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Recent Cases

ANIMALS—DOMESTIC ANIMALS—CHICKENS AND OTHER FOWL

Tillery v. Crook[1]

In an action to recover damages for chickens killed by defendant's dogs and a loss of egg production, the Springfield Court of Appeals held that a chicken is a "domestic animal" under *Missouri Revised Statutes* § 273.020 (1949), which states that (emphasis added) "every case where sheep or *other domestic animals* are killed or maimed by dogs, the owner of such animals may recover against the owner or keeper of such dog or dogs the full amount of damages. . . ." The court held that the evidence was sufficient to sustain the judgment for plaintiffs under the statute.

In the petition it was not entirely clear whether the action was brought on common law grounds or under the statute above mentioned. Under common law it is necessary that the plaintiff allege and prove that the owner or keeper of the dog had knowledge of the vicious propensities or inclinations of the dog,[2] but under the statute the owner or keeper of the dog is absolutely liable if the dog kills or maims domestic animals regardless of the knowledge of the dog's vicious propensities or inclinations. Apparently the court decided the action was brought under the statute and the major question then became whether a chicken is a domestic animal so as to come within the statute's protection.

In an earlier Missouri case, *Ornburn v. Haley*,[3] the court specifically avoided passing on the question of whether a chicken is a "domestic animal" under *Missouri Revised Statute* § 273.030 (1949)[4] where the owner of chickens had been losing them through raids by a dog and when he saw a dog carrying one away shot the dog. The court held that a justification had been established for the killing of a chicken-killing dog on common law grounds for protection of property because the dog was caught destroying property, and it was reasonable to believe that the

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1. 297 S.W.2d 9 (Mo. App. 1957).
2. Holmes v. Murray, 207 Mo. 413, 105 S.W. 1085 (1907) [the statute by eliminating scienter merely changed the common law and does not deprive the dog owner of property without due process]; Jacobsmeyer v. Poggemoeller, 47 Mo. App. 560 (1891); 3 C.J.S., *Animals* § 151 (1936).
3. 225 S.W. 114 (Mo. App. 1920); *Accord,* Sabin v. Smith, 26 Cal. App. 689, 147 Pac. 1180 (1915).
4. Mo. REV. STAT. § 273.030 (1949): "If any person . . . shall discover any dog or dogs under such circumstances as to satisfactorily show that such dog or dogs has or have been recently engaged in killing or chasing sheep or other domestic animal or animals, such person is authorized to immediately pursue and kill such dog or dogs, ..."

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destruction of such property would continue unless the dog was killed and the defendant did so believe.

It has been held that the words "domestic animals" are not technical words which have peculiar distinct meanings at law but are to be construed according to the ordinary, common and approved usage of the language.[5] Merriam-Webster's *New International Dictionary*[6] leaves some doubt as to the meaning, for in defining a "domestic animal" it states that it is "any of various animals . . . which have been domesticated by man so as to live and breed in a tame condition" which is apparently broad enough to include chickens and other poultry. But in its definition 2b of "animal" this dictionary states that it is "often, in popular usage, animal, as distinguished from a bird, reptile, etc." which clearly would not include a chicken. The same distionary in definition 1 of "animal" includes a modern scientific classification of the animal kingdom which clearly would include a chicken; in "phylum XIII, sulphylum vertebrata" it lists "amphibia, reptilia, aves [birds] and mammalia" among others. On the other hand, Black's *Law Dictionary*[7] states that an "animal" is "any animate being which is endowed with the power of voluntary motion" and then states that it is "an animate being, not human." Halsbury[8] classifies poultry under the heading of "domestic animals" while New York by statute[9] classifies fowls, ducks, geese and turkeys as "domestic animals". Both "animal" and "domestic animal" as used in the *Restatement of Torts* include chickens.[10]

The issue whether a chicken or other fowl is an "animal" or a "domestic animal" arises in a variety of cases. Under statutes prohibiting cruelty to animals, a goose has been held to be an "animal",[11] and a Missouri court once held that the word "animals" as used in such a statute should be construed to cover all creatures except human beings.[12] In the construction of a will bequeathing the testator's "horses and all other animals on the premises," it has been held that fowls were included.[13] On the other hand, it has been held that a zoning ordinance prohibiting the slaughtering of "animals" did not prohibit killing chickens be-

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5. Commonwealth v. Flynn, 285 Mass. 136, 188 N.E. 627 (1934); Thurston v. Carter, 112 Me. 361, 92 Atl. 295 (1914).
6. (2d ed. 1940).
7. BLACK, LAW DICTIONARY (4th ed. 1951).
8. 1 SIMONDS, HALSBURY'S LAWS OF ENGLAND § 1250 (3d ed. 1952) "The common law follows the civil law in classifying animals in two divisions, as follows:

> (1) Domestic or tame (domitae or mansuetae naturae). This class includes all such beasts and birds as by habit or training live in association with man; for example, cattle, horses, sheep, goats, pigs, poultry, cats, and dogs. . . .
> (2) Wild (ferae naturae). . . ."

9. N.Y. AGRICULTURE AND MARKETS LAW § 107.
10. RESTATEMENT, TORTS § 506 (1938).
11. State v. Bruner, 111 Ind. 98, 12 N.E. 103 (1887).
12. State v. Bogardus, 4 Mo. App. 215 (1877).
13. Huber v. Mohn, 37 N.J. Eq. 432 (1883).

cause "animals" as used in the ordinance meant quadrupeds and not birds or fowl.[14] In *Reiche v. Smythe*[15] it was held that an import duty imposed on all horses and mules, cattle, sheep "and other live animals" did not include birds as the revenue act was to be read in the light of an earlier act which exempted from a duty animals of all kinds, birds, and land and water fowls. A duck was held to be an animal within the meaning of the term "animal" as used in a sodomy statute,[16] but in Missouri the statute[17] uses the term "beast" which probably does not include fowl.[18]

Many Missouri statutes would seem to indicate that domestic fowls or poultry are not included in the classification "domestic animals" or "animals,"[19] but another statute would seem to indicate, at least by inference, that a fowl is an "animal."[20]

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14. State *ex rel.* Del Monte v. Woodmansee, 72 N.E.2d 789 (Ohio App. 1946).
15. 80 U.S. 162 (1871).
16. Reg. v. Brown, 24 Q.B. Div. 357 (1890).
17. MO. REV. STAT. § 563.230 (1949).
18. R. v. Multreaty, 1 RUSSELL, CRIMES AND MISDEMEANORS 940 (8th ed. 1923); MERRIAM-WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1940).
19. MO. REV. STAT. § 137.120(2) (1949), Personal property, tax assessment lists contents—". . . domesticated animals of all kinds and all other livestock and their value; the number of poultry including chickens, guineas, ducks and geese and their value."
MO. REV. STAT. § 560.380 (1949) ". . . or shall maliciously expose any poisonous substance, with intent that the same shall be taken or swallowed by any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or domestic fowl. . . ."
MO. REV. STAT. § 73.110(32) (1949), Cities of the first class—"To prohibit the running at large of horses, cattle, hogs and other animals, and fowls, and to authorize impounding and sale of same for running at large."
MO. REV. STAT. § 74.143(6) (1949), Alternate form, cities of the first class—"To prohibit the running at large of cattle, horses, mules, sheep, swine, goats and other animals and poultry. . . ."
MO. REV. STAT. § 75.110(62) (1949), Cities of the second class—"To prohibit the running at large of cattle, horses, mules, sheep, swine, goats and other animals and poultry, . . ."
MO. REV. STAT. § 77.510 (1949), Cities of the third class—". . . The council may also regulate or prohibit the running at large of cattle, hogs, horses, mules, sheep, goats and other animals and domestic geese, ducks, chickens and turkeys. . . . The council may also provide penalties for the owners or keepers who shall permit such animals or geese, ducks, chickens or turkeys to run at large."
MO. REV. STAT. § 79.400 (1949), Cities of the fourth class—"2. The board of aldermen may also regulate or prohibit the running at large of cattle, hogs, horses, mules, sheep, goats and all other domestic animals, also geese, ducks, chickens, turkeys and all other domestic fowls and cause such animals or fowls as may be running at large to be impounded and sold in such manner and at such time as may be prescribed by ordinance."
20. MO. REV. STAT. § 270.190 (1949): "In all counties and townships that have adopted the provisions of this chapter, the owner of domestic geese shall keep the same upon his own premises and in his own enclosure, and if any such geese escape from the enclosure of the owner, they may be dealt with the same as all other animals, as provided by this chapter."

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In jurisdictions where the common law is in effect as to requiring the owner of domestic animals to keep them on his own land at his own peril it has been uniformly held that domestic poultry and turkeys are animals.[21] In the Missouri case of *Evans v. McLalin*,[22] it was held that although chickens and like domestic fowls are not animals in the usual acceptance of that term they are included in the category of domestic animals which are permitted to run at large in Missouri open range counties and townships.[23]

With regard to statutes similar to §§ 273.020-.030, *Missouri Revised Statutes* (1949) concerning dogs which kill sheep or domestic animals, it has been held that a dog is not a domestic animal within the statute's meaning.[24] However, in the case of *Holcomb v. Van Zylen*,[25] the court, after some hesitation, follows the definition that an "animal" is any animate being not human and therefore a turkey was within the terms of the statute's protection as an "other domestic animal" in line with the principal case.

In deciding that a chicken was a "domestic animal" under the statute in the principal case, the court seems to have used a common sense approach to the problem, and it is to be noted that those few cases in which courts have held that chickens or poultry are not "domestic animals" the court faced very different practical problems and the cases are distinguishable in view of the practical problems presented.

ROBERT E. LUSK

EVIDENCE—ADMISSIBILITY OF CONFESSIONS AS TO CO-DEFENDANTS

Paoli v. United States[1]

The petitioner, Paoli, and four co-defendants were convicted in the United States District Court for the Southern District of New York of conspiring to

21. Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938) [the court said that the word "animal" viewed in the broad sense in the language of the law, is used in contra-distinction to a human being, and signifies an inferior living creature, generally having the power of self motion and may, therefore, be said to include domestic turkeys and poultry]; Adams v. Clark, 189 Ky. 279, 224 S.W. 1046 (1920); McPherson v. James, 69 Ill. App. 337 (1896); Cox v. Burbidge, 13 C.B. (N.S.) 430 (1863).

22. 189 Mo. App. 310, 175 S.W. 294 (1915).

23. An open range county or township is one which has not adopted MO. REV. STAT. c. 270 (1949). See MO. REV. STAT. c. 272 (1949) generally on fencing.

24. Skog v. King, 214 Wis. 591, 254 N.W. 354 (1934).

25. 174 Mich. 274, 140 N.W. 521 (1913). In this case the court said that the sole question was whether a turkey was an "animal" within the meaning of a statute similar to the one in question in the principal case. The court said that it could be reasoned that 'animal" did not mean fowl, if a classification such as animals, fowls, reptiles, insects, etc. is used. The court later stated, after considering the argument that a turkey is an "animal", that either view could be accepted without doing much violence to the language of the act.

1. 352 U.S. 232 (1957).

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possess and transport alcohol in unstamped containers and to evade payment of federal taxes on alcohol. The trial court admitted in evidence a confession of a co-defendant made after the termination of the alleged conspiracy, but stated clearly that the confession was to be considered only in determining the guilt of the confessor and not that of the other defendants. The court instructed, in part,

> . . . I will again advise the jury that any admissions by the defendant Whitley after the date of his arrest can be considered by you in connection with the determination of the guilt or innocence of the defendant Whitley together with the other testimony. But any admissions by the defendant Whitley are not to be considered as proof in connection with the guilt or innocence of any of the other defendants. The reason for that I explained before to you, that the admission by a defendant after his arrest of participation in an alleged crime may be considered as evidence by the jury against him with the other evidence because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such a person after his arrest implicates other defendants in such admission it is not evidence against them, because as to those defendants it is nothing more than hearsay evidence. I advise you of that in connection with the testimony of the last witness [Greenberg] as to any oral statements made by Whitley or any written statements made by Whitley.
>
> The existence of the conspiracy and each defendant's connection with it must be established by individual proof based upon reasonable inference to be drawn from such defendant's own actions, his own conduct, his own declarations, and his own connection with the actions and conduct of the other alleged co-conspirators.
>
> To find any defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy.
>
> If you find that every circumstance relied upon as incriminating is susceptible of two interpretations, each of which appears to be reasonable, and one of which points to a defendant's guilt, the other to his innocence, it is your duty to accept that of innocence and reject that which points to guilt.

Only the petitioner appealed. The conviction was affirmed by the United States Circuit Court of Appeals on appeal. The principal question was whether the trial court erred in admitting the confession in evidence. The United States Supreme Court affirmed the conviction of a 5-4 vote. The majority held that a declaration made by a conspirator after the termination of the conspiracy may be used only against the confessor and that appropriate instructions must be given to the jury to protect the rights of the other defendants. They further held that, in the present case, the trial court's instructions to the jury on that subject were sufficient, and that the admission of the confession was not reversible error. They pointed out that the other evidence against the petitioner was sufficient to sustain his conviction. The dissent was based on the theory that the court's instructions were not sufficient to erase the imprint of the confession from the minds of the jury. They would have reversed the conviction and forced the prosecution to bring the defendant to trial separately rather than to use the confession in a joint trial.

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It appears that the principal question involved in this trial is whether the confession of Paoli's co-defendant should have been admitted in evidence. The confession named Paoli as one of the conspirators. The general rule in regard to the admission of such declarations is that admissibility is determined as of the time when they are made. Such declarations are admissible if they were made while the conspiracy was still in operation and if they were designed to further the conspiracy.[2] This rule is based on a theory of implied authority to speak, *i.e.*, that the one making the statement did so in furtherance of the common scheme and thus had authority to make the statement.

However, if the statement or declaration is made after the conspiracy has ended, such declaration is generally not admissible against any of the other conspirators even though they are being tried jointly.[3] The confession of one of the defendants in such a trial may be admitted in evidence against that individual defendant, if the judge instructs the jury that the confession is not to be considered as evidence against the other co-defendants.[4]

The inadmissibility of such confessions is qualified to the extent that they are admissible against a co-defendant if made in his presence and he assented to such declaration.[5] They are not admissible for such use if the co-defendant was not present when they were made.[6] If the co-defendant's assent was not voluntarily obtained, the statement of the defendant cannot be admitted in evidence against the co-defendant.[7] The use of force against an individual to cause him to be present when the confession was made renders the confession inadmissible against him,[8] as one cannot find any assent to the confession in such a situation and it certainly does not meet the requirement that the assent be voluntary. Of course, denial by a defendant of the truth of such a confession which was made by another conspirator after the termination of the alleged conspiracy would

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2. Lutwak v. United States, 344 U.S. 604 (1953); Fiswick v. United States, 329 U.S. 211 (1946); Clune v. United States, 159 U.S. 590 (1895); Rimmer v. United States, 172 F.2d 954 (5th Cir. 1949) in which statements made by a conspirator by way of confession after arrest were held inadmissible; United States v. Goodman, 129 F.2d 1009 (2d Cir. 1942).

3. People v. Buckminster, 274 Ill. 435, 113 N.E. 713 (1916); State v. Allison, 175 Minn. 218, 220 N.W. 563 (1928); Koontz v. State, 10 Okla. Crim. Rep. 553, 139 Pac. 842 (1928).

4. People v. Young, 316 Ill. 508, 147 N.E. 425 (1925); People v. Buckminster, *supra* note 3; Marcum v. Commonwealth, 227 Ky. 356, 13 S.W.2d 243 (1929); State v. Allison, *supra* note 2; State v. Smith, 201 Wis. 8, 229 N.W. 51 (1930).

5. State v. Hinthorn, 315 Mo. 203, 285 S.W. 990 (1926).

6. State v. Irvin, 324 Mo. 217, 22 S.W.2d 772 (1929); Rounds v. State, 171 Tenn. 511, 106 S.W.2d 212 (1937).

7. Bachelor v. State, 216 Ala. 356, 113 So. 67 (1927); People v. Kozlowski, 368 Ill. 124, 13 N.E.2d 174 (1938); Stagemeyer v. State, 133 Neb. 9, 273 N.W. 824 (1937); Commonwealth v. Oreszak, 328 Pa. 65, 195 Atl. 45 (1937).

8. State v. McCullum, 18 Wash. 394, 51 Pac. 1044 (1897).

render the confession inadmissible against the one denying the correctness of the statement.[9]

A further problem is raised in the situation in which the co-defendant is present at the time the confession is made but remains silent. Mere silence is usually not assent to the confession's authenticity.[10] There are times when a confession is made or phrased in such a manner that a reasonable man would make a reply of some type, in which instance the confession will be admissible against the co-defendant.[11]

In the principal case the confession which is under attack was made after the conspiracy had ended. The trial court judge, in admitting the confession, instructed the jury that they were not to consider the confession as evidence against the other defendants. Thus, we have an application of the rule that these confessions are admissible in evidence against the declarant as long as adequate instructions are given to the jury to safeguard the rights of the other defendants.

In conclusion, it appears that Paoli's principal argument as well as that of the dissent is that the admission of the confession for use even against the declarant left an imprint or effect on the minds of the jurors which was not erased by the court's instructions. Actually such a conclusion amounts to nothing more than a charge that the jury did not follow the court's instructions. There undoubtedly have been trials in which it appears that juries have not completely followed the court's instructions. With all of the safeguards of our jury system, it is unlikely (even if desirable) that we shall reach the point where all jurors detach their decisions from their personalities. Despite this it would seem that our jury system has worked well and we should presume that a jury is capable of and does follow the court's instructions. This view is summed up in the majority opinion of this case when Justice Burton said, "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense."

ELDEN R. STERNBERG

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9. Westberry v. State, 174 Ga. 646, 163 S.E. 729 (1932); People v. Cardinelli, 297 Ill. 116, 130 N.E. 355 (1921); People v. Wysocki, 267 Mich. 52, 255 N.W. 160 (1934); Mitchell v. State, 171 Miss. 4, 156 So. 654 (1934); State v. Grier, 203 N.C. 586, 166 S.E. 595 (1932).

10. Zeller v. State, 123 Ohio St. 519, 176 N.E. 81 (1931); Commonwealth v. Rose, 327 Pa. 220, 193 Atl. 17 (1937); Commonwealth v. Smith, 105 Pa. Super. 497, 161 Atl. 418 (1932).

11. Sparf v. United States, 56 U.S. 51 (1895); Burns v. State, 226 Ala. 117, 145 So. 436 (1932); Anderson v. State, 197 Ark. 600, 124 S.W.2d 216 (1939); Mathis v. State, 55 Ga. App. 727, 191 S.E. 272 (1932); State v. Dills, 208 N.C. 313, 180 S.E. 571 (1935); Jackson v State, 52 Ohio App. 309, 3 N.E.2d 651 (1935); Winfree v. State, 22 Tenn. App. 317, 123 S.W.2d 827 (1939).

FEDERAL TORT CLAIMS ACT:[1] DAMAGES—APPLICABILITY OF MAXIMUM IN STATE STATUTE PROVIDING FOR PUNITIVE DAMAGES ONLY

Massachusetts Bonding & Insurance Co. v. United States[2]

Jeremiah Crowley was killed through the negligent operation of traveling cranes by government employees at a federal arsenal in Massachusetts. Suit was instituted in the Federal District Court, District of Massachusetts, by the decedent's administratrix and by the insurer of the decedent's employer, who had paid compensation to Crowley's dependents by reason of the Massachusetts Workman's Compensation Act. The suit was brought under the Federal Tort Claims Act and was based upon the Massachusetts Death Act, which provided, in part, that damages were to be assessed with reference to the degree of the defendant's culpability, and that they were not to exceed twenty thousand dollars.[3] The Massachusetts Act, while admitted to be remedial to the extent that it does provide compensation to the decedent's dependents,[4] has been construed to be primarily punitive in nature.[5]

The relevant provision of the Federal Tort Claims Act provides that the United States is to be liable in the same manner and to the same extent as a private individual under like circumstances, but that the United States is not to be liable

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1. For general discussion and interpretation of the Act, see Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946); Anderson, *Recovery from the United States Under The Federal Tort Claims Act*, 31 MINN. L. REV. 456 (1947); Gellhorn and Schench, *Tort Action Against the Federal Government*, 47 CAL. L. REV. 722 (1947); Baer, *Suing Uncle Sam in Tort*, 26 N.C. L. REV. 119 (1948); Hulen, *Suits on Tort Claims Against the United States*, 7 F.R.D. 649 (1948); Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1949); Gellhorn and Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325 (1954); Fisher, *The Federal Tort Claims Act After Five Years*, 3 MERCER L. REV. 363 (1954); Gerwig, *A Decade of Litigation Under the Federal Tort Claims Act*, 24 TENN. L. REV. 301 (1956). (In chronological order.) See also Comment by this writer in 22 Mo. L. REV. 48 (1957).

2. 352 U.S. 128 (1956).

3. MASS. ANN. LAWS, c. 229, § 2 (1955), providing that an employer, whose servants shall cause the death of another not in his employment or service, through negligence, "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants."

4. Putnam v. Savage, 244 Mass. 83, 138 N.E. 808 (1923); Sullivan v. Hustis, 237 Mass. 441, 130 N.E. 274 (1921).

5. Arnold v. Jacobs, 316 Mass. 81, 54 N.E.2d 922 (1944); Maccharolo v. Howell, 294 Mass. 144, 200 N.E. 905 (1936); Porter v. Sorell, 280 Mass. 457, 182 N.E. 837, 85 A.L.R. 1159 (1932).

for punitive damages.[6] An amendment engrafted on this provision in 1947 provides that where a state's wrongful death statute makes provision only for punitive damages, the United States is liable for actual or compensatory damages measured by the pecuniary injuries suffered by the claimant.[7]

The district court held that since the Massachusetts Act was punitive in nature, the minimum and maximum limits contained in it were not applicable to suits against the government, and accordingly awarded compensatory damages against the United States in the sum of sixty thousand dollars.

The circuit court of appeals reversed this judgment upon its finding that Congress merely intended to change the measure of damages from punitive to compensatory where the state law provided only for punitive damages in its wrongful death act, and that it did not, by the 1947 amendment, intend to further modify the general rule under the Federal Tort Claims Act that the local law is to control the government's liability. It therefore held that the ceiling on damages under the Massachusetts Act was applicable to suits under the Federal Tort Claims Act.[8]

Upon appeal, the Supreme Court granted certiorari,[9] and reversed the decision of the court of appeals in a five to four decision.[10] The court, in an opinion by Mr. Justice Douglas, indicated that the Massachusetts Act clearly provided for punitive damages since the measure was the degree of the defendant's culpability without reference to the pecuniary injuries suffered by the claimant. Mr. Justice

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6. 28 U.S.C. § 2674 (1952). This provision has been construed to create liability upon the government, based upon local law, where a private person would be liable under like or analogous circumstances. Indian Towing Co. Inc. v. United States, 250 U.S. 61 (1955), noted in 1 HOWARD L. J. 188 (1955); 42 A.B.A.J. 68 (1956); 25 FORDHAM L. REV. 167 (1956); 2 HOWARD L.J. 159 (1956); 54 MICH. L. REV. 875 (1956); 27 MISS. L. J. 252 (1956); 2 N.Y.L. FORUM 223 (1956); 31 NOTRE DAME L. REV. 306 (1956); 30 ST. JOHN'S L. REV. 301 (1956); 9 F.R.D. 143 (1956). See also 22 MO. L. REV. 48, 65-66 (1957).

7. It was discovered that the death acts in Alabama and Massachusetts provided for punitive damages only and that the government could not be held liable under the Federal Tort Claims Act in those two states. House Report No. 748, June 30, 1947, U.S. CODE CONG. SERV., 80th Cong. (1947). Several bills were introduced to relieve this situation. H.R. 3668, 80th Cong., 1st Sess., would have created liability against the United States for punitive damages where state law provided only for such. H.R. 3690 was designed to abolish all prohibition against the award of punitive damages under the Federal Tort Claims Act. At the instance of the Comptroller General, the form in which the amendment became positive law was:

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." 61 STAT. 722 (1947), 28 U.S.C. § 2674 (1952).

8. 227 F.2d 385 (1st Cir. 1955).

9. 350 U.S. 980 (1956).

10. 352 U.S. 128 (1956).

Douglas then pointed out that when Congress rejected this measure and created a different standard of compensatory damages, measured by the pecuniary losses involved, it must have gone "the whole way and made inoperative the rules of local law governing the imposition of 'punitive' damages." The differences in the policy of a ceiling on punitive damages, which is a policy limiting the imposition of punishment, and the policy behind a ceiling on compensatory damages was emphasized to support this reasoning.

Mr. Justice Harlan concurred with the Douglas opinion, and followed its reasoning closely. He emphasized that in providing for a completely different standard of recovery in suits against the United Sates, Congress was legislating not only as to the manner of recovery, but also as to the extent of recovery since the two standards would rarely lead to the same result. He concluded, therefore, that, in suits under the Federal Tort Claims Act, Congress had made the Massachusetts restriction upon the imposition of "punishment" inapplicable to the substituted standard.

Mr. Justice Frankfurter, joined by Justices Reed, Clark and Brennan, registered a strong dissent. He warned against the dangers of finding a clear meaning in Congressional enactments without regard to the legislative history[11] and of not construing particular legislation in light of its overall purpose. The overall purpose of the Federal Tort Claims Act is to make the United States liable in the same manner and to the same extent as a private individual under like circumstances, and it was felt that the 1947 amendment should be construed in such a manner as to carry out this purpose as far as possible. Not to recognize the ceiling in the Massachusetts Act would be to deviate from this purpose. Relying upon statements in Congress to the effect that the 1947 amendment was designed to eliminate the discrepancy between the two states having punitive wrongful death acts, Alabama and Massachusetts, and the other forty-six states,[12]

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11. Boston Sand and Gravel Co. v. United States, 278 U.S. 41, 48 (1928), where Mr. Justice Holmes states: "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. This is rather an axiom of experience than a rule of law, and does not preclude considerations of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute. But, as we have said, the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops, . . ."

12. "This bill simply amends the Federal Tort Claims Act so that it shall grant to the people of two States the right of action already granted to the people of the other 46.

"This bill, with the committee amendment, will not authorize the infliction of punitive damages against the Government, and as so amended, it is reported favorably by a unanimous vote.

"Its passage will remove an unjust discrimination never intended, *but which works a complete denial of remedy for wrongful homicide.*" H.R. Rep. 748, *Committee on the Judiciary*, 80th Cong., 1st Sess., p. 2; Sen. Rep. No. 763, *Committee on the Judiciary*, 80th Cong., 1st Sess., p. 2 (Emphasis added.)

the dissent concluded that not to apply the Massachusetts ceiling in suits under the Federal Tort Claims Act, when the ceilings in the compensatory wrongful death acts in a dozen other states were applied, would only operate to perpetuate the discrepancy. Further, Mr. Justice Frankfurter seemed to feel that the Massachusetts Legislature would have imposed the same ceiling upon recovery were the Massachusetts Act one providing for compensatory recovery.

It seems to this writer that the soundest arguments are to be found with the majority. Congress, when it enacted the 1947 amendment, found that the general rule provided in the Federal Tort Claims Act was not satisfactory when applied in the wrongful death situations in Alabama and Massachusetts. It therefore changed the rule by that amendment, creating an exception, and any attempt to construe the exception to harmonize too closely to the general rule would be to defeat the Congressional intent to change it. Congress, by the amendment, without reference to any limitation, has dictated that the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries.[13] Frequently, as indeed has been found in the instant case, the actual pecuniary injuries will exceed twenty thousand dollars. To award only twenty thousand dollars in such a situation would be *not* to follow Congress' direction. The discrimination which Congress intended to eliminate was a discrimination "which works a complete denial of remedy for wrongful homicide."[14] Congress set up its own remedy, with its own standard of recovery. It must not, therefore, have intended to apply a local limit on relief which was designed to fit a completely different standard of remedy, or more precisely, a different standard of punishment. Certainly, this construction is in harmony with the liberal interpretation which it is generally conceded should be given to the Federal Tort Claims Act.[15]

RAYMOND ROBERTS

REAL PROPERTY—UNACKNOWLEDGED DEED AS PASSING TITLE—EFFECT OF ADDITION OF FRAUDULENT ACKNOWLEDGMENT

Robb v. N.W. Electric Power Cooperative[1]

Landowners sued in equity to have a 1951 instrument conveying a perpetual easement for a right of way for the construction, operation and maintenance of

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An unprinted statement by the Comptroller General to like effect was provided in the Government's brief: "Since in those two states compensatory damages are not allowed, all that is required is to amend the Federal Tort Claims Act to say that in such states compensatory damages shall be allowed. . . . It is believed that that suggestion would eliminate the discrepancy and would make the settlement of claims in those two states to be exactly in accord with the general rules followed in the other 46 states. . . ."

13. *Supra* note 7.
14. *Supra* note 12.
15. 22 Mo. L. REV. 48, 62 (1957).

1. 297 S.W.2d 385 (Mo. 1957).

an electric transmission line declared null and void because a fraudulent and void acknowledgment had later been added to the instrument before it was recorded. The instrument was given for consideration, signed by landowners and delivered to the representative of N.W. Cooperative by landowners intending to grant the rights set forth by its terms. The supreme court held that the alteration did not deprive the N.W. Cooperative of the title and interest conveyed or reinvest landowners with that title, but that the landowners were entitled to have the instrument removed from the records of the recorder of deeds because it was not acknowledged and not entitled to be recorded.

The Missouri cases have been generally consistent in holding that an unacknowledged deed is an effective and valid conveyance of title and interest as between the parties and those with actual notice,[2] except in the case of release of dower,[3] and in the case of sheriff's deeds and similar types of cases.[4] Some doubt was cast upon this proposition by *Goodwin v. Gerling*,[5] a case presenting a special problem of protection under the Soldiers and Sailors Civil Relief Act,[6] where the court stated that the grantee under an unacknowledged and unrecorded deed was neither the legal nor the equitable "owner", but had only an "equitable claim." In the principal case the court held that the deed, when delivered, was an effective and valid conveyance of the easement interest and title so far as the parties to the suit were concerned, and thus the principal case is in line with the general current of Missouri authorities.

The court in the principal case was faced with the main problem of whether the later addition of a fraudulent acknowledgment to the deed granting the easement was such an alteration as to void the interests and titles originally conveyed by the deed. Generally, the effect of an unauthorized and material alteration to an instrument by a party thereto is to vitiate that instrument so

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2. Pew v. Price, 251 Mo. 614, 620, 158 S.W. 338, 339 (1913) [grantee held vested with full title against grantor where grantor delivered a deed and possession of property]; MO. REV. STAT. § 442.400 (1949) and annotations thereunder; GILL, MISSOURI TITLES § 384 (3d ed. 1931).

3. In a companion case, McCoy v. N.W. Electric Power Cooperative, 297 S.W.2d 390 (Mo. 1957), the court held that the deed was insufficent to release a joining wife's inchoate dower in view of the fact tha the deed was not acknowledged, MO. REV. STAT. § 442.030 (1949).

The court expressly did not consider the question of the effect of the new Probate Code on the wife's inchoate dower. See generally on the problem, Dribben, *Comment, Dower, Homestead Estate, Homestead Allowance, and Release of Marital Rights Under the New Missouri Probate Code*, 21 MO. L. REV. 151 (1956).

4. Brannock v. McHenry, 252 Mo. 1, 158 S.W. 385 (1913) [sheriff's deed in execution sale]; Eckhardt and Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri* § 92, preceding Chapt. 441, 23 V.A.M.S. (1949): 1 GILL, TREATIES ON REAL PROPERTY LAW IN MISSOURI 62 (1949).

5. 362 Mo. 19, 239 S.W.2d 352 (1951). On this case see Murdock [nee Gibson], *Note, Real Property, Title Under Unrecorded Deed, Soldiers and Sailors Civil Relief Act*, 17 MO. L. REV. 471 (1952).

6. 50 U.S.C.A. APP. §§ 501 et. seq. (1951).

that no recovery may afterwards be had upon it.[7] It has been said this general rule was reference only to the effect of the unauthorized alteration upon the instrument itself and not upon the original consideration for which the instrument was given.[8]

However, by the conveyance in the principal case, the Cooperative was already vested with the easement and by the weight of authority any alteration of a deed after it has once been delivered will not operate to divest that which has already vested or have any effect upon the title orginally passed.[9] This doctrine was early recognized by the courts of England.[10]

In an earlier Missouri case of *Carson v. Woods*,[11] the Carsons, with knowledge that unbeknown to Mrs. Woods her agent had orally agreed to sell the land to someone else, prevailed upon Mrs. Woods to sign a memorandum of an agreement to sell land to them. Later one of the Carsons signed the deed as a witness without the knowledge or authority of Mrs. Woods so that they could record the instruments. The Carsons brought suit for specific performance of the contract which was denied upon the grounds that they mutilated and changed, without authority of the maker, the instrument in writing they asked be enforced. The court in the principal case distinguished the *Carson* case upon the grounds that it represented the doctrine of "clean hands" and that in the *Carson* case no title to the land had been conveyed as the instrument was a memorandum of a contract to sell. Even in the case of an instrument of conveyance, a material alteration will destroy all right of action upon executory covenants. In other words, the general rule as previously stated would be applicable.[12]

The court in the principal case did not consider as persuasive two earlier Missouri cases[13] which failed to distinguish between the alteration of executed

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7. Humphreys Sav. Bank v. Carpenter, 213 Mo. App. 390, 250 S.W. 618 (1923) [mortgagee's material alteration of chattel mortgage rendered mortgage void]; 3 C.J.S., *Alteration of Instruments* § 5.

8. Anno., *Unauthorized Alteration of Written Instruments, Effect of Alteration Upon Rights of Parties*, 86 Am. St. Rep. 118 (1900).

9. Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513 (1870) [alteration of deed of conveyance of real property]; Alexander v. Hickex, 34 Mo. 496, 86 Am. Dec. 118 (1864) [conveyance of real property by deed later altered does not affect title already vested in grantee]; Tibeau v. Tibeau, 19 Mo. 78, 59 Am. Dec. 329 (1853) [later alteration of deed used in conveyance of real property does not affect title vested in grantee]; Waldron v. Waller, 65 W. Va. 605, 64 S.E. 964, 32 L.R.A. (N.S.) 284 (1909) [alteration of deed which conveyed land has no effect on title already vested]; 2 AM. JUR., *Alteration of Instruments* § 37; 3 C.J.S., *Alteration of Instruments* § 16b.

10. 1 COKE UPON LITTLETON 35b, Hargraves note 7 (1st Am. from 19th London Edition 1853).

11. 177 S.W. 623 (Mo. 1915).

12. Waldron v. Waller, 65 W. Va. 605, 64 S.E. 964, 13 L.R.A. (n.s.) 284, cited in note 9 *supra*.

13. Kempf v. Phillips Pipe Line Company, 61 S.W.2d 422 (Mo. App. 1933); Hardt v. Phillips Pipe Line Company, 85 S.W.2d 202 (Mo. App. 1935).

and executory instruments. In each of these cases a pipe line company had affixed fraudulent acknowledgments upon the instruments granting easements without the consent of the grantors and the court of appeals set aside and cancelled the deeds upon the basis that they had been materially altered. It would seem that the principal case overrules these two earlier Missouri cases.

ROBERT E. LUSK

RESTRAINTS ON ALIENATION—PRE-EMPTIVE RIGHT

Kershner v. Hurlburt[1]

Plaintiff and defendant each desired to own part of a parcel of land consisting of more than two lots lying situate between their respective residences in a commercial area of Rolla. Defendant purchased the land, on which there was a small three room house, for $2,550. In pursuance of a prior oral understanding, defendant conveyed by warranty deed to plaintiff the west half of the lots for $1,275. At that time the parties entered into a contract providing that if either party desired to sell his half of the lots he would give to the other the first refusal at the purchase price. Defendant subsequently conveyed to a third person the east half of the lots for $3,500. Specific performance of the contract was denied by the supreme court, which held that the pre-emptive provision of the contract did not appear to have any purpose except to prevent the sale, and was void as an unreasonable restraint on alienation.

The common law has long favored the alienability of land. It has been thought that such a policy is beneficial to a progressive society, the growth of which is dependent upon the opportunity to exercise individual initiative. To make transfers of land responsive to economic and social fluctations has been seemingly the adopted criterion. Restrictions on transfer tend to restrict the extension of credit and operate to prevent creditors from satisfying their claims. They take property out of commerce by destroying its marketability and tend to prevent its improvement and optimum use because a landowner is neither able to secure credit by mortgaging his interest nor able to sell to another who can finance the needed improvement.

One of the common law rules designed to preserve alienability is the Rule Against Perpetuities, which invalidates every future interest that may vest beyond lives in being and twenty-one years.[2] Such a future interest, especially when

1. 277 S.W.2d 619 (Mo. 1955).
2. Lockridge v. Mace, 109 Mo. 162, 166, 18 S.W. 1145, 1146 (1891), ". . . lands cannot be limited in any mode so as to be locked up from alienation beyond the period of a life or lives in being and twenty-one years after, allowing the period of gestation in addition of a child *en ventre sa mere*, who is to take under such limitation."

limited to an unborn or unascertained person, is an indirect restraint on alienation. The Rule extends to interests created by specifically enforceable contracts.[3] It did not invalidate the pre-emption contract involved in his case because that contract, as construed by the court, was personal to the parties and so not binding beyond lives in being.[4]

Another common law rule designed to preserve alienability is the rule against direct restraints on alienation.[5] Direct restraints on alienation are of two types: (1) disabling restraints, and (2) penalty restraints.[6] A disabling restraint is a provision in a conveyance depriving the conveyee of power to transfer his interest, so that any transfer he makes is inoperative. Except in the case of the interest of a beneficiary of a spendthrift trust or trust for support, all disabling restraints on alienation are void.[7] A penalty restraint on alienation is a provision imposing a penalty, commonly forfeiture of his interest, upon an owner who transfers his interest. Penalty restraints on alienation of estates in fee simple are usually void.[8] Some jurisdictions enforce penalty restraints on estates in fee simple if they penalize only transfer to a limited group of possible transferees.[9]

The *Restatement of Property* takes the position that a pre-emptive provision, like that involved in the instant case, is a penalty restraint on alienation and valid as to an estate in fee simple only if the pre-emptive optionee is required to meet any offer received by the optionor as a condition to the exercise of the right of first refusal.[10] In the principal case the plaintiff, holding the pre-emptive right, was not required to compete with a contemporary offer; the offeror was bound to sell at a price stipulated in the contract by the parties. A leading case adhering to the view expressed by the *Restatement* is In re *Rosher*.[11] The American

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3. 41 AM. JUR. *Perpetuities and Restraints on Alienation*, § 35, p. 78 (1942).
4. Citing Williams v. Diederich, 359 Mo. 683, 686 (1), 223 S.W.2d 402, 403 (1) (1949).
5. 6 AMERICAN LAW OF PROPERTY § 26.66 (1952).
6. The contract in this case was deemed to create a pre-emptive right contingent upon a condition precedent to the exercise of the right to purchase, or the first refusal, rather than an option to buy on the part of the plaintiff. The distinguishing feature between a pre-emptive right and an option would seem to be the location of power. Garcia v. Callender, 125 N.Y. 307, 26 N.E. 285 (1891). An option to purchase arises in this type of contract only when the other party desires to sell, and then it is said to be short lived, if no specific provision is made for its duration. 5 CORBIN ON CONTRACTS § 1197, pp. 831-833 (1951).
7. 6 AMERICAN LAW OF PROPERTY § 26.16 (1952).
8. The cases are collected in GRAY, RESTRAINTS ON ALIENATION 8-25 (2d ed. 1895); 6 AMERICAN LAW OF PROPERTY § 26.15 (1952).
9. 6 AMERICAN LAW OF PROPERTY § 26.46 (1952).
10. RESTATEMENT OF PROPERTY, Div. IV, § 413, p. 2441 (1944).
11. 26 Ch. Div. 801 (1884) (Devise to son with stipulation that if any person claiming through or under him should desire to sell the property or any part of it during the life of the testator's wife, she should have the option to purchase the same at the price of £3000 for the whole. At the time of the testator's death the value of the property was at least five times the sum at which the wife was

cases follow generally the view expressed in the *Restatement*.[12] There are jurisdictions which have held that a fixed-price pre-emption is valid even though the prior agreed price is not indicative of current value, reasoning that a pre-emption, like an ordinary option, is designed not to deter, but rather to foster alienation.[13]

In the instant case the court adopted the view that contracts containing a pre-emptive provision for a fixed-price may be valid if the particular purpose sought to be accomplished is reasonable. In the principal case it found the contract contained no covenants restricting the use or leasing of the lots for any purpose. Although the plaintiff contended that the purpose of the contract "was to prevent the encroachment of undesirable buildings which would be injurious to the values of both properties as residences," the court felt that the contract not only failed to embody this avowed purpose, but in effect negatived it.[14] In finding that the purpose of the provision "could have accomplished nothing more than to arbitrarily restrain the alienation of the lots for the lives of the respective parties," the court pointed out that if the value increased, neither party would desire to sell, and if the value remained the same or decreased, no advantage would result from the agreement.[15]

The rule laid down in the instant case that a fixed-price pre-emption provision is valid if reasonable means, in effect, that such a provision throws doubt on the title until its validity its ascertained by litigation. If a pre-emptive provision not within the Rule Against Perpetuities is desired it would seem necessary in order to avoid possible litigation to provide that the sale price be based upon the current market value at the time of the sale, making some provision in the contract for an appraised value to be agreed upon.

If the party exercising the right of pre-emption must pay the offeror's price, there is no material impediment to alienation, assuming the sale price to be re-

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given the right to purchase. The court held that the language in substance amounted to an absolute restraint against sale during the life of the widow and the restraint was consequently invalid.) This case was followed in England in *In re* Cockerill, 2 Ch. 131 (1929).

12. Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451 (1887); Lewis Oyster Co. v. West, 93 Conn. 518, 107 Atl. 138 (1919); Henderson v. Bell, 103 Kan. 422, 173 Pac. 1124 (1918); Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 S.E. 89 (1923).

13. Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926) and companion case, Windiate v. Leland, 246 Mich. 659, 225 N.W. 620 (1929) (decided while the two lives perpetuities statute in effect); Lantis v. Cook, 342 Mich. 347, 69 N.W.2d 849 (1955) (Here pre-emption called a mere option to purchase at a fixed price upon the happening of a condition precedent); 2 SIMES, FUTURE INTERESTS § 462 (1936). In Elliott v. Delaney, 217 Mo. 14, 116 S.W. 494 (1909), it was held that an owner may agree, for a valuable consideration, not to sell his property during his lifetime, or that a certain person shall have the right to say whether or not he will take the property at the owner's death at a stipulated price.

14. 277 S.W.2d 619, at p. 626.

15. *Ibid.*

flective of current value.[16] Only where the offeror must accept much less than the fair value will the pre-emptive provision act as a serious impediment to alienation. It has been suggested that where such contracts containing pre-emptive covenants are not to be performed within the time allowance of the Rule Against Perpetuities, they should not be decided on the issue of perpetuities, but rather upon whether they become a material restraint upon alienation.[17] The use of the Rule Against Perpetuities as a criterion of validity has been called unsound because the duration of a pre-emptive right bears no necessary relation to the extent of the burden it imposes on alienability and also because the Rule itself was designed for non-commercial dispositions of property. Pre-emptions, as in the principal case, are commonly found in commercial transactions.[18] Perhaps the rule against direct restraints on alienation should be the sole determinative of the validity of such pre-emptions.

WILLIAM A. R. DALTON

16. Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956), action for specific performance of a pre-emptive right. Restrictive covenant in every conveyance in a residential subdivision in Jackson County called "Lake Lotawana" which provided that no sale should be made without notice to the grantor and the owners of the adjoining lots on the sides who shall have the opportunity to buy on the terms of the proposed sale. $9,000 was the agreed sale price, $1,000 to be paid down and the balance on the delivery of the deed. The seller retained the right to visit such property and to occupy a bedroom alone during such visits. Buyers agreed to treat her cordially and to furnish her with meals during such visits. Rights of the seller were non-assignable. Plaintiffs agreed to meet these terms of sale and sought specific performance of the pre-emptive provision in the conveyance. Defendant argued the pre-emptive right was an unreasonable restraint of such land. The supreme court held the effect of a pre-emptive right to purchase, as a practical restraint on alienation, depends upon the manner of fixing the price, and that the provision in this case was not an unreasonable restraint on alienation and that the petition stated a claim upon which relief should be granted.

17. 6 AMERICAN LAW OF PROPERTY § 26.66 (1952).

18. 54 MICH. L. REV. 1006 at p. 1007 (1956).