson, 44 S.W.2d 985 (Tex. App. 1932), *cert. den.* 287 U.S. 599 (1932).
6. Helms v. Holmes, 129 F.2d 263 (4th Cir. 1942), 141 A.L.R. 1367 (1942).
7. Peck v. Jenness, 7 How. (U.S.) 612 (1849); *In Re* Weisberg, 253 Fed. 833 (E.D. Mich. 1918); *In re* De Lauro, 1 F. Supp. 678 (D. Conn. 1932).

Ottinger[8] it was held that a federal district court could issue an injunction against a state suit on a discharged debt in bankruptcy on the grounds of bill of peace. Then, in *Local Loan Co. v. Hunt*,[9] it was decided that the bankruptcy court had ancillary jurisdiction to issue an injunction to preserve the advantages obtained under a discharge. But the court said, "It does not follow, however, that the court was bound to exercise its authority and it probably would not and should not have done so except under unusual circumstances such as exist here."[10] The court left it very unclear as to what constituted "unusual circumstances."[11] It has later been held that possible loss of employment because of bother to the employer through garnishment is such a circumstance. This decision has been criticized[12] and, except for one isolated case,[13] severely limited[14] or distinguished.[15]

Whether the court in the principal case felt that the *Local Loan* case was of any value in reaching its decision is questionable. The court seemed to rely mainly on its own interpretation of the bankruptcy act. The court stated, "If release doesn't mean what it says then a discharge in bankruptcy becomes a mere procedural matter and affords little or no protection to one who has availed himself of its provisions."[16]

While this decision may be in accord with the true aims of congress in passing the Bankruptcy Act, it is none the less a clear departure from previous decisions and should serve as a caveat to those who would attempt to enforce a debt, discharged in bankruptcy, by legal process.

RALPH H. SMITH, JR.

NEGLIGENCE—ACTION BY WIFE AGAINST HUSBAND FOR ANTENUPTIAL PERSONAL TORT

Hamilton v. Fulkerson[1]

Plaintiff filed a suit for damages for personal injuries sustained in an automobile accident as a result of defendant's alleged negligence. Two days later the parties intermarried. On motion by the defendant the circuit court dis-

8. 50 F.2d 856 (4th Cir. 1931), 77 A.L.R. 956 (1931).
9. 292 U.S. 234 (1934).
10. *Supra* note 9.
11. *In re Caldwell*, 33 F. Supp. 631 (N.D. Ga. 1940).
12. Note, *Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court*, 30 VA. L. REV. 531 (1944).
13. *In re* Setzler, 73 F. Supp. 314 (S.D. Cal. 1947).
14. *In re* Barber, 140 F.2d 727 (3d Cir. 1944).
15. *In re* Harris, 28 F. Supp. 487 (E.D. Ill. 1939).
16. 143 F. Supp. 9, 12 (W.D. Mo. 1956).

1. 285 S.W.2d 642 (Mo. 1955), motion for rehearing or to transfer to court en banc denied Jan. 9, 1956.

missed the action, and the plaintiff appealed. In this case of first impression in Missouri it was held that a wife is entitled to maintain an action against her husband for an antenuptial personal tort resulting from his negligence.[2]

The supreme court considered as pertinent to these facts section 451.250, *Missouri Revised Statutes* (1949). It provides:

> ". . . any personal property, including rights in action, belonging to any woman at her marriage . . . shall . . . be and remain her separate property and under her sole control, . . . and any such married woman may, in her own name and without joining her husband, as a party plaintiff institute and maintain any action in any of the courts of this state having jurisdiction, for the recovery of any such personal property, including rights in action as aforesaid, with the same force and effect as if such married woman was a femme sole; . . ."[3]

The court had little difficulty in holding under this statute that the cause of action for the personal tort, belonging to the plaintiff while single, remained as her separate property as a right in action after marriage.[4]

While the rule of common law prohibited suits between spouses, the Married Woman's Acts have allowed the wife to sue in her own name and alone for injuries done to her property or person by a stranger. Where the tortious conduct has been that of the husband, most jurisdictions allow the wife to re-

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2. The right of a wife to sue her husband for a personal tort committed during coverture is closely related, and most, if not all of the arguments for and against the existence of that right apply to the right under discussion. While distinguished, the two rights have not generally been given separate treatment either by the courts or the writers on the subject. Any right in the wife to maintain such an action springs from the interpretation given to the various "Married Woman's Acts", but the majority of American jurisdictions have refused to give such an interpretation and continue to follow the common law rule prohibiting suits between spouses. For a general discussion see; Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461, 471-80 (1922); Farage, *Recovery for Torts Between Spouses*, 10 IND. L.J. 290 (1935); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1041-56 (1930); Anno. in 43 A.L.R.2d 632 (1955).

3. The general provisions of MO. REV. STAT. § 451.250 (1949), were enacted by MO. LAWS 1875, p. 61. An amendment of 1883 added the provisions giving the wife the right to sue in her own name for her personal property and rights in action.

4. Those minority jurisdictions allowing recovery by a wife for personal torts committed by the husband during coverture of course allow recovery for his antenuptial torts. While generally the jurisdictions prohibiting actions between spouses have not distinguished antenuptial torts, at least two other courts to date have reached the same result as the Missouri court: Curtis v. Wilcox, [1948] 2 K.B. 478, [1948] 2 All Eng. 573, *overruled* Gottiffe v. Edelston, [1930] 2 K.B. 378; Carver v. Ferguson, 254 P.2d 44 (Cal. App. 1953) (allowed wife to recover for the antenuptial tort, holding that the cause of action remained her separate property. The California Supreme Court granted hearing, and thereafter the action was dismissed which by Calfornia law nullified the effect of the case as authority).

cover for the injuries to her property but do not for injuries to her person.[5] A growing minority of states, however, have interpreted these Acts as allowing the wife an action against her husband even for the personal tort.[6] Missouri was committed to the more general rule by the decision in *Rogers v. Rogers*,[7] followed in all respects by *Willott v. Willott*.[8] Those cases, however, involved torts committed by the husband upon the wife during coverture and, as the *Willott* case points out, were not concerned with the statute relating to the wife's separate property rights.[9]

The factual distinction between an antenuptial tort and one committed during coverture is obvious enough, but whether or not this distinction should determine the absence or presence of a legal right after the parties intermarry would seem to depend upon the theory behind the common law prohibition of suits between spouses as applied by Missouri courts. At common law the husband and wife were one.[10] This doctrine had the effect not only of prohibiting the wife to sue alone, but there could be no tort committed between spouses who were legally one.[11] An old argument against the wife's right of action, but one which has had an effective revival, is that of public policy.[12]

The reasons usually assigned to support the public policy argument are that such actions between spouses would disturb domestic tranquillity; tend to cause marital discord and divorce; cause fictitious, collusive, and fraudulent claims; cause a rise in liability insurance rates; and promote trivial actions. It has also been contended that a spouse has adequate remedy for civil wrongs inflicted by the other spouse through the criminal and divorce courts.

As the tort in the principal case was committed before coverture there could be no defense of legal identity, and by the holding that the cause of action

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5. PROSSER ON TORTS 672 (2d ed. 1955); 41 C.J.S., *Husband and Wife* § 395. Oregon now allows recovery for intentional torts committed on the wife by the husband, but does not for negligent torts: Apitz v. Dames, 205 Ore. 242, 287 P.2d 585 (1956) (intentional tort); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1956) (negligent tort).

6. PROSSER ON TORTS 673 (2d ed. 1955); Albertsworth, *Recognition of New Interests in the Law of Torts, supra* note 2; Anno. in 43 A.L.R.2d 632 (1955).

7. 265 Mo. 200, 177 S.W. 382 (1915) (action by wife against husband for false imprisonment).

8. 333 Mo. 896, 62 S.W.2d 1084, 89 A.L.R. 114 (1933) (action by wife against husband for injury from husband's negligent operation of automobile).

9. *Id.* at 898. Considering the interpretation given MO. REV. STAT. § 451.250 (1949) in the noted case, we may ask what effect, if any, will it have on the law of the Willott decision. The statute reads: ". . . any personal property, including rights in action, belonging to any woman at her marriage, *or which . . . has grown out of any violation of her personal rights*, shall . . . be and remain her separate property. . . ." (Emphasis added).

10. PROSSER ON TORTS 670 (2d ed. 1955).

11. Phillips v. Barnet, [1876] 1 Q.B.D. 436; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27 (1877).

12. *Ibid;* PROSSER ON TORTS 674 (2d ed. 1955); Rogers v. Rogers, *supra* note 7; Thompson v. Thompson, 218 U.S. 611 (1910).

in the wife remained her separate property after marriage, the procedural difficulty was overcome.[13] The argument that to allow such an action would be contrary to public policy would still apply if valid. The court in its discussion of the *Rogers* and *Willott* cases concluded that this last mentioned argument was the rationale of the present Missouri rule against actions between spouses for personal torts. Similarly, it interpreted the cases of other jurisdictions which apply this prohibition to suits involving antenuptial torts as being based upon the same argument.

But in Missouri a wife can sue her husband's employer for her personal injuries sustained on account of the husband's negligence while acting in the scope of his employment, even though the employer may in turn recover over against the husband.[14] Thus, she can do indirectly what she cannot do directly. The court reasoned that there would be the same considerations of public policy in such an action, and in the words of the court ". . .clearly indicates that . . . there were no considerations of public policy weighty enough to prohibit a wife's suit against her husband for a personal tort even though committed during marriage."[15] The court thus overcame to its own satisfaction the public policy argument in general.

Such aspects of the argument as disruption of the domestic tranquillity would seem to lose their forcefulness in view of the actions allowed between spouses based upon wrongful acts affecting their separate property. There would appear to be little tranquillity left at the time of suit anyhow, except that usually in a negligence case the husband's insurance company is the real party in interest.[16] This is obviously true in the principal case as any real hostility between the spouses as a result of the tort would appear unlikely in view of the later marriage. Here the court concluded that the cost of liability insurance should not determine the presence of a legal right. It also pointed out the fact that because an injured spouse only has recourse to the criminal and divorce courts is but to show that for this type injury there is no remedy.

A question is raised by the present holding concerning the husband's reciprocal right to recover. Considering that the court bases the decision on purely statutory grounds, it would seem that in absence of statute there can be

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13. Mo. REV. STAT. § 451.250 (1949) (allowing wife to sue as femme sole for injury to her separate property).

14. Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S.W.2d 645 (1936); Rosenblum v. Rosenblum, 231 Mo. App. 276, 96 S.W.2d 1082 (1936); *accord*, Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Tallios v. Tallios, 345 Ill. App. 387, 103 N.E.2d 597 (1952).

15. 285 S.W.2d 642, 647 (Mo. 1955).

16. No wife would want to sue her husband for a negligent tort except as a "raid on an insurance company." Newton v. Weber, 119 Misc. 240, 196 N.Y.Supp. 113 (Sup. Ct. 1922).

no similar right in the husband.[17]

While the opinion in the instant case expressly stated that the court gave no opinion on the validity of the law established in the *Rogers* and *Willott* cases,[18] there are indications that inroads may have been made upon that doctrine. The public policy argument upon which those decisions seem to rest was seriously questioned, and the court states that the contrary interpretation of the statute involved would have been "possible and plausible". In speculating on what position the court will take when the situation involved in those cases again comes before it, the pragmatical attitude shown in the principal case may offer some insight. However, the doctrines of stare decisis and judicial legislation may prove formidable, and the possible anomaly concerning the husband's reciprocal right will surely be considered.

LARRY DAVIS

NEGLIGENCE—DEATH OF APARTMENT TENANT AT HANDS OF PAINTER—LIABILITY OF LANDLORD FOR FAILURE TO INVESTIGATE EMPLOYEE

Kendall v. Gore Properties[1]

A corporate landlord, through its manager, hired a painter to paint the interior of decedent's apartment. The painter strangled the decedent. An action for wrongful death was brought by decedent's administratrix who charged that Gore Properties and its manager were negligent in hiring a painter and then assigning and allowing that painter to enter and paint, without supervision or control, after regular working hours, the apartment of decedent who was a single woman living alone in Washington, D.C., without making an investigation, obtaining references or having previous experience with the painter. The Court of Appeals for the District of Columbia reversed the trial court's directed verdict for defendants and held that a prima facie case of negligence had been

17. North Carolina holds that the "Married Woman's Acts" have abrogated the wife's common law disability to sue, but denies a similar right to the husband, holding that his disability still obtained, and removal was a matter for the legislature. Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949); *accord:* Fehr v. General Accident Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944). But see Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931), allowing husband to recover from his wife for her antenuptial tort on basis of statute to the effect that a woman's liability for her torts was not affected by her marriage, and Leach v. Leach, 300 S.W.2d 15 (Ark. 1957) for a novel case in which the husband was held to have a good cause of action against his wife for a *postnuptial* negligent tort on basis of statute removing wife's common law disability to be sued alone.

18. *Supra* notes 7 and 8.

1. 236 F.2d 673 (D.C. Cir. 1956).

made out on the aspect of disregarding the elementary precautions of making an inquiry concerning an employee who is to work in occupied apartments and then allowing that employee to work without supervision in the leased premises of an unprotected tenant.

The theory of the case was not that of "respondeat superior" where a master is generally not liable for the crimes or intentional torts of his servant acting outside the scope of the employment[2], unless the crime by the servant is in itself a violation of a duty assumed by the master toward the person injured, such as a bailment situation[3]. Rather, the theory was that the landlord itself had breached a duty owed by the landlord to the decedent which was the proximate cause of the death and that the criminal act was not an efficient intervening or superseding cause[4].

Ordinarily, there is no general duty to act for the protection of others[5], but often, because of a particular social relationship, the law imposes a duty to refrain from negligent conduct which would facilitate injury to a person or property as a result of a criminal act by a third person[6]. Some of these relationships are common carrier and passenger[7], innkeeper and guest[8], banker and

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2. Rohrmoser v. Household Finance Corp., 231 Mo. App. 1188, 86 S.W. 2d 103 (1935). An employee of the defendant loan corporation went to the female plaintiff's apartment to collect on a loan, then assaulted plaintiff and tore her dress. The court held these acts were not within the scope of employment and the loan corporation was not liable.

3. In Bowles v. Payne, 251 S.W. 101 (Mo. App. 1923), the defendant was the bailee of plaintiff's goods when the goods were stolen by servants of the defendant. The defendant was held liable.

4. Daneschocky v. Sieble, 195 Mo. App. 470, 193 S.W. 966 (1917). A contractor had placed building materials on the sidewalk and out into the street forcing pedestrians to walk around them and into the street. The contractor was held liable for injuries to a pedestrian run down by a reckless motorist who was breaking the speed limit. See Annotation 78 A.L.R. 480 (1932).

5. 2 RESTATEMENT OF TORTS § 314 (1936).

6. Harper and Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934).

7. Baker v. Texas & P. Ry. Co., 158 S.W. 263 (Tex. Civ. App. 1913), 78 A.L.R. 482 (1913). Defendant railway was negligent for allowing white men in colored car on train and that this was the proximate cause of assault on plaintiff's wife by white man; Hines v. Garrett, 131 Va. 125, 108 S.E. 690 (1921), defendant railway was held liable for damages to female plaintiff who was carried past her station then let off to walk back but was assaulted and raped while walking back; but see Sira v. Wabash Ry. Co., 115 Mo. 127, 21 S. W. 905 (1893), where the railway was not liable for similar consequences when it let off female passenger at preceding station to await train which would stop at her station.

8. Overstreet v. Moser, 88 Mo. App. 72 (1901), hotel proprietor held liable for assault on guest by servant.

customer[9] and sheriff and prisoner[10]. However, the landlord was not the guarantor of the safety of its tenants[11] but did have a duty not to hire or retain employees which it knew or should have known, in the exercise of ordinary care, were unworthy of the trust which was placed in them[12].

In the principal case, where the decision was based on the defendant's failure to make a reasonable investigation of the painter or have him employed sufficiently long to merit the trust placed in him, the court said that decedent was entitled to assume the defendants would not assign a person to work after hours in her apartment without supervision when they had failed to exercise any care in ascertaining the trustworthiness of such person.

The decision appears to mark at least some extension to the limits of liability in this particular field. Prior to the principal case it had usually been stated that it was necessary to establish and show both a duty to investigate and also that a reasonable investigation would have disclosed sufficient facts to put the defendant on notice of dangerous, dishonest or criminal propensities in the person employed before liability would be attached[13]. In this case the last

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9. Nelson v. Union Bank, 33 Manitoba L.R. 508, 13 B.R.C. 329 (1923), bank failed to make inquiry if negotiable wheat certificates had been received for seven weeks. They were stolen but bank held liable as loss to holder was occasioned by bank's negligence.

10. Asher v. Cabell, 50 Fed. 818 (5th Cir. 1892). Action for permitting prisoner to be killed by a mob.

11. Pessagno v. Euclid Inv. Co. Inc., 112 F.2d 577 (D.C. Cir. 1940).

12. Priest v. F.W. Woolworth Five & Ten Cent Store, 228 Mo. App. 23, 62 S.W. 2d 926, 23 A.L.R. 2d 390 (1933), where the assistant store manager of defendant injured a customer by bending her backward over a counter while engaged in horseplay. The court reversed a judgment for the plaintiff as this was not within the scope of employment, but stated that the action could have been founded upon employer's failure to exercise ordinary care in employing proper servants; Smothers v. Welch & Company House Furnishing Company, 310 Mo. 144, 274 S.W. 678, 40 A.L.R. 1209 (1925), furniture dealer held not liable for indecent assault upon lady customer by salesman in remote part of building but still owes duty of ordinary care to employ competent and law abiding servants; Hall v. Smathers, 240 N.Y. 486, 148 N.E. 654 (1925), landlord who knowingly kept an incompetent and dangerous janitor was held liable for janitor's assault upon a tenant who rightfully went to the basement to feed some cats kept on the premises; Rhodes v. Warsawsky, 242 Ill. App. 101 (1926); PROSSER, HANDBOOK OF THE LAW OF TORTS, 248, 249; 1 RESTATEMENT OF AGENCY § 213d (1933).

13. Porter v. Thompson, 357 Mo. 31, 206 S.W.2d 509 (1947), where a private watchman employed by defendant shot plaintiff's husband out of jealousy in a restaurant where watchman went during working hours in violation of duties. Court said a showing that the watchman had vicious propensities was not enough. The plaintiff also had to show that the master knew or should have known of these propensities and since there was not substantial evidence on this the demurrer should have been sustained; Arp v. Rogers, 99 S.W.2d 103 (1936); Fleming v. Bronfin, 80 A.2d 915, 104 A.2d 407 (D.C. 1954), defendant's delivery-man assaulted a housewife. The court held the master not liable for negligence in selection as there was no evidence that investigation would have uncovered

step was eliminated and the landlord was still found to be liable.

The case of *Argonne Apartment House Co. v. Garrison*[14] was distinguished on the grounds that in that case there were written references required although unchecked and that the employee had been assigned to work as an electrician's helper under an old and trusted employee. The court labeled as dictum the liability limiting statement in the *Argonne* case that it was not sufficiently shown that investigation would have disclosed sufficient facts to put owner on notice of employee's dishonesty.

The court rationalizes its departure from the more usual limits of liability with a statement to the effect that if the landlord may fail to make even a cursory inquiry and be allowed to excuse itself in its own ignorance then its own recklessness would be exalted. The court believed this would place a premium upon a wilful refusal to make an elementary inquiry into the habits, tendencies and work experience of employees of landlords.

ROBERT E. LUSK

NEGLIGENCE—MANUFACTURER'S LIABILITY FOR INJURIES TO PERSONS WITH PECULIAR SUSCEPTIBILITY TO SUBSTANCE IN PRODUCT

Merrill v. Beaute Vues Corporation[2]

Plaintiff brought an action for injuries to her optic nerve suffered after using defendant's home permanent wave lotion. After the jury had answered interrogatories favorably to the plaintiff, the United States District Court for the Eastern District of Oklahoma, sustained defendant's motion for judgment notwithstanding the verdict on the ground that the evidence was insufficient to sustain the jury's answers to those interrogatories. The substance of the answers was: that the plaintiff was injured as a direct and proximate result of using the defendant's product; that the substance known as ammonium thioglycolate contained in defendant's product was dangerous and injurious to the health of those who use it; and that the defendant had knowledge of the dangerous and injurious

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facts to put master on notice; LaLone v. Smith, 39 Wash.2d 167, 234 P.2d 893 (1951); F. & L. Mfg. Co. Inc. v. Jomark Inc. 134 Misc. 349, 235 N.Y.S. 551 (1929); 1 RESTATEMENT OF AGENCY § 213d (1933); PROSSER, HANDBOOK OF THE LAW OF TORTS, pp. 366, 367.

14. 42 F. 2d 605 (D.C. Cir. 1930). The apartment house owner was not held liable for the theft of jewelry by an employee from a tenant.

1. For an excellent article on the medico-legal aspects of allergies, see Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based Upon Breach of Implied Warranty of Quality*, 24 So. CALIF. L. REV. 221 (1951); see also, Comment, 49 MICH. L. REV. 253 (1951); Anno. 26 A.L.R.2d 963.

2. 235 F.2d 893 (10th Cir. 1956).

qualities of the product. The court of appeals affirmed, holding that the plaintiff did not have a cause of action against the manufacturer in view of proof that her injury was an isolated instance of injury to an unusually susceptible individual, in that over 500,000,000 similar products had been sold with only very rare ill effects. The court also held that a manufacturer who places his product on the market, knowing that some unknown few, not in an identifiable class which could be effectively warned, may suffer allergic reactions or other isolated injuries not common to ordinary or normal persons, need not respond in damages to such persons, saying that warranties do not extend to injuries caused by peculiar idiosyncrasies or physical condition of a user which are not reasonably foreseeable because the rule as to negligence in such cases applies to warranties.

The court in so holding applied what is apparently the majority rule where the injured party suffers injury as a result of his peculiar sensitivity, idiosyncrasy, or allergic condition.[3] Other courts have held that the mere fact that only a small proportion of those who use the product will be affected does not relieve the manufacturer of liability,[4] and the Massachusetts courts and Missouri have held that where the substance contained in the product is somewhat harmful to normal persons, the mere fact that the injured party's physical condition contributes to the extent or seriousness of the injury does not relieve the manufacturer of liability.[5]

The result reached by the majority of courts has been the same whether the action was brought on the theory of breach of implied warranty or on the negligence theory. The cases tried on the theory of breach of implied warranty are apparently based upon the proposition that the implied warranty of fitness

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3. Zager v. F.W. Woolworth, 30 Cal.App.2d 324, 86 P.2d 389 (1939) (freckle cream); Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N.E.2d 801 (1942); Graham v. Jordan Marsh Co., 319 Mass. 690, 76 N.E.2d 404 (1946) (cold cream); Longo v. Tourain Stores, 319 Mass. 727, 66 N.E.2d 792 (1946) (gloves); Payne v. R.H. White Co., 314 Mass. 63, 49 N.E.2d 425 (1943) (dress); Bradt v. Holloway, 242 Mass. 446, 136 N.E. 254 (1922) (scarf); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939) (dress); Hanrahan v. Walgreen Drug Co., 243 N.C. 268, 90 S.E.2d 392 (1955) (hair rinse); Barrett v. S.S. Kresge Co., 144 Pa. Super. 516, 19 A.2d 502 (1941) (dress); Levi v. Colgate-Palmolive Proprietary Ltd., 41 New So. W. St. 48, 58 New So. W. 63 (1941) (bath salts).

4. Proctor & Gamble Mfg. Co. v. Superior Court, 124 Cal.App.2d 157, 268 P.2d 199 (1954) (dictum); Bianchi v. Denholm & McKay Co., 312 Mass. 469, 19 N.E.2d 967, 121 A.L.R. 460 (1939) (face powder); Brown v. Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913) (coat) action against jobber; Schilling v. Roux Distributing Co., 240 Minn. 71, 59 N.W.2d 907 (1953) (hair dye); Reynolds v. Sun Ray Drug Co., 135 N.J.L. 475, 52 A.2d 666 (1947) (lipstick); Zirpola v. Adam Hat Stores, 122 N.J.L. 21, 4 A.2d 73 (1939) (hat).

5. Evinger v. Thompson, 364 Mo. 658, 265 S.W.2d 726 (1954); Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N.E. 631 (1934).

extends only to normal use by a normal person.[6] Those tried on the theory of negligence turn on the actual knowledge of the manufacturer that there is a risk of injury to the user.[7] While some courts have held that knowledge that the substance may be harmful to "some" persons, even though the number be small, is sufficient,[8] the majority have emphasized the "dangerous character" of the substance and held that if the manufactured article was incapable of injuring the ordinary, normal person, the manufacturer or jobber owes no duty to warn the abnormally susceptible user.[9]

The question of whether the plaintiff is an ususually susceptible person, and thus without remedy, has also received varying treatment. While some courts have held that the presence of an allergy or unusual susceptibility is a matter of defense only and that in the absence of proof to the contrary the jury may consider him normal,[10] probably a greater number of courts have held that the plaintiff must show that he is a normal person in order to bring himself within the class of people to whom the warranty or duty to warn extends.[11]

The cases in Missouri involving allergy or peculiar susceptibility are somewhat in conflict. The present status of the law in regard to cases brought on the theory of breach of implied warranty seems to be in line with the case herein noted and the majority rule, while the cases tried on the negligence theory would seem to be more in line with the minority. A short survey of the Missouri cases is here presented in order that the reader may make his own analysis of them.[12]

Marra v. Jones Store Company[13] involved an action by the purchaser of a blouse against the retailer for dermatitis allegedly contracted from some

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6. Worley v. Proctor & Gamble, 253 S.W.2d 532 (Mo. App. 1952); Ross v. Porteous, Mitchell & Braun Co., *supra* note 3, and cases generally in note 3, *supra*.

7. Briggs v. National Industries, 92 Cal.App.2d 542, 207 P.2d 110 (1949); Gould v. Slater Woolen Co., 147 Mass. 315, 17 N.E. 531 (1888).

8. Proctor & Gamble Mfg. Co. v. Superior Court, *supra* note 4; Brown v. Sehler Co., *supra* note 4.

9. Levi v. Colgate-Palmolive Proprietary Ltd., 41 New So. W. St. 48, 58 New So. W. 63 (1941); Briggs v. National Industries, *supra* note 7.

10. Marra v. Jones Store Co., 170 S.W.2d 441 (Mo. App. 1943); Payne v. R.H. White Co., 314 Mass. 63, 49 N.E.2d 425 (1943); Zager v. F.W. Woolworth Co., 30 Cal.App.2d 324, 86 P.2d 389 (1939).

11. Worley v. Proctor & Gamble, 253 S.W.2d 532 (Mo. App. 1952); Flynn v. Bedell Co., 242 Mass. 450, 136 N.E. 252 (1922); Graham v. Jordan Marsh Co., 319 Mass. 690, 76 N.E.2d 404 (1946); Longo v. Touraine Stores, 319 Mass. 727, 66 N.E.2d 792 (1946); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939); Cleary v. John M. Maris Co., 173 Misc. 954, 19 N.Y.S.2d 38 (Sup. Ct. 1940).

12. On implied warranties in Missouri in general, see Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri*, 10 Mo. L. Rev. 147 (1945). This article contains an interesting analysis of the cases cited in notes 13 and 14, *infra*.

13. 170 S.W.2d 441 (Mo. App. 1943).

poisonous substance in the blouse. The case was tried on a breach of warranty theory and the Kansas City Court of Appeals affirmed recovery by the plaintiff although there was no direct evidence to prove any poisonous or irritating substance was contained in the blouse at the time of the sale. The court held that the seller's want of actual knowledge of the injurious substance was immaterial even though it could not have been discovered by reasonable inspection, but indicated that proof of allergy might have been a defense if shown by the defendant.

State ex rel. *Jones Store Co. v. Shain*[14] quashed the opinion in the *Marra* case on the ground that it was in conflict with the previous supreme court decisions holding that a retailer was liable on the breach of warranty theory only when he knew that the purchaser was buying for a particular use, otherwise the rule of caveat emptor applied unless the defect was discoverable by reasonable inspection. While this holding applied only as to retailers, the language and reasoning in the *Marra* opinion might still be of value in an action against a manufacturer.

The case of *Worley v. Procter & Gamble Mfg. Co.*[15] is the most recent Missouri decision involving breach of warranty. In that case the St. Louis Court of Appeals held that the scope of the warranty in question was limited to absence of ingredients injurious to the skin of a normal person using detergent in a normal manner, and that the burden was on the consumer to show that she was such a person and that it was injurous to her skin. This holding is directly in line with the majority rule.

In the negligence field only two cases have been found, neither of which involve a suit against a manufacturer. However, since the underlying principles are still applicable they are worthy of noting. The case of *Arnold v. May Dept. Stores Co.*[16] involved an action by a patron against the operator of a beauty shop for dermatitis allegedly caused by application of a hair dye to which she was sensitized or allergic. The plaintiff had previously suffered injury from application of a hair dye some ten years earlier and she informed the operator of that fact. The operator applied the solution without testing or further investigation and the plaintiff suffered serious injury. The court held that the operator knew, or should have known, of her condition and could have foreseen the possible effects, therefore, negligence was properly proved. On these facts, the case is not contra to the majority rule since the defendant had notice that this particular plaintiff was susceptible.

The case of *Evinger v. Thompson*[17] is somewhat more in point although it is an action by an employee against his employer under the Federal Employer's

14. State *ex rel.* Jones Store v. Shain, 352 Mo. 630, 179 S.W.2d 19 (1944).
15. *Supra* note 6.
16. Arnold v. May Dept. Stores Co., 337 Mo. 727, 85 S.W.2d 748 (1935).
17. 364 Mo. 658, 265 S.W.2d 726 (1954).

Liability Act. Here the plaintiff contracted dermatitis from working with a rust inhibitor containing a chrome compound. The court held that while it was not common knowledge that the rust inhibitor contained harmful chemicals, that it was a question for the jury whether the employer had knowledge, actual or constructive, of its harmful character, although the burden of proof was on the plaintiff. The court further held that the question of allergy was also for the jury and that if it is shown that a considerable number may be affected by the chemical in the inhibitor, recovery would not be denied because of the plaintiff's peculiar susceptibility. On the latter point the court seems to be nearer the minority view by recognizing that even though the substance might not be injurious to the "normal" person, there may still be liability if "some" persons are liable to suffer injury.

While the case noted herein is sound in light of present legal authority, medical advances in regard to allergies are quite likely to increase the volume of litigation in this field which in turn may lead to a change in the attitude of the courts. In view of the present uncertainty in the Missouri decisions, it is submitted that, if presented in a proper case, the Missouri Supreme Court still has a freedom of choice as to which rule it will follow, the minority rule toward stricter liability, or the present majority rule as represented by this case.

DWIGHT L. LARISON

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND—STATUTE OF LIMITATIONS ON ACTION FOR BREACH OF RESTRICTION

McLaughlin v. Neiger[1]

By instruments dated 1921 and 1934, the several lots in a subdivision were effectively restricted so that no business could be carried on in any building. It was further provided that the restrictions would constitute a binding contract among all lot owners, their successors in interest, and any persons holding under either of them. The instruments also contained a provision that the restrictions would constitute covenants attached to and running with the land.

This action was brought by the owner of one of the lots to enforce, by way of injunction, the restrictive covenant as against a nursery school operated for profit on one of the restricted lots. Plaintiffs alleged they learned of the breach in 1952.

In the trial court, the defendants moved to dismiss on the grounds that the action was barred by the five year statute of limitations on personal actions,

1. 286 S.W.2d 380 (Mo. App. 1956).

section 516.120, *Missouri Revised Statutes* (1949).[2] This claim was based on an allegation of open and continuous operation of the nursery school since 1946. The defendant's theory was that the plaintiffs were here attempting to enforce a contract right.

Plaintiffs, on the other hand, claimed that this action was controlled by one of two ten year statutes of limitation, section 516.010, *Missouri Revised Statutes* (1949), the ten year bar on real actions, or section 516.110, *Missouri Revised Statutes* (1949), the ten year bar on personal actions,[3] apparently basing their strongest claim on the assertion that the restrictive covenant created a property right in the lot owners which could be included under "lands, tenements, or hereditaments" as covered by section 516.010.

The trial court granted the defendants' motion to dismiss on the ground, among others, that the five year statute of limitations on personal actions, section 516.120, was applicable. The plaintiffs' appeal to the Supreme Court of Missouri was transferred to the St. Louis Court of Appeals, which reversed and remanded the case. The court assumed, for the purposes of the appeal, that there had been open and continuous violation of the restrictive covenant since 1946. The court decided that section 516.010, the ten year statute on real actions, was applicable on the following line of reasoning:

First, the court stated that restrictive covenants of this type run with the land, thus creating a duty of the holder of the land to conform to the covenant, although he did not personally sign it.

Next, the court held that valid restrictive covenants create an easement appurtenant to the land, and therefore the owner of each lot had an easement in each and all of the lots affected by the restrictions.

The court concluded by finding that this easement appurtenant to the land constituted an hereditament. This was arrived at by finding that these easements had two characteristics of hereditaments. First, this was a right growing out of, or appurtenant to real property, and second, it could be inherited along with the land. Therefore, since this was an hereditament which plaintiff was attempting to recover, the action was governed by section 516.010, the ten year statute of limitations on real actions.

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2. Section 516.120 provides: "Within five years: (1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; . . ."

3. Section 516.010 provides: "No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person . . . unless it appears that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action." Section 516.110 provides: "Within ten years: . . . (3) Actions for relief, not herein otherwise provided for."

Under this finding the court did not discuss whether or not the ten year statute of limitations on personal actions, section 516.110, was applicable.

This is apparently a case of first impression in Missouri. There have been several cases where violations of restrictive covenants have been considered[4] but any lapse of time before suit was usually considered in connection with whether or not the plaintiff was guilty of laches, waiver, or abandonment.[5] Seemingly, there was no argument of laches in this case, probably because plaintiff did not actually know of the violations until long after their beginning. Of course, it is well settled in Missouri that the statutes of limitation apply to equitable actions as well as legal actions.[6]

It is difficult to compare decisions of other jurisdictions in a statutory interpretation of this type. However, almost all decisions on cases of this type were decided on the question of laches, waiver, or abandonment.[7] One Oregon case[8] was found where a building line restriction was held to be an easement subject to the state's real property statute of limitations (which was similar to Missouri's).

The St. Louis Court of Appeals' reasoning seems to be supported by authority both in Missouri and other jurisdictions. The weight of authority seems to hold that restrictive covenants of this type run with the land, even without an express declaration to that effect (which was contained in this covenant).[9] Applying any of the tests used by text writers and courts, (especially the time-honored criterion of "intention") there seems to be little doubt that this covenant restriction runs with the land.

As to the court's declaration that the restrictive covenant created an easement in all of the lots, there is a contrary view in some jurisdictions.[10] These decisions hold that restrictive covenants of this type merely create contract rights in the parties. However, the more widely followed rule and the rule as laid down in

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4. Hall v. Koehler, 347 Mo. 658, 148 S.W.2d 489 (1941); Pierce v. St. Louis Union Trust Co., 311 Mo. 262, 278 S.W. 398 (1925); Miller v. Klein, 177 Mo. App. 557, 160 S.W. 562 (1913).

5. As an example, if a property owner knowingly sits by, does nothing, and allows another property owner to erect a $100,000 business building on land restricted to residential buildings, he forthwith would be estopped from asserting his rights under the restriction.

6. Campbell v. Webb, 363 Mo. 1192, 258 S.W.2d 595 (1953); Branner v. Klaber, 330 Mo. 306, 49 S.W.2d 169 (1932).

7. See generally, Moore v. Adams, 200 Ark. 810, 141 S.W.2d 46 (1940); Hoffman v. Schwan, 312 Ill. App. 160, 38 N.E.2d 53 (1941).

8. De Martini v. Hayhurst, 154 Ore. 663, 62 P.2d 1 (1936).

9. Cook v. Tide Water Associated Oil Co., 281 S.W.2d 415 (Mo. 1955); 26 C.J.S. *Deeds* § 167 (1).

10. 14 AM. JUR. *Covenants, Conditions and Restrictions* § 193.

numerous Missouri cases is that the interests actually created are easements, *i.e.* property rights.[11]

Once the court found that an easement was created, it seems clear that there would be little difficulty in finding that the plaintiff was attempting to recover an hereditament. The cases and authorities cited by the court in the opinion to support this contention show the abundance of authority to the effect that easements appurtenant to real property and capable of being inherited are hereditaments.[12]

Therefore, it appears that the court was clearly right in determining that restrictive covenants of the type in the principal case are controlled by the real property statute of limitations, section 516.010. Even though it is now settled that a ten year statute of limitations applies, it is probable that most cases of this type in the future will continue to be argued on a laches, waiver, or abandonment issue, in order to reduce substantially the ten year period.

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11. The leading Missouri case is Peters v. Buckner, 288 Mo. 618, 232 S.W. 1024 (1921). See also, State *ex rel.* Britton v. Mulloy, 332 Mo. 1107, 61 S.W.2d 741 (1933); Matthews v. First Christian Church of St. Louis, 355 Mo. 627, 197 S.W.2d 617 (1946); 14 AM. JUR. *Covenants, Conditions and Restrictions* § 193. These easements are sometimes called negative easements, negative equitable easements, or servitudes.

12. Also see Hickey v. Danna, 238 Mo. App. 839, 187 S.W.2d 764 (1945).