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Recent Cases

CONTRACTS—OPTION TO PURCHASE—RIGHT TO CONDEMNATION AWARD

*Brooks v. Yawkey*¹

In recent case the defendant gave plaintiff's decedent an option for 90 days to purchase certain Ontario realty, plus an agreement to extend the option for an additional six months for \$16,000 more. During the original 90 days, and before the option had been exercised, 85 acres, being the most valuable part of the land, was expropriated by the Ontario Power Commission. Defendant notified plaintiff's decedent that the option was revoked, but plaintiff's decedent tendered \$16,000 within the 90 day period, and within the six month period attempted to exercise the option and demand the remainder of the land plus the condemnation damages.

The Federal District Court,² applying New York law by agreement, held an option alone creates no compensable interest in the land, and plaintiff's decedent could not exercise the option because the parties contemplated the continued existence of this land and when it was expropriated the contract to result from the exercise of the option became impossible of performance, thus excusing defendant from liability. This decision was affirmed in the case being noted, on the same grounds.

The court uses as analogies to support its holding, cases where there was an option to purchase and the premises were destroyed by fire.³ In these cases the optionee was not allowed to exercise the option and claim an abatement in the purchase price to the extent the premises were damaged.

It is not clear in these cases whether the theory used is impossibility of performance of the intended contract, an improper and hence ineffective acceptance, or a lack of interest in the land on the part of the optionee which prevents the doctrine of equitable conversion from applying. However, all these cases agree that the option may be exercised upon full payment of the purchase price.

Similarly, where the option is to purchase and the buildings are burned but insured, the optionee is refused the right to exercise the option and, upon payment of the full purchase price, take the damaged premises and the insurance money that the optionor-insured received.⁴

1. 200 F. 2d 663 (1st Cir. 1953).

2. *Goodman v. Yawkey*, 101 F. Supp. 769 (D. Mass. 1952).

3. *Caldwell v. Frazier*, 65 Kan. 24, 68 Pac. 1076 (1902); *Strong v. Moore*, 105 Ore. 12, 207 Pac. 179 (1922); *Gamble v. Garlock*, 116 Minn. 59, 133 N.W. 175 (1911); *Clark v. Burr*, 85 Wis. 649, 55 N.W. 401 (1893).

4. *Trumbull v. Bombard*, 171 App. 700, 157 N. Y. Supp. 794 (3rd Dep't. 1916); *Gilbert v. Port*, 28 Ohio St. 276 (1875); *Edwards v. West*, L.R. 7 Ch. Div. 858, 26 Week. Rep. 507, 30 L.T.N.S. 481, 47 L.J.Ch.N.S. 463 (1878). But see, *Dolan v. Spencer*, 92 Colo. 389, 21 P. 2d 411 (1933).

In the case of executory contracts for the purchase of realty and the premises are destroyed by fire, the courts are not in agreement. The English courts,⁵ and a minority of American courts,⁶ hold that the risk of loss is on the vendee, that the insurance is a personal indemnity contract, and that the vendee is not entitled to the proceeds. If he takes the property, it is upon payment of the full purchase price.

The more modern American rule⁷ in the above situation gives the vendee the right to any insurance on the premises. The theory used is that the vendor is "trustee" of the proceeds of the insurance policy for the vendee. The better reason, and the one coming more to be used, is that this is the usual meaning attached to the transaction in the market place and the courts should recognize this business usage.⁸

But to return to the option. Where the optioner receives the fire insurance money, then if the option is coupled with a right, duty, or other interest, the courts seem to indicate that the optionee may obtain this insurance money when exercising the option.⁹

Turning to the situation where there is an option to purchase land and the land is condemned before the option is exercised, the use of the theory of impossibility of performance and consequent excuse of the optionor, in the case being noted, is the only instance found of a court so approaching the subject.

Most courts either grant or deny the optionee the right to exercise his option or claim part of the condemnation award on the basis of whether the option is an interest

5. *Rayner v. Preston*, L.R. 18 Ch. Div. 1 (1881); *West of England Fire Ins. Co. v. Isaacs*, 1 Q.B. 226 (1897); *Phoenix Assur. Co. v. Spooner*, 2 K.B. 753, 74 L.J.K.B. 792 (1905); now changed by statute, St. 15 Geo. V., c. 20, § 47 (1925).

6. *King v. Preston*, 11 La. Ann. 95 (1856); *Plimpton v. Farmer's Mut. Ins. Co.*, 43 Vt. 497, 5 Am. Rep. 297 (1871); *Kortlander v. Elston*, 52 Fed. 180 (6th Cir. 1892) (personal property); *White v. Gilman*, 138 Cal. 375, 71 Pac. 436 (1903).

7. *Standard Oil Co. v. Dye*, 223 Mo. App. 926, 20 S.W. 2d 946 (1929); *Gillingham v. Phelps*, 5 Wash. 2d 410, 105 P. 2d 825 (1940) (personal property); *Kaufman v. All Persons*, 16 Cal. App. 388, 117 Pac. 586 (1911); *Brady v. Welsh*, 200 Iowa 44, 204 N.W. 235 (1925); *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425 (1863); *Russell v. Elliott*, 45 S. D. 184, 186 N.W. 824 (1922).

8. VANCE ON INSURANCE, § 131, p. 777 at 781 (3rd Ed. 1951), and cases cited.

9. *Carnation Lumber & Shingle Co. v. Tolt Land Co.*, 103 Wash. 633, 175 Pac. 331 (1918) (option plus provisions to insure with payment to lessor as his interest should appear); *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L.R.A. 150 (1895) (lessee with an option and agreement to maintain the building, held entitled to the insurance when option exercised); *Peoples St. Ry v. Spencer*, 156 Pa. 85, 36 Am. St. Rep. 22, 27 Atl. 113 (1893) (lessee with an option and insurance kept up by lessee although payable to lessor, held entitled to the insurance when option exercised); *Reynard v. Arnold*, L.R. 10 Ch. 386, 23 Week. Rep. 804 (1875) (option and lease with a provision for lessee to insure and lessor insured and thereby destroyed the value of lessee's insurance; lessee entitled to the insurance when option exercised); see also, *Dolan v. Spencer*, *supra*, note 4.

in land,¹⁰ with the resulting application of the doctrine of equitable conversion determining the rights of the parties. Whether an option is or is not an interest in land is discussed fully elsewhere,¹¹ and will not be covered here.

The court in *Nicholson v. Weaver*¹² used the ideas of equitable assignment to give the optionee a right to that part of the award which is the difference between the contract price and the value as fixed in the condemnation proceedings. The theory the court proceeds on is that the taking of the land does not abrogate the claims of persons who have valid rights against the land, but rather, transfers those claims from the land to the award. This idea has been given support by several courts,¹³ although not with reference to options.

Only one other case found has actually held that the optionee has the right to claim an interest in the award. The Massachusetts court,¹⁴ by way of dictum, said that the optionee has no interest in the land which entitles him to a share of the award, but that the optionee does have a right to *buy* the award which in equity represents the land. This makes a two step procedure necessary whereas *Nicholson v. Weaver* requires only one action to accomplish the same results.

With regard to the impossibility theory used in the noted case, it might well be said that in the case of executory contracts for the sale of land, most courts allow the vendee to obtain the condemnation award, less the purchase price, when the land is taken between the date of contract and the time legal title is transferred.¹⁵ Im-

10. Option not an interest in the land in condemnation proceedings. *East Bay M.U. Dist. v. Kieffer*, 99 Cal. App. 240, 278 Pac. 476 (1929); *People v. Ocean Shore R.R.*, 90 App. 2d 464, 203 P. 2d 579 (1949); *Cornell-Andrews Smelting Co. v. Boston & P. R.R.*, 209 Mass. 298, 95 N.E. 887 (1911); *In re Waterfront on Upper New York Bay*, 246 N.Y. 1, 157 N.E. 911 (1927), *modifies* 219 App. Div. 387, 220 N.Y. Supp. 23 (2d Dep't. 1927) (allowing optionee-lessee his interest, because the provision in the lease denied the optionee-lessee any interest in the condemnation award); *Taggart Paper Co. v. State*, 187 App. Div. 843, 176 N.Y. Supp. 97 (3d Dep't. 1919); *U.S. v. Four Parcels of Land*, 20 F. Supp. 306 (S.D. N.Y. 1937); *Cf. Brass v. Sheffield*, 49 Kan. 702, 31 Pac. 306 (1892) (judgment creditor trying to reach optionee's interest, held, no interest); *Farmer v. Littlefield*, 335 Mo. 243, 195 S.W. 2d 657 (1946) (option not an interest in land in a partition suit). Option as an interest in the land in condemnation proceedings: 23 Tracts of Land v. U.S., 177 F. 2d 967 (6th Cir. 1949); *Cullen & Vaughn Co. v. Bender Co.*, 122 Ohio St. 82, 170 N.E. 633 (1930); *Phoenixville, V.F. & S. Electric Co.'s Appeal*, 70 Pa. Super Ct. 391 (1918) (option acknowledged); *Lester v. Hutson*, 184 S.W. 268 (Tex. Civ. App. 1918): See also, *Telford v. Frost*, 76 Wis. 172, 44 N.W. 835 (1890) (question of surrender of an option as an interest in land); *North Pa. R.R. v. Davis & Leeds*, 26 Pa. 238 Pa. 238 (1856) (option to renew a lease as compensable). The theory of relation back has been used to give the optionee an interest in the land. 23 Tracts of Land v. U.S., *supra*; *Kerr v. Day*, 14 Pa. 112 (1850).

11. See, *Jones, Option to Purchase as an Interest in Land*, 10 MONT. L. REV. 70 (1949).

12. 194 F. 2d 804 (7th Cir. 1952).

13. *U.S. v. Dunnington*, 146 U.S. 338 13 Sup. Ct. 79, 36 L.Ed. 996 (1892); *Yellow Cab Co. v. Howard*, 243 Ill. App. 263 (1927); *Phillips v. U.S.*, 151 F. 2d 645 (7th Cir. 1945); *Eagle Lake Improvement Co. v. U.S.*, 160 F. 2d 182 (5th Cir. 1947).

14. *Cornell-Andrews Smelting Co. v. Boston & P. R.R.*, *supra* note 10.

15. *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201 (1903); *Bailey v. Osborn*, 80 N.J.L. 333, 78 Atl. 9 (1910); *Atlanta v. Callaway*, 137 Ga. 495, 73 S.E. 736 (1912); *Reife v. Osmer*, 252 N.Y. 320, 169 N.E. 399, 67 A.L.R. 1101 (1929); *Salvatore v. Fuscellaro*, 53 R.I. 271, 166 Atl. 26 (1933); also see 67 A.L.R. 1101.

possibility of performance is equally applicable in this situation. However, New York has held that the executory contract acts as an assignment of the award to the vendee, as equitable owner.¹⁶

It might be well to note that one court which allows the optionee to exercise the option after the land has been condemned, on the theory that the option is an interest in the land, has indicated that a distinction might be drawn between an option alone and an option coupled with some other interest.¹⁷ Such a distinction would be in accord with the insurance cases which allow the optionee to claim the insurance only if the option is coupled with an additional interest. On this basis the decision of the court would appear proper.

However, whether such a distinction is valid in either case is questionable. The reason that seems to be in the background of all the cases is that to allow the optionee to exercise the option subsequent to condemnation, or claim a share of the award, would be unreasonable and unfair, because it would allow the optionee to wait until the award was made before he exercised his option, and he would do so only if it were profitable, while in no way being bound prior to such election.¹⁸

The proper answer to this is that it is not unreasonable or unfair. This is the very essence of the option. The purpose in taking an option is that it will be exercised only if it is profitable. The only difference here is that the optionee can positively determine, in advance, the profit he will make.

Likewise, the optionor is not being injured. He has agreed upon a price which he believes reasonable as evidenced by the giving of the option. The optionee has a chance to buy at this price prior to condemnation. The optionor should be equally bound by the option after condemnation.

LYNN EWING, JR.

FEDERAL INCOME TAXATION—INFORMATION AT SOURCE—LIMITATION ON DUTY TO REPORT PAYMENTS TO ANOTHER IN EXCESS OF \$600 AS REQUIRED BY SECTION 147(a) OF INTERNAL REVENUE CODE.

*United States v. Carroll*¹

This case brings to public attention Section 147(a) of the Internal Revenue Code², of which the court says:³

"Section 147 has been the law since 1916. It has never been construed by an appellate court.

"It was admitted that only one other case, and that of a minor

16. *Reife v. Osmer*, *supra* note 15. This matter is now covered in New York by statute. New York Real Property Law, Sec. 240-a.

17. *Cullen & Vaughn Co. v. Bender Co.*, *supra* note 10.

18. *In re Waterfront on Upper New York Bay*, *supra* note 10.

1. 117 F. Supp. 209 (W.D. Mo. 1945).

2. 26 U.S.C.A., § 147(a).

3. 117 F. Supp. 209, 213 (W.D. Mo. 1954).

nature, had been brought under its provisions.⁴ In fact, it has been so universally disregarded by both the taxpayer and the tax collectors, that great numbers of persons did not know of its existence. That of course, does not justify its violation or affect the guilt of one who violates it."

Defendant was indicted, charged with violating Section 147(a) for the years 1948-1949-1950. Specifically, he was charged with having failed to report to the Tax Commissioner 45 payments in excess of \$600 each made to designated persons during the year 1948, 36 such payments made in 1949, and 20 such payments made in 1950. Section 147(a) provides that:

"All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits, and income (other than payments described in section 148 (a) or 149)⁵ of \$600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulation hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and *the name and address of the recipient of such payment.*"

The applicable penalty for violating the above quoted section of the Internal Revenue Code is set forth in Section 145(a):

4. But see *United States v. Carroll*, 345 U.S. 457 (1953) wherein the same defendant as in the principal case was indicted on 101 counts of having willfully failed to make an individual return under Section 147(a). Treasury Reg. 118, § 39.147-1 (Old Reg. 111, § 29.147-1 as amended T. D. 5313, 1944 Cum Bull. 308, T. D. 5687, 1949-1 Cum. Bull. 9) provides for (a) an "Information Return", Form 1099, to be prepared and filed for each payee, and (b) an "Annual Information Return", Form 1096, which latter form is, in effect, a summarization of the information on the accompanying Forms 1099. Form 1099 contains no formal declaration by the payor nor any signature by him. Form 1096 is signed and verified by the payor-reporter. *Held*, in an opinion by Mr. Justice Douglas, that to multiply the crimes by the number of Forms 1099 required to be filed is to revise the regulatory scheme, and that the purpose of Section 145(a) is fulfilled when the sanction is applied only to a failure to file Form 1096. Indictment dismissed.

5. 26 U.S.C.A., § 148 (a): "INFORMATION BY CORPORATIONS.— Dividend payments.—Every corporation shall, when required by the Commissioner, render a correct return, duly verified under oath, of its payments of dividends, stating the name and address of each shareholder, the number of shares owned by him, and the amount of dividends paid to him."

26 U.S.C.A., § 149: "RETURNS OF BROKERS. Every person doing business as a broker shall, when required by the Commissioner, render a correct return duly verified under oath, under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, showing the names of customers for whom such person has transacted any business, with such details as to the profits, losses, or other information which the Commissioner may require, as to each of such customers, as will enable the Commissioner to determine whether all income tax due on profits or gains of such customers has been paid."

"Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, *who willfully fails* to pay such estimated tax or tax make such return on declaration, keep such records or *supply such information*, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution." (Italics added).

A number of important regulations have been issued by the Treasury Department⁶ relative to Section 147(a), but such regulation, other than that one⁷ which

6. In general, Reg. 118, § 39.147-1 (Old Reg. 111, § 29.147-1) establishes the time and place for filing the return, and prescribes the form to use. Reg. 118, § 39.147-2 (Old Reg. 111, § 29.147-2) provides for reporting under this Section that portion of wages paid an employee which is not subject to withholding, in case total wages to said employee exceed \$600. Reg. 118, § 39.147-3 (Old Reg. 111, § 29.147-3) establishes the following exemptions wherein no payments need be reported, even though the amount paid exceeds \$600:

- (1) Payments by a broker to his customers;
- (2) Payments of any type made to corporations;
- (3) Bills paid for merchandise, telegrams, telephone, freight, storage, and similar charges;
- (4) Payments of rent made to real estate agents (but the agent must report payments to the landlord if the amount paid during the calendar year was \$600 or more);
- (5) Payments representing earned income for services rendered without the United States made to a citizen of the United States, if it is reasonable to believe that such amounts will be excluded from gross income under the provisions of Section 116(a) and the regulations thereunder;
- (6) Salaries and profits paid or distributed by a partnership to the individual partners;
- (7) Payments of commissions made by fire insurance companies, or other companies insuring property, to general agent, except when specifically directed by the Commissioner to be filed;
- (8) Payments of income upon which income tax has been withheld at the source and reported on Forms 1012, 1013, and 1042, or Forms 941, W-2, and W-3;
- (9) Amounts paid by the United States to persons in its service (civil or armed forces) as an allowance for traveling expenses, including an allowance for meals and lodgings, as, for example, a per diem allowance in lieu of subsistence, and amounts paid as reimbursements for traveling expenses;
- (10) Payments of interest on obligations of the United States or any agency or instrumentality thereof;
- (11) Payments of interest on corporate bonds, except in the case of interest on bonds, mortgages, deeds of trust, or other similar obligations issued before January 1, 1934, and containing a tax-free covenant;
- (12) Payments made to employees for services performed in Puerto Rico.

Also, certain returns required under other Sections of the Code are exempted. Reg. 118, § 39.147-4 (Old Reg. 111, § 29.147-4) provides that payments of interest on bonds, need not be reported under this Section if ownership certificates have been filed as required by other Sections of the Code. Reg. 118, § 39.147-5 (Old Reg. 111, § 29.147-5) exempts payments made to non-residents on the basis that the returns filed by withholding agents on Form 1042 shall constitute and be treated as returns of

establishes the time and place for filing the report required, were not material in this case, nor was there at issue a failure to pay any tax. The government's case against Carroll rested squarely on the allegation that defendant failed to make the reports required by Section 147(a) for the years 1948-1949-1950 and was, therefore, subject to criminal prosecution.

Carroll was a partner in two establishments in St. Louis which, in gambler's parlance, would be called "bookie joints". Operations involved taking bets on horse races and other sporting events, fixing odds, determining results, and paying off successful bettors. Some of this "business" was carried on by bettors personally visiting the establishments, but through the use of telephones and telegrams, the scope of operations was nation-wide and ran into millions of dollars annually, requiring the attention of 30 to 40 employees in one of the establishments alone⁸. All transactions were conducted on a daily basis, and payoffs were made daily. The books and records of the establishments were destroyed at the end of each month to avoid possible seizure.

The government was, accordingly, handicapped in its efforts to convict Carroll by being limited to the use of secondary evidence in the form of photostatic copies of checks as recorded on the bank's recordak, which showed only one side of the checks and not the endorsements. The named payees, hostile to the government because of the nature of the transactions being disclosed, were able to express doubt as to whether they actually received the checks, without the prosecution being able to contradict them by showing them their endorsement.

Moreover, the payoff checks which formed the principal basis for the indictment of Carroll were not signed by him. They were signed by certain authorized employees of the two establishments, and were cleared through special bank accounts carried in the names of the "operators" (akin to managing partners) of the establishments, who were also the ones responsible for preparing and signing the ordinary returns required by law, such as income tax returns, unemployment compensation and old age annuity returns and reports. There was no evidence that Carroll had access to the records. However, it was shown that he was very often in attendance at the two establishments and that he did often take bets; also, previous to this action, as a part of an income tax investigation, he had produced records of the two establishments for purposes of revealing that most of his income was derived from their operations.

information. Reg. 118, § 39.147-6 (Old Reg. 111, § 29.147-6) defines "foreign items" as used in this Section. Reg. 118, § 39.147-7 (Old Reg. 111, § 29.147-7) provides for the reporting of "foreign items" under certain named conditions. Reg. 118, § 39.147-8 (Old Reg. 111, § 29.147-8) provides for the reporting of the name of the actual owner when the person receiving a payment falling within the provisions of Section 147(a) is not himself the actual owner.

7. Reg. 118, § 39.147-1 (Old Reg. 111, § 29.147-1).

8. An interesting sidelight is that one witness testified that he had been dealing with the establishments for approximately fifteen years!!

The government's first contention was that the defendant owned and operated the gambling establishments, and under the law, was charged with the responsibility of making returns, although he had actually and physically not made the payments to the persons named. The court, after concluding that Carroll was a *partner* in the establishments, answered this contention in these words:

"If every person who is a partner in a business, but who has no actual control over the records and the conduct of the ordinary daily affairs of the business is to be held liable under this statute for failing to make report of payments to all persons who may have earned a profit, or who may become entitled to money within the definition of the statute, then there would literally be hundreds of thousands of persons subject to criminal prosecution who actually had no knowledge or information or responsibility for the actual conduct of a business."

Pointing out that the two "operators" were the men who made the payments and who would be liable for failing to make the report, the court then said that the government "caught the wrong pig by the ear."

The government did have photostatic copies of four checks which actually bore the signature of Carroll. Three of these, all dated on the year 1949, and for amounts of \$1,500, \$500 and \$200 respectively, were made payable to Maury Ryan, who identified himself on the stand as a professional gambler. Ryan testified that he could not be sure that he received the checks. The court concluded that there was "not a scintilla of evidence as to what the checks were for, or whether they came within the definition of payments required to be reported by the statute."

The prosecution then raised the contention that every payment of \$600 or more, insofar as this case was concerned, was required to be reported. Defendant contented that it was only necessary to report profits at the end of the year, if there were any. The court accepted neither contention, but decided that the statute meant that all payments of \$600 or more in any year⁹ involving *rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments* or other *fixed* or *determinable gains* or *profits* were required to be reported. Thus, the return of money left for investment by wagering need not be reported; such payments would be the return of the payee's investment, in the nature of a return of capital investment. The amount realized, if any, would be a gain upon that investment.

Under this construction, if one laid a bet of \$400 and won \$200 he would receive a payment of \$600, but \$400 of that amount would be the return of his own money, and would in no sense represent gain or profit or emoluments or any of the other

9. The court pointed out that Section 147(a) says "in any taxable year" but the regulation (Reg. 118, § 39.147-1; old Reg. 111, § 29.147-1) says "in any calendar year".

things defined in the statute, but if one laid the same bet of \$400 and won \$600, he would receive a payment of \$1,000, of which \$600 would represent profit and gain.¹⁰

Summing up its conclusions on this matter, the court says:¹¹

"If any person shall make payment of \$600 or more in 'fixed or determinable gains, profits and income', during a taxable or calendar year, to any person he is required to report it. Whether or not such amount so paid shall represent gains and profits or income upon which a tax may finally be exacted, is not a question for determination by the payor. That question must be determined as between the payee and the Collector of Revenue.

"The question the payor must determine is whether or not such amount represents gains, profits or income insofar as the relations between him and the payee are concerned."

Emphasizing that the entire purpose of the returns required by Section 147(a) is "purely for informational purposes and no other", intended to afford the Bureau information concerning income of persons other than the ones required to make the returns, the court found the facts in the instant case insufficient to sustain a conviction upon the offense charged, there being "not a scintilla of evidence" as to what the checks were for, and "no evidence" showing that they represented "gains, profits, and income". Carroll was discharged.

Principles of law which might be drawn from the opinion handed down in this case are: (1) In a partnership operation, it is the duty of the partner who is actively managing the business, who personally signs checks or makes payments, or who supervises the issuance of such checks or payments, and who is personally responsible for other government-required reports, to make the reports required by Section 147(a), and criminal liability for failure to do so is limited to that particular partner; (2) Only payment to another of \$600 or more involving "fixed or determinable gains or profits" need be reported under Section 147(a); (3) The burden of proof that the indictment is of the proper partner, as identified in (1) above, and that the payments are "fixed or determinable gains or profits", as mentioned in (2) above, rests on the government in a criminal prosecution for failure to comply with Section 147(a).

It is submitted that the decision in the instant case, while a proper outcome of the case, is bottomed upon an erroneous conclusion, and does not reach the merits of the issue presented, nor does it make for a practical application of the government's power to require returns purely for informational purposes.

One of the establishments in which Carroll was a partner is located in St.

10. In drawing this same hypothetical, the court's opinion reads: "If one laid a bet of \$400 and won \$200, he would receive a payment of \$600, but \$400 of that amount would be the return of his own money, and would in no sense represent gain or profit or emoluments or any of the other things defined in the statute, but if he had laid the same bet of \$400 and had won \$1000, then \$600 of it would represent profit and gain." 117 F. Supp. 209, 213 (W.D. Mo. 1954). Inasmuch as the last phrase, as written, is mathematically incorrect, it is assumed the court meant "and had received a payment of \$1,000" instead of "and had won \$1000".

11. 117 F. Supp. 209, 214 (W.D. Mo. 1954).

Louis, Missouri, the other in East St. Louis, Illinois. In both of these states bookmaking is a crime¹². Here there was open admission of bookmaking. There is an established doctrine that a crime committed in the course of a criminal business in which partners are engaged, imputes to all partners actual authorization for such acts incident to the business, and make all of them guilty.¹³ This was no ordinary, legal partnership between Carroll and his "operators". Bookmaking is a criminal business. Failure to file the returns required by Section 147(a) is an illegal act made criminal by Section 145(a), incident to the criminal business. Hence, it would seem that if Carroll's operators (managing partners) were guilty of violating Section 147(a), he too would be guilty. If so, the court erred in limiting its scrutiny to checks actually signed by Carroll personally, and in its conclusion that the government "caught the wrong pig by the ear".

The real merit of the controversy, it is submitted, lies in the words of Section 145(a), ". . . who *willfully* fails to . . . supply such information . . ." (emphasis added). This phase of the issue was not discussed in the opinion, and, in fact, it appears that the government proceeded on the theory that if it could show (1) payments of over \$600 to other persons, and (2) failure to file the returns required by law, the indictment of Carroll would result in his conviction. The court, while not accepting this theory, nevertheless limited possible violators in the case of partnerships, to a partner who actually managed the business, personally signed checks or made payments, or supervised the issuance of such checks or payments, and who was personally responsible for other government-required reports. The court justified this by saying that otherwise "there would literally be hundreds of thousands of persons subject to criminal prosecution who actually had no knowledge or information or responsibility for the actual conduct of a business". The court made no distinction between a partnership organized to operate a legal business and one organized for criminal purposes. Nor did the court give any recognition to the word "willful" in Section 145(a). The word "willful" is clearly recognizable as meaning "intentional"¹⁴ and in a criminal statute such as the one here, as meaning "with guilty intent"¹⁵. The protection for the "hundreds of thousands of persons" would appear to lie not in the fact that they are non-violators (the court having admitted that Section 147(a) has been "universally disregarded")¹⁶, but rather in the fact that "hundreds of thousands of persons" are not *willfull* violators, but instead, violators through inadvertence or negligence.

12. MO. REV. STAT. §§ 563.350, 563.360 (1949); ILL. REV. STAT. Ch. 38, § 340 (1949).

13. State v. O'Kelley, 258 Mo. 345, 167 S.W. 980, 52 L.R.A. (N.S.) 1063 (1914). Also, consider this enlightening statement, "Accordingly it is held that any violation of the internal revenue laws incurring a penalty committed by a partner in the course of partnership business is in legal contemplation the act of all the partners, and each of them is liable to pay the penalty, and the fact that the partner knew nothing of the violation, and never consented to it, is no defense." 40 AM. JUR. § 197.

14. WEBSTER'S COLLEGIATE DICTIONARY, (5th ed. 1938).

15. "In common parlance the word 'wilful' is used in the sense of intentional, as distinguished from accidental or involuntary; but when used in a penal statute, it means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful" 14 AM. JUR. §28.

16. See paragraph 1 of this note.

Had the court, in the instant case, scrutinized all of the checks which represented payoffs, whether signed by Carroll or not, and had the payees all testified, a violation of Section 147(a) might have been found; yet it does not follow that it would necessarily be a "willfull" violation under Section 145(a), for which reason the outcome of the case, in the light of the government's failure to sustain its burden of proving willfull violation, seems sound.

There are other aspects to the decision. The court's opinion says, in essence, that one liable to report under Section 147(a), must report those payments which represent "fixed or determinable gains, profits, and income". If one receives an amount of \$400 for investment, which then earns \$650, there is an amount of \$1,050 to be paid to the investor. What is the amount to be reported under Section 147(a)? The court gives no specific answer, but the implication is very clear that only the \$650, the amount of "gain, profit, or income", need be reported, because the original \$400 investment now returned is the investor's own money coming back to him. But the Bureau investigator, when later examining the income of the recipient of the \$1,050 check, will search in vain for an amount of \$650 such as will be shown on the report sent in by the payor charged with filing the return required under Section 147(a). As a practical matter, it would seem that the government would prefer the reporting of the entire payment as a means of easier identification when examining the books of the named payee.

Considering, too, that the report is "purely for informational purposes", intended to afford the Bureau information concerning income of persons other than the ones required to make the returns, it is submitted that the administration of Section 147(a) would be facilitated by the reporting of *all* payments in excess of \$600 except those payments specifically exempt by regulation.¹⁷ It is to be noted the listed exemptions are broad enough to remove the element of burdensomeness from the reporting. By reporting all other payments to others in excess of \$600, the payor would be relieved of the necessity of distinguishing between payments made (a) which represent gains, profits, and income "insofar as the relations between him and the payee are concerned," and (b) which do not represent such gains, profits, and income. It is suggested that the labor involved in making the distinction may often exceed the extra labor which would be required to list all such payments rather than only those involving gains, profits, and income. Also, in a case such as the principal one discussed herein, the issue would then clearly be, "Did the payor willfully fail to make the report?", rather than turning on a rather fine distinction, extremely difficult to prove, as to whether or not the payment represented gain, profit, and income, or something else. In the last analysis, it is really no concern of the payor what the payment represents; that is a matter between the payee and the Collector of Internal Revenue. Should doubt arise as to the nature of any given reported payment, under a system where all payments were reported, the government would still have the right, presumably, of asking the payor his version of the

17. See footnote 6, *supra*.

nature of the payment, provided it was not satisfied with the proofs which the payee presented.

Likewise, from the point of view of the investigator and from the point of view of the payee, it appears to be a better system to have *all* payments, other than listed exemptions, reported. The honest payee, who files an income tax return in which he attempts to report his correct taxable income, will not be embarrassed in explaining any and all payments received, and is, in fact, under a duty to do so if requested by the investigator. Any investigator worth his salt will, even under the present system, examine all payments received, whether reported by others or not. Thus, by having *all* payments reported, the examiner would be in a better position to uncover payments made and received which have not been shown as received by the taxpayer; a system which recommends itself in contrast to the court's determination, in the principal case, that it is at the discretion of the payor as to what payments should be reported.

FRED LAMBERT

REAL PROPERTY—HOMESTEAD—POSSESSION AS NOTICE

*Karsznia v. Kelsey*¹

The defendants, husband and wife, acquired title to the land in question by a general warrantly deed which was recorded. Thereafter they occupied this land as their homestead, and so occupied the land at the time of trial. After they acquired the homestead they became indebted to John and Barbara Roth who recovered judgment on the debt. To satisfy this judgment the land was sold at a sheriff's sale to A. J. Lange who recorded the sheriff's deed. Then Lange conveyed the land by quitclaim to the plaintiff who paid valuable consideration for it. Plaintiff brought an action of ejectment against the defendants. Judgment in the trial court for the defendants was affirmed on appeal.

Because the defendant's debt to the Roths arose after the acquisition of their homestead, the homestead was not subject to execution to satisfy the debt.² But the plaintiff claimed that because the sheriff notified the defendants of their exemption rights and the defendants made no claim, they should be estopped to now assert their homestead right. The court did not find an estoppel, however, because the defendants are not estopped unless they had a duty to speak, and there was no duty to

1. 262 S. W. 2d 844 (Mo. 1953).

2. Mo. REV STAT. § 513.510 (1949) (" . . . in case of existing estates, such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created."); *Sperry v. Cook*, 247 Mo. 132, 152 S.W. 318 (1912) (" . . . the exemption of the homestead applies to all causes of action accruing after the filing of the deed by which the title is vested in the execution or attachment debtor, even though the property may not have become a homestead until after the cause of action upon which the process is founded had accrued."); *Brune v. Rathbun*, 204 S.W. 2d 705 (Mo. 1947).

disclose matters of which the other party had notice.³ The plaintiff's claim of protection as a bona fide purchaser for value depended on whatever he had notice of the defendant's rights, and the question was whether the possession of the defendant gave notice by reason of the defendant's possession. The court held possession did give notice of homestead, saying: "One who buys real estate in the visible possession of a third person is chargeable with notice of the title and rights of that person in the premises."⁴

Under the recording act, *Missouri Revised Statutes*, Section 442.400 (1949),⁵ a purchaser of land for value will be protected as against unrecorded instruments unless he has actual notice. Missouri cases dealing with the specific problem have held that notice of the fact of possession is not imputed, but a purchaser must actually know that some one is in possession of the land before he is put on inquiry as to the rights of the party in possession.⁶ The problem is discussed in 16 *Missouri Law Review* 142 (Ring, "Possession as Notice Under the Missouri Recording Act"). Of course a settled rule of agency imputes the knowledge of an agent to the principal. Therefore, any time a real estate broker acts for a purchaser, the broker's knowledge of possession would be actual knowledge to him, and consequently is actual notice to his principal. The same rule would apply if the purchaser required his attorney to examine the land as part of his job in rendering an opinion as to the title. So from a practical standpoint, in a vast majority of the cases the buyer does have actual knowledge, either first hand or via an agent, that the land he is purchasing is in the possession of a third person, and the same result is reached as under a simple notice type of recording act. But the Missouri courts have not always been careful in specifying that actual notice is required, and have often spoken of possession as giving notice.⁷ Moreover, the statements of fact in some of the cases do not make it clear whether the lower court found that the purchaser knew of the possession or

3. *Williams v. Reid*, 37 S.W. 2d 537 (Mo. 1931); 31 C.J.S., *Estoppel*, § 90, p. 309 ("To constitute estoppel, it is essential that the party claiming it should be ignorant of a title or interest of the party against whom the estoppel is claimed, and that he should have made due inquiries as to the state of the title."); 19 Am. J. 665, § 55.

4. *Karsznia v. Kelsey*, 262 S.W. 2d 844, at 864 (Mo. 1953).

5. "No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

6. *Drey v. Doyle*, 99 Mo. 459, 12 S.W. 287 (1888) (Missouri's leading case which states that actual notice is required by the statute; *McBride Realty Co. v. Groce*, 223 Mo. App. 388, 15 S.W. 2d 957 (1928); *Masterson v. West End R.R.*, 5 Mo. App. 64 (1878) ("The fact of notice cannot be arrived at as a direct inference from the bare fact of possession."); *Shumate v. Reavis*, 49 Mo. 333 (1872) ("Possession, though not actual notice, is evidence of such notice, to be submitted to the jury."); *Whitman v. Taylor*, 60 Mo. 127 (1875); *Harrison v. Cachelin*, 23 Mo. 117 (1856).

7. *Johnson v. Moore*, 346 Mo. 854, 143 S.W. 2d 254 (1940); *Chilton v. Cady*, 298 Mo. 101, 250 S.W. 403 (1923); *Swift v. Buford*, 280 Mo. 432, 217 S.W. 980 (1920); *Titus v. North Kansas City Development Co.*, 264 Mo. 229, 174 S.W. 432 (1915); *Gulley v. Waggoner*, 255 Mo. 613, 164 S.W. 557 (1914); *Squires v. Kimball*, 208 Mo. 110, 106 S.W. 502 (1907); *Stuart v. Ramsey*, 196 Mo. 404, 95 S.W. 382 (1906); *Myers v. Schuchmann*, 182 Mo. 159, 81 S.W. 618 (1904); *Wiggenhorn v. Daniels*, 149 Mo. 160, 50 S.W. 807 (1899); *Davis v. Briscoe*, 81 Mo. 27 (1883).

not.⁸ So there are two lines of cases in Missouri, one using broad general language which would impute notice to the purchaser whether he actually knew of the possession or not, and the other following the words of the recording act and requiring actual knowledge of the possession before he is put on inquiry.

However, some rights in land, such as title gained by adverse possession, are not required to be recorded in Missouri. In this type of situation the recording act would not apply, and the rights of a subsequent buyer as against the adverse possessor would be governed by common law. In such a case the purchaser could only get such title as his grantor had. Since title obtained by adverse possession is just as good as a perfect record title in Missouri,⁹ it would seem that once the adverse possessor's title is perfected, he need not even continue his possession to be protected against a subsequent purchaser.¹⁰ Title obtained in this way is outside the scope of the recording act and it does not apply.

The statutes of some states require a formal declaration of homestead.¹¹ But in Missouri homestead interests are protected without being recorded. Thus they are outside the scope of the recording act and it should not apply to them. So here, as in the case of adverse possession, since no statute covers the problem, the common law would govern and possession would give notice to a subsequent purchaser. The court's statement, that one who buys real estate in the visible possession of a third party is chargeable with notice, is too broad if interpreted as applying to every interest in the land in every type of situation. The court was dealing with a problem not covered by the recording act, and its language should not be interpreted as applying to the cases controlled by the act. It is not a precedent for cases concerning a required recordation of interest.

Every purchaser of land should examine the land he is buying for indications of possession and user. If a third party has an unrecordable interest of a certain type and is in possession, the possession, in itself, is sufficient to put on inquiry as to the outstanding interest. Even if the interest of the third party is a recordable one the purchaser cannot rely on his ignorance of possession because the jury may, from the fact of possession and very slight evidence of actual notice, find that the purchaser had actual notice, or the court might follow the line of cases which, in general language, imputes notice to the purchaser, regardless of his knowledge of possession. In any event, one who purchases land in the possession of one other than the grantor probably has bought himself a lawsuit.

THOMAS G. STRONG

8. *Chilton v. Cady*, 298 Mo. 101, 250 S.W. 403 (1923); *Titus v. North Kansas City Development Co.*, 264 Mo. 229, 217 S.W. 980 (1915); *Myers v. Schuchmann*, 182 Mo. 189, 81 S.W. 618 (1904).

9. *Ridgeway v. Holliday*, 59 Mo. 444 (1875); *Biddle v. Mellon*, 13 Mo. 335 (1850).

10. See 16 Mo. L. REV. 461 (1951).

11. *Goodwin v. Colorado Mortg. & Invert. Co.*, 110 U.S. 1, 28 L.Ed. 47, 3 Sup. Ct. 473 (1883) (Colorado); *Finerty v. First Nat. Bank*, 92 Okla. 102, 218 Pac. 859, 21 A.L.R. 1326 (1923); *Coats v. Caldwell*, 71 Tex. 19, 8 S.W. 922, 10 Am. St. Rep. 725 (1888).

MORTGAGES—TWENTY-YEAR LIMITATION ON FORECLOSURE

*Oehler v. Philpott*¹

Plaintiffs executed a deed of trust on March 5, 1932, to secure their \$600 principal note to defendant, payable on March 5, 1935, and several interest notes payable either before or on that date. No payments were made on the notes nor were there any agreements extending the due date. On April 30, 1951, defendant filed an affidavit describing the deed of trust and the notes, stating the amount due and owing to him as the owner and holder. Thereafter the trustee of the deed of trust, also a defendant in the principal case, instituted foreclosure proceedings under his power of sale. Plaintiff brought suit to enjoin the sale. On judgement for plaintiffs, defendant appealed to the Missouri Supreme Court, but the case was transferred to the St. Louis Court of Appeals on jurisdictional grounds.² After reversing and remanding,³ the court of appeals ordered the case transferred to the supreme court for the purpose of re-examining the existing law. The supreme court reversed the court of appeals and affirmed the trial court judgment for plaintiffs.

The only issue of the case was whether, under the provisions of *Missouri Revised Statutes*, Section 516.150 (1949),⁴ the filing of an affidavit, after the obligation of the notes themselves was barred by the ten year statute of limitations but within the twenty years after the maturity date of the notes, has the effect of permitting the lawful exercise of the power of sale.

In *Carwood Realty Co. v. Gangol*,⁵ under similar facts, the note, secured by a deed of trust, was payable in 1915 and later was extended until 1937. In 1934 an affidavit was filed pursuant to the statute. The deed of trust was foreclosed in 1940. Debtor sued to cancel the trustee's deed, citing Section 516.150. The court ruled for defendant on grounds that the statute was one of repose and could not be used to

1. 263 S.W. 2d 201 (Mo. 1953).

2. 253 S.W. 2d 179 (Mo. 1952).

3. 255 S.W. 2d 90 (Mo. 1953).

4. "No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust, to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statutes of limitation of this state; nor in any event after the lapse of twenty years from the date at which the last maturing obligation secured by the instrument sought to be foreclosed is due on the face of such instrument, unless such termination of said period falls within two years after the passage of this section, or has heretofore happened, in which event such suit, action or proceeding may be begun within two years after the passage of this section without regard to the date of the instrument or the maturity of the obligation, unless otherwise barred under the provisions of the general statutes of limitation, unless before the lapse of said twenty years the owner of the debt thereby secured or some person for him shall file an affidavit duly verified, or file an instrument in writing acknowledged as deeds are required to be acknowledged in order to entitle them to record in this state, showing the amount due and owing thereon." The portion printed in italics is the statute as passed in 1891 (Mo. REV STAT. § 4276, 1899), omitting the words "executed hereafter" as appeared therein preceding the phrase "to secure any obligation." The 1921 amendment (Mo. LAWS, 1921, page 202) altered the statute to the form as printed above.

5. 232 S.W. 2d 399 (Mo. 1950).

obtain affirmative relief, and that the affidavit was properly filed so as to permit the foreclosure. The court said by way of dictum: "Therefore, aside from any question concerning extensions of the obligation . . . the statute was complied with and the foreclosure was not void." This dictum indicated that even though the note may have been barred by the ten-year statute of limitations,⁶ the deed of trust may be foreclosed any time within twenty years from the due date of the note, or any time thereafter if a proper affidavit be filed.

The court of appeals in the principal case reluctantly followed the dictum in the *Carwood* decision and permitted foreclosure even after the note had been barred. However, on transfer the supreme court overruled the *Carwood* dictum, saying (emphasis by the court):

"No foreclosure can be had of an instrument securing a barred note at any time after action on the note is barred.

". . . [w]e do not believe the court intended to announce a rule that an instrument securing a note barred by the 10 year statute could be foreclosed under the 20 year provisions of Sec. 516.150."⁷

The present decision seems to carry out the intent of the legislature in passing the statute, viz; foreclosure is prohibited if the statutes of limitation have run against the obligation, and even if the note is not so barred, by reason of an extension agreement or payments made after the due date, the lapse of twenty years from the date the obligation becomes due, as appears on the face of the mortgage, will bar foreclosure unless, before the expiration of said period, an affidavit is filed for record showing the amount owing on the obligation. This view is supported by *Ste. Genevieve County v. Heberlie*,⁸ decided by the supreme court in 1943.

The supreme court in the present case allowed plaintiffs to obtain affirmative relief under the statute. This ruling is at variance with other cases stating that the statute is one of repose only, and cannot be used to obtain affirmative relief,⁹ on the theory that the debtor who seeks equity must do equity by paying the creditor. The doctrine definitely is not settled, however,¹⁰ and at least one case holds that the

6. Mo. Rev. Stat. § 516.110 (1949).

7. 263 S.W. 2d 201, 203 (Mo. 1953).

8. 351 Mo. 70, 171 S.W. 2d 667 (1943).

9. *Milby v. Murphy*, 121 S.W. 2d 169, 171 (Mo. App. 1938), where the court said: "It does not provide that the lien of the deed of trust shall continue in existence for twenty years from the date of maturity of the note and that at the expiration of such period the deed of trust shall ipso facto become a nullity in the absence of the filing of the statutory affidavit or instrument, but instead it provides that no suit, action or proceeding under power of sale to foreclose the deed of trust shall be had or maintained after the lapse of twenty years from the date of the maturity of the note.

". . . [I]t confers no substantive right upon the party entitled to plead it by way of defense, and cannot be made the basis of a plea for affirmative relief."

See also *Carwood Realty Co. v. Gangol*, *supra* note 5; *Greenfield v. Petty*, 346 Mo. 1186, 145 S.W. 2d 367 (1940); *Stock v. Schloman*, 322 Mo. 1209, 1217, 18 S.W. 2d 423, 432 (1929); 164 A.L.R. 1387 (1946); and the court of appeals decision in the present case, citing the *Carwood* and *Milby* cases.

10. *Martin v. Lewis*, 244 S. W. 2d 87 (Mo. 1951); 16 Mo. L. Rev. 383 (1951).

statute is one of extinguishment.¹¹ The court of appeals, although agreeing that the statute is one of repose, stated that plaintiffs' suit here is actually defensive, although technically affirmative relief is sought.¹² Regardless of whether the statute as originally passed in 1891, *supra* note 4, was intended to be one of repose or extinguishment, the results sought to be accomplished by the legislature in amending the law in 1921 would seem to be clear. As pointed out by the court of appeals:

" . . . The determination of the question as to whether a note is barred generally depends on facts not appearing upon the public records since it may be kept alive for an indefinite period of time by payments or other acts that toll the running of the statute. This created a situation in which a title examiner could not safely approve a title, where an unreleased deed of trust appeared of record, regardless of the age of the instrument.

"It would appear that this condition led to the amendment of the statute in 1921."¹³

Perhaps the present decision is a move toward the probable legislative intent, viz; to rid titles of the encumbrances of old mortgages and deeds of trust and to make it possible for the title examiner to determine the status of such encumbrances from the face of the record.¹⁴ It is hoped that the supreme court in another case will state categorically that Section 516.150 is a statute of extinguishment.

STEPHEN E. STROM

11. *Stock v. Schloman*, 226 Mo. App. 234, 239, 42 S.W. 2d 61, 63 (1930), stating:

"The amendment of 1921 is plainly not a statute of repose, but one of extinguishment containing its own limitations. Therefore after the lapse of twenty years from the date the note in suit fell due as shown on the fact of the mortgage, the lien of the mortgage, under the circumstances, became absolutely extinguished. In the absence of the filing of the affidavit or instrument required by law the mortgage was dead and nothing could bring it to life, it could not be revived by any acts tending to show a waiver, or estoppel or acknowledgement of the debt."

See also *Utz v. Dorman*, 328 Mo. 258, 39 S.W. 2d 1053 (1931).

12. Citing *Boyd v. Buchanan*, 176 Mo. App. 56, 61, 162 S.W. 1075, 1077 (1914), which holds:

"The period of limitation for a mortgage or deed of trust by our statute is the same as for the note it secures, and equity follows the law in applying the limitation prescribed by the law. Therefore a bill to enjoin the foreclosure of a deed of trust by a sale by the trustee on the ground that the note is barred will lie at the instance of the owner of the land."

13. 255 S.W. 2d 90, 91 (Mo. App. 1953).

14. See *Wentz v. Price Candy Co.*, 352 Mo. 1, 6, 175 S.W. 2d 852, 854 (1943):

"The intention of the legislature should be the guide in determining whether a statute extinguishes the right or merely the remedy. . . Yet courts should exercise restraint in declaring a construction that the very right itself is extinguished by the lapse of time unless such is the plain statutory intent."

The case, however, in construing another section than the one presently under consideration, does infer that Section 516.150 is properly one of repose.