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Comments

THE CONCEPT OF POSSESSION AS APPLIED TO INTOXICATING LIQUOR BY THE MISSOURI COURTS

The passage of House Bill 248 by the Missouri General Assembly in 1959 may bring to a close a respite of nearly three decades during which the Missouri courts have not been called upon to deal with the possessory concept as it relates to intoxicating liquor. Section one of this bill reads as follows:

Any person under the age of twenty one years, who purchases or attempts to purchase, or has in his *possession*, any intoxicating liquor as defined in section 311.020 is guilty of a misdemeanor.¹ (Emphasis added.)

During the prohibition era many decisions of the Missouri courts involved the pursuit of this legalistic will-of-the-wisp. The nebulous and nomadic nature of the concept of possession would lead one to suspect that the end of the noble experiment was accompanied with a feeling of relief on the part of the courts as they laid aside their efforts to define the concept in this area of the law. Holmes had observed much earlier that the concept of possession had fallen into the hands of the philosophers.²

While the possibility that the enactment of House Bill 248 will flood the courts with litigation commensurate with that brought about by the advent of prohibition seems remote, it would appear that after nearly thirty years of non-involvement with the problem the Missouri courts may once again come to grips with the concept of possession as it relates to intoxicating liquor. In resolving such problems as may arise in this area it is suggested that the courts will be guided by the concept judicially developed in Missouri during an earlier period when the mere possession of intoxicating liquor was a criminal offense.

In the development of this topic it is proposed: first, to review the previous Missouri statutes that made the possession of intoxicating liquor a crime; second, to examine the definition of *possession* as related to intoxicating liquor and as developed by the Missouri courts; and third, to consider certain classes of fact situations and the application to them of this judicial concept of possession.

I. REVIEW OF THE MISSOURI STATUTES MAKING POSSESSION OF INTOXICATING LIQUOR A CRIMINAL OFFENSE

Prior to 1872 statutory regulations imposed on dramshops in Missouri were limited to controlling the sale, gift and disposition of intoxicants. In that year the

1. Mo. Laws 1959, H.B. 248, § 1.
2. HOLMES, THE COMMON LAW 206 (1881).

Twenty-Sixth General Assembly amended the existing statutes by creating a special class of liquor licenses to be known as wine and beer licenses.³ The licensees were prohibited from *keeping* certain more potent liquids in or about their wine and beer shops.⁴ This early law apparently produced no litigation at the appellate level.⁵

In 1907 a penalty was provided to protect against the *keeping* and *storing* of intoxicating liquor by other than licensed dramshop operators and wholesalers⁶ and to prohibit any person from *storing* or *keeping* intoxicants for another person in any county having adopted the local option law.⁷ These enactments produced the first explorations by the Missouri courts into what constituted the possession of intoxicating liquor.⁸ Three decisions construing that section of the statutes making illegal the *storing* and *keeping* of intoxicating liquor for a person in a local option county are worthy of separate mention. In *State v. Burns*,⁹ the defendant, while sitting in his buggy with the intention of driving from Mt. Vernon to Freistatt, was given money by two residents of the local option county in which the transaction took place for the purchase of whiskey. Having completed the round trip the defendant was arrested prior to delivering the whiskey. In upholding the conviction of the defendant for *keeping, storing* and *delivering* the whiskey the Missouri Supreme Court ruled that the defendant did

retain in his possession—that is, keep in his possession—overnight, the whiskey From the time he bought the whiskey until the attempted delivery he kept it in his possession the defendant, who was in possession of the whiskey . . . was, during every moment of such possession, keeping it¹⁰

No effort was made by the court in the *Burns* case to define *keeping, storing* or *possessing*. The language of the decision indicated that *keeping* was considered as synonymous with *possessing*. Nor was the court troubled by drawing a distinction between *custody* and *possession*.

3. Mo. Laws 1871, at 48, § 1.

4. Mo. Laws 1871, at 48, § 4.

5. An early law that did produce litigation was enacted in 1877 making it a misdemeanor knowingly to sell intoxicating liquor to any student of the State University, or of any school, college or academy in Missouri, Mo. Laws 1877, at 273, § 1. The Kansas City Court of Appeals held in 1889 that the statute applied to all students regardless of age, *State v. Cooper*, 35 Mo. App. 532 (K.C. Ct. App. 1889).

6. Mo. Laws 1907, at 232, § 1.

7. Mo. Laws 1907, at 232, §§ 2-3 allow certain exceptions.

8. *State v. Burns*, 237 Mo. 216, 140 S.W. 871 (1911); *State v. Rawlings*, 232 Mo. 544, 134 S.W. 530 (1911); *State v. Farrand*, 197 Mo. App. 589, 198 S.W. 77 (K.C. Ct. App. 1917); *State v. Jancie*, 191 S.W. 1100 (Spr. Ct. App. 1917); *State v. Leonard*, 195 Mo. App. 283, 190 S.W. 957 (K.C. Ct. App. 1916); *State v. Richardson*, 192 Mo. App. 429, 182 S.W. 782 (K.C. Ct. App. 1916); *State v. Brown*, 188 Mo. App. 248, 175 S.W. 131 (K.C. Ct. App. 1915); *State v. Parkel*, 185 Mo. App. 70, 170 S.W. 915 (Spr. Ct. App. 1914); *State v. Galliton*, 176 Mo. App. 115, 161 S.W. 848 (Spr. Ct. App. 1913); *State v. McMurtry*, 161 Mo. App. 400, 143 S.W. 521 (Spr. Ct. App. 1912).

9. 237 Mo. 216, 140 S.W. 871 (1911).

10. *Id.* at 223-24, 140 S.W. at 872.

In *State v. Rawlings*,¹¹ decided under the same statute,¹² the court again failed to define possession but announced that "*possession* lasting only five minutes would not sustain the charge of *storing*, but . . . would justify the court in submitting to the jury the question of whether or not the defendant *kept* . . . intoxicating liquors . . ."¹³ (Emphasis added.) The *Rawlings* case suggested that although *keeping* and *storing* could be distinguished, possession was a part of either.

In a case involving an illiterate laborer, who on instructions from his employer picked up nine barrels of bottled beer packed in straw at the freight station, the Kansas City Court of Appeals indicated a concept of *keeping* which included more than the act of *possessing*. The court held that the defendants who

at the time of . . . [their] arrest, being in *possession* of the beer . . . [as] servants of the purchaser, were 'keeping' it . . . providing they knew . . . [it] was beer, imported into the county for the purpose of being disposed of in violation of the Local Option Law.¹⁴ (Emphasis added.)

The court's decision was consistent with the later Missouri cases involving the possession of intoxicating liquor in suggesting that such possession requires knowledge; but inconsistent with the same cases in requiring the presence of a guilty intent.¹⁵

Following the passage of the eighteenth amendment¹⁶ and the beginning of national prohibition as embodied in the Volstead Act,¹⁷ the Missouri Legislature adopted the first state prohibition statute in 1920. With certain exceptions the selling, giving away or transporting of intoxicating liquor was declared illegal.¹⁸ Within a year after the adoption of the state prohibition statute an amendment was passed prohibiting the *possession* of intoxicating liquor.¹⁹

11. 232 Mo. 544, 134 S.W. 530 (1911).

12. Mo. Laws 1907, at 232, § 1.

13. 232 Mo. at 562, 134 S.W. at 534.

14. *State v. Brown*, 188 Mo. App. 248, 251, 175 S.W. 131, 132 (K.C. Ct. App. 1915).

15. See notes 40-57 *infra*.

16. U.S. CONST. amend. XVIII (1919). The eighteenth amendment prohibited the manufacture, sale, transportation, importation and exportation of intoxicating liquor for beverage purposes. The word *possess* did not appear in the amendment and hence no express power was given to Congress to prohibit the *possession* of intoxicating liquor. See *State v. Heilman*, 246 S.W. 622 (K.C. Ct. App. 1923) and citations contained therein to the effect that neither the eighteenth amendment nor the Volstead Act prohibited the state from legislating on the subject of prohibition except to the extent that no state could legalize that which the federal law and constitution declared illegal.

17. 41 Stat. 308 (1919). The Volstead Act prohibited the *possession* of intoxicating liquor except under certain specified circumstances. For a discussion of the word *kept* under a provision of the Volstead Act condemning as nuisances places where intoxicating liquor was so held, see Note, 2 Miss. L.J. 346 (1930).

18. Mo. Laws 1919, at 409, § 1.

19. Mo. Laws 1921, at 413, § 1. The manufacture, sale, giving away or transportation of intoxicating liquor were felonies in Missouri, Mo. Laws 1923, at 242, § 21, while possession alone was punishable as a misdemeanor, *State v. Brown*, 331 Mo. 556, 56 S.W.2d 405 (1932). As pointed out in *State v. Jenkins*, 321 Mo. 1237, 14 S.W.2d 624 (1929) it was not a crime in Missouri to drink intoxicating liquor. Under certain conditions the possession of intoxicating liquor was not illegal

The possession of intoxicating liquor remained a misdemeanor in Missouri, punishable by stiff fines and jail sentences,²⁰ until the end of the prohibition period in 1933. With all federal prohibition laws having been repealed that year, Governor Park called the Fifty-Seventh General Assembly into extra session and in January 1934 prohibition was repealed in Missouri. Simultaneous with the repeal of the state prohibition statute a new liquor control act was enacted to cover the "regulation, control, manufacture, brewing, sale, possession, transportation and distribution of intoxicating liquor."²¹ Missouri was again a wet state and while the selling, manufacturing and transporting of intoxicants remained the subjects of elaborate legislative controls, the possession of intoxicating liquor was prohibited only in certain cases involving its acquisition from unlicensed suppliers or in unsealed containers.²² The above controls relating to possession have been in effect in Missouri since 1934²³ and have produced reported litigation.²⁴ However, none of these decisions have cast any light on the possessory concept as it is likely to arise under the new state law.

In addition, perhaps it should be kept in mind that in at least one instance the Missouri courts have upheld the validity of a local ordinance making it illegal to possess intoxicating liquor under circumstances not prohibited or made punishable under the state law.²⁵

II. POSSESSION DEFINED

In defining possession within the meaning of the National Prohibition Act the United States Court of Appeals for the Eighth Circuit, in a case involving the proprietor of a Kansas City, Missouri "soft drink parlor," upheld an instruction of the trial court that

under the state prohibition statute. For a discussion of this problem as related to possession of intoxicants by a physician, or by other parties when the intoxicating liquor was lawfully obtained and held in the private residences of said lawful possessors, see, *State v. Ryan*, 217 Mo. App. 538, 269 S.W. 627 (Spr. Ct. App. 1925).

20. The severity of the penalties assessed by the trial courts against many of the parties found guilty of possession of intoxicants seems not unrelated to the large number of cases appealed to the upper courts. See, *e.g.*, *State v. Smith*, 293 S.W. 487 (Spr. Ct. App. 1927) in which defendant was fined \$700 by the trial court and sentenced to eight months in jail; *State v. Brokaw*, 281 S.W. 105, 107 (Spr. Ct. App. 1926) in which defendant on trial for a first offense was given the maximum sentence of one year in jail and a \$1000 fine. "[W]e are unable to say . . . [the punishment] was excessive."

21. Mo. Laws Extra Sess. 1933-34, at 77, §§ 1-46.

22. Mo. Laws Extra Sess. 1933-34, at 80, § 8.

23. Mo. Laws 1937, at 527; Mo. Laws 1945, at 1043; Mo. Laws 1949, at 320; § 311.580, RSMo 1949.

24. See, *e.g.*, *State v. Henderson*, 350 Mo. 968, 169 S.W.2d 389 (1943); *Bardenheier Wine & Liquor Co. v. St. Louis*, 345 Mo. 637, 135 S.W.2d 345 (1949) (en banc).

25. *City of Springfield v. Stevens*, 358 Mo. 699, 216 S.W.2d 450 (1949) (en banc) involved an unsuccessful attack upon a local ordinance prohibiting the possession of intoxicating beverages by taxicab drivers.

by possession is meant actual possession by the person who is accused of having the intoxicating liquor, not necessarily in his hands, but he must have control and dominance over it²⁶

Essentially the same view was taken by the United States Court of Appeals for the Fourth Circuit where a defendant husband claimed the small quantity of liquor found in a medicine cabinet had been left there without his consent or knowledge by his divorced wife. The prosecution had the burden of proving both a power of control in the defendant and an intent to exercise dominion over the liquor.²⁷ In the relatively few federal decisions which defined possession under the Volstead Act, the common law concept of possession requiring physical control and possessory intent was closely followed. A complicating factor under the Volstead Act was the requirement that possession was an offense only when it was for the purpose of violating the law, such as the holding of intoxicating liquor for sale or barter.²⁸

The Missouri courts very early adopted the definition of possession as set out in *Corpus Juris*²⁹ and later decisions of these same courts neither strayed far from, nor added materially to, the definition stated therein.

'To possess' means to have the actual control, care, and management of the liquor, and not a passing control, fleeting and shadowy in its nature. Neither ownership nor actual physical possession is essential. And possession through a coprincipal or through an innocent agent would come within the purview of such statutes³⁰

In *State v. Lane*,³¹ decided by the Springfield Court of Appeals in 1927, the court, with an evidenced awareness of the above definition, complained that the term possession as used in the Missouri prohibition statute had "never been clearly defined by any decision of the appellate courts of this state in so far as our search has enabled us to discover."³² But, having called attention to a need for a more detailed statement of the possessory concept as applied to intoxicants, the court not only neglected to hand down a more precise and definitive concept of its own, but proceeded to embrace the "definition" adopted in the earlier decisions. In fact, the court muddled the water somewhat by stating that *custody* was involved in the term *possession*.³³ Later decisions of the Springfield court relied without further

26. *Murphy v. United States*, 18 F.2d 509, 512 (8th Cir. 1927).

27. *Gunnoe v. United States*, 34 F.2d 12 (4th Cir. 1929), Note, 15 IOWA L. REV. 209 (1930).

28. *Petition of Shoemaker*, 9 F.2d 170 (W.D. Pa. 1925); *Bryson v. State*, 27 Ga. App. 230, 108 S.E. 63 (1921). See also, Annot., 10 A.L.R. 1553 (1921) on construction and effect of the Volstead Act.

29. 33 C.J. *Intoxicating Liquors* § 198 (1924).

30. *Ibid.* as quoted in *State v. Huff*, 317 Mo. 299, 302, 296 S.W. 121, 122 (1927); *State v. Murdock*, 27 S.W.2d 730, 732 (K.C. Ct. App. 1930); *State v. Ward*, 9 S.W.2d 253, 254 (Spr. Ct. App. 1928); *State v. Compton*, 297 S.W. 413, 414 (Spr. Ct. App. 1927); *State v. Lunfrunk*, 279 S.W. 733, 735 (K.C. Ct. App. 1926).

31. 221 Mo. App. 148, 297 S.W. 708 (Spr. Ct. App. 1927).

32. *Id.* at 150, 297 S.W. at 709.

33. *Id.* at 151, 297 S.W. at 709.

question on the definition of possession as adopted from *Corpus Juris* and as employed in the early cases.³⁴

Toward the end of the prohibition period there was a tendency on the part of the Missouri courts to speak less of *control, care and management*, and to call attention to the necessity of *dominion* over the intoxicating liquor. For example, in *State v. Hammer*,³⁵ decided in 1933, the court held that the terms *possess* and *possession* meant the "act of having, holding and exercising dominion and control over the article in question [one pint of whiskey, more or less] to the exclusion of others."³⁶ This transfer of affection by the courts to the word *dominion* seems not to have effected any change in the judicial concept of the term possession.

Other jurisdictions used language similar to that adopted by the Missouri courts in defining possession as applied to intoxicating liquor. Even in jurisdictions where the language used was dissimilar to that of the Missouri courts, the differences brought to light appear to have been more semantic than real.³⁷

34. In *State v. Ward*, *supra* note 30, the court made no mention of custody and adopted without question or qualification the definition in *Corpus Juris*, and in 1929 the court held: "Our courts have pretty thoroughly established the rule that possession, within the meaning of the prohibition law, means to have actual control over and management of the liquor and not a passing or fleeting control." *State v. Nelson*, 21 S.W.2d 190, 191 (Spr. Ct. App. 1929).

35. 63 S.W.2d 181 (Spr. Ct. App. 1933).

36. *Id.* at 182. See also, *e.g.*, *State v. West*, 226 Mo. App. 1149, 49 S.W.2d 274 (K.C. Ct. App. 1932).

37. Possession of liquor involves knowledge, dominion and control, with plenary power of disposal in the alleged possessor, *Colbaugh v. United States*, 15 F.2d 929 (8th Cir. 1926). Possession of intoxicants is the exercise of personal control and management to the exclusion of others, *State v. Metz*, 107 Kan. 593, 193 Pac. 177 (1920). By possession is meant the having, holding, or detention of the intoxicating liquor in one's own power or command, *Brooks v. Commonwealth*, 206 Ky. 720, 268 S.W. 339 (1925). There must be a conscious and substantial possession by the defendant, as distinguished from a mere involuntary or superficial possession, *Skidmore v. Commonwealth*, 204 Ky. 451, 264 S.W. 1053 (1924). The intent to possess is an essential element of possession, *People v. Tripp*, 248 Mich. 225, 226 N.W. 834 (1929); 10 B.U.L. REV. 237 (1930); 16 VA. L. REV. 293 (1930). Possession of intoxicating liquor is not a passing control, fleeting and shadowy in its nature, *People v. Germaine*, 234 Mich. 623, 208 N.W. 705 (1926); *Anderson v. State*, 132 Miss. 147, 96 So. 163 (1923); *State v. Williams*, 243 Pac. 563 (Ore. 1926). Knowledge of the presence of intoxicating liquor on one's premises, coupled with the power to control it, is sufficient to make one guilty of unlawful possession, *State v. Harris*, 106 Ore. 211, 211 Pac. 944 (1923). To constitute possession there need not necessarily be an actual personal holding of the liquor, nor is it necessary that it be otherwise actually on the person, *State v. Alpin*, 128 Wash. 36, 221 Pac. 989 (1924). There must be some claim of right, control or dominion, with knowledge of the facts, *Schwartz v. State*, 192 Wis. 414, 212 N.W. 664 (1927). Possession is having personal charge of, or exercising the right of ownership, management or control of the liquor, *Newton v. State*, 94 Tex. Crim. 288, 250 S.W. 1036 (1923). Possession of intoxicating beverages means having actual control, care, and management of the liquor, *Thomas v. State*, 89 Tex. Crim. 609, 232 S.W. 826 (1921). See also Note, 28 COLUM. L. REV. 103 (1928); Note, 2 TEMP. L.Q. 188 (1928); Note, 14 Ky. L.J. 169 (1926).

A. Intent

Under the federal prohibition laws the naked possession of intoxicating liquor without intent to violate the law was not a crime.³⁸ A similar situation existed under certain state statutes.³⁹ In Missouri mere possession was a criminal offense. One of the earliest cases to reach the appellate courts held that

the statute [Sec. 6588, RSMo 1919] as it was amended [Mo. Laws 1921, at 413, §§ 1-4], says nothing about the liquors being 'for beverage purposes' and hence such purpose now forms no element of the offense.⁴⁰

In *State v. Sillyman*,⁴¹ decided in 1928, the Missouri Supreme Court held an information charging the defendant with the possession of intoxicating liquor for beverage purposes to be not insufficient as to form. The defendant, said the court, could not be heard to complain because the state had "alleged more than it was required to prove."⁴² The Missouri courts held fast to a construction of the state prohibition statute to the effect that possession in and of itself was prohibited and thereby unlawful.⁴³

B. Knowledge

While knowledge has been dispensed with as an element of certain criminal offenses, and while the Supreme Court of the United States has recognized a legislative power to declare an offense and to exclude the element of knowledge from an inquiry as to its commission,⁴⁴ the Missouri courts were unwilling to dismiss the element of knowledge in enforcing the provision of the state prohibition statute against the possession of intoxicating liquor.

A common defense under the statute making possession a criminal offense was a protestation on the part of the defendant that the intoxicating liquor found in

38. *Petition of Shoemaker*, *supra* note 28; *Bryson v. State*, 27 Ga. App. 230, 108 S.E. 63 (1921). *But see*, *Keen v. United States*, 11 F.2d 260 (8th Cir. 1926) in which it was held that an information charging possession was not insufficient for lack of an averment that the possession was with the intent to use the intoxicating liquor unlawfully.

39. See, e.g., *Commonwealth v. Certain Intoxicating Liquors*, 258 Mass. 85, 154 N.E. 569 (1927); *Williams v. State*, 66 Tex. Crim. 662, 148 S.W. 306 (1912).

40. *State v. Heilman*, 246 S.W. 622, 623 (K.C. Ct. App. 1923).

41. 7 S.W.2d 256 (Mo. 1928).

42. *Id.* at 258.

43. See, e.g., *State v. Hedrick*, 296 S.W. 152, 153 (Mo. 1927) in which the court took judicial notice that "corn whiskey" was fit for beverage purposes; *State v. Jackson*, 289 S.W. 654 (K.C. Ct. App. 1927); *State v. Gooch*, 285 S.W. 474 (Mo. 1926); *State v. Anderson*, 215 Mo. App. 291, 255 S.W. 358 (K.C. Ct. App. 1923). But note the language of the Kansas City Court of Appeals in *State v. Brown*, 188 Mo. App. 248, 251, 175 S.W. 131, 132 (K.C. Ct. App. 1915) in which the defendant was charged with violation of a statute, Mo. Laws 1907, at 232, § 2, making it illegal to keep or store intoxicating liquor for a person in any county operating under the local option law: "Guilty intent is the essence of crime, and it devolved upon the state to prove the existence of such intent on the part of the accused." *Accord*, *People v. Myers*, 239 Mich. 105, 214 N.W. 130 (1927).

44. *C.B. & Q. Ry. Co. v. United States*, 220 U.S. 559 (1911).

his house,⁴⁵ in his garage,⁴⁶ under the floor of his bedroom,⁴⁷ in his suitcase,⁴⁸ in his woodshed⁴⁹ or in his corncrib⁵⁰ was there without his consent or knowledge. In *State v. Chambers*,⁵¹ for example, the defendant denied knowledge of the presence of the liquor discovered in his home. It was held that the accused "had a right to make this defense, but the jury was not bound to believe him."⁵² It did not.

The burden of proof rested on the party charged with possession and the earlier Missouri decisions adhered closely to the rule that possession of the premises by the defendant was prima facie evidence that intoxicating liquor discovered on the premises was there with his knowledge. This doctrine was clearly stated in *State v. Blocker*⁵³ by the Springfield Court of Appeals:

The evidence for the state in this case showed defendant Blocker in possession of the building and its contents, and that made a prima facie showing of guilty knowledge of the presence of the liquor therein by the defendant, and if he, in fact, did not know of its presence, that was a matter of defense to be shown by him.⁵⁴

A later decision tempered the harshness of the rule laid down in the *Blocker* case when applied to those in possession of hotels and rooming houses. Reversing a judgment against the proprietor of a rooming house, the Kansas City Court of Appeals reflected that a contrary holding would "in effect, make a hotel keeper responsible for the acts of his guests in bringing liquor upon the premises without his knowledge."⁵⁵ *State v. Hayes*⁵⁶ extended this modification of the general rule to certain other public or semi-public places. The *Hayes* case concerned the finding of a bottle of whiskey in the pocket of a coat hanging in the bathroom of a barber shop under circumstances which suggested that the coat did not belong to the defendant owner of the shop. The accused denied knowledge of the presence of the whiskey. Although holding that the defendant had a "technical possession and the right of control" of the toilet, the court also recognized the nature of the facilities contained therein and held as a practical matter that such control by the possessor of the premises could not be "actual and uninterrupted." "[N]o one would seriously contend," continued the court, "that the Terminal Railway Company could be convicted of the possession of liquor upon the bare evidence that liquor was found in the lobby of Union Station in Kansas City . . ."⁵⁷

45. *State v. Chambers*, 286 S.W. 744 (Spr. Ct. App. 1926).

46. *State v. Heilman*, *supra* note 40.

47. *State v. Huckabe*, 269 S.W. 691 (Spr. Ct. App. 1925).

48. *State v. Galliton*, 176 Mo. App. 115, 161 S.W. 848 (Spr. Ct. App. 1913).

49. *State v. Lee*, 298 S.W. 1044 (St. L. Ct. App. 1927).

50. *State v. Fortner*, 297 S.W. 177 (Spr. Ct. App. 1927).

51. 286 S.W. 744 (Spr. Ct. App. 1926).

52. *Ibid.*

53. 274 S.W. 1097 (Spr. Ct. App. 1925). See also, *State v. Briggs*, 281 S.W. 107 (Spr. Ct. App. 1926) citing *State v. Blocker*, *supra*.

54. 274 S.W. at 1098.

55. *State v. Suter*, 294 S.W. 448, 450 (K.C. Ct. App. 1927).

56. 224 Mo. App. 687, 26 S.W.2d 1002 (K.C. Ct. App. 1930).

57. *Id.* at 689, 26 S.W.2d at 1003.

E. *The Possession of Mash and Manufacturing Equipment*

Under certain conditions the possession of mash and certain mash-related equipment essential to fermentation was also a crime under the Missouri prohibition law. Although a discussion of the above offense is beyond the scope of this Comment, it is of some interest to note that in this area of the prohibition law the courts required an illegal intent.

It was well settled in Missouri that the mere possession of fermented mash or of mash which was likely to ferment was not a crime.⁶³ In addition, the examined decisions followed without exception the rule that the bare possession of paraphernalia suitable and appropriate for the manufacture of intoxicants would not support a conviction without positive evidence that the articles and utensils in question had been or were being used for the suspected illegal purpose.⁶⁴ The Missouri cases on the possession of mash, stills, distilling and brewing equipment are as numerous as those dealing with the possession of intoxicants.⁶⁵

III. THE RELATION OF CERTAIN FACT SITUATIONS TO POSSESSION AS DEFINED BY THE MISSOURI COURTS

A. *The Relation of Title to the Fact of Possession*

Having adopted a definition of possession that required neither ownership nor actual physical possession of the intoxicating liquor by the accused, the Missouri courts were consistent in holding that proof of ownership was not a necessary requirement for conviction.⁶⁶ This position was in line with the examined decisions of other jurisdictions.⁶⁷

Nor did the Missouri courts in the relatively few cases found in point appear to consider the ownership of the land⁶⁸ on which the intoxicating liquor was found

188 Pac. 915 (1920) holding that constructive possession was sufficient to establish guilt in a charge of illegal possession of intoxicating beverages. The Washington decisions employed the term "constructive possession" in the commonly accepted sense.

63. See, e.g., *State v. Schroetter*, 11 S.W.2d 1100 (Spr. Ct. App. 1928); *State v. Richards*, 2 S.W.2d 146 (Spr. Ct. App. 1928); *State v. Hurnden*, 2 S.W.2d 145 (Spr. Ct. App. 1928); *State v. Hazelhorst*, 296 S.W. 139 (Mo. 1927); *State v. Pinto*, 312 Mo. 99, 279 S.W. 144 (1925).

64. *State v. South*, 278 S.W. 1089 (St. L. Ct. App. 1925); *State v. Frazier*, 217 Mo. App. 524, 269 S.W. 410 (Spr. Ct. App. 1925); *State v. Lipps*, 267 S.W. 414 (K.C. Ct. App. 1924); *State v. Keithley*, 217 Mo. App. 396, 266 S.W. 738 (Spr. Ct. App. 1924).

65. See, e.g., cases cited notes 63 and 64 *supra*; *State v. Hyde*, 297 Mo. 213, 248 S.W. 920 (1923); *State v. Anno*, 296 S.W. 825 (K.C. Ct. App. 1927); *State v. Sikes*, 281 S.W. 142 (Spr. Ct. App. 1926).

66. See note 30 *supra*.

67. See, e.g., *Anderson v. State*, 132 Miss. 147, 96 So. 163 (1923); *Thomas v. State*, 89 Tex. Crim. 609, 232 S.W. 826 (1921).

68. *State v. West*, 226 Mo. App. 1149, 49 S.W.2d 274 (K.C. Ct. App. 1932).

Other jurisdictions generally adopted the same position as that taken by the Missouri courts in requiring knowledge as an element of guilt in the determination of cases involving the possession of intoxicating liquor.⁵⁸

C. *The Quantity Possessed*

As one might suspect, the quantity of the intoxicating liquor which the numerous defendants were charged with possessing under the Missouri prohibition law varied from exceedingly small amounts to, on occasion, a considerable cache. In 1925 the Missouri Supreme Court held that there was

no irreducible minimum as to the quantity necessary to constitute a violation A court cannot say as a matter of law that this amount of liquor [thirty six half gallon fruit jars each containing from a few drops to a teaspoon of whiskey] was so negligible as to require a directed verdict for the defendant.⁵⁹

In view of the not uncommon situations involving the destruction of the whiskey either by pouring it out or by breaking the container prior to or simultaneous with the appearance of the arresting officers,⁶⁰ such an interpretation was undoubtedly welcomed by those charged with enforcement of the statutory prohibition against possession. The doctrine of the above case seems to have been uniformly followed in Missouri.⁶¹

D. *Constructive Possession*

The only Missouri liquor case discovered that dealt with the concept of *constructive* possession resulted in a holding that evidence as to such possession would not support a criminal charge of the illegal possession of intoxicants. But in arriving at this decision the court defined *constructive* possession as a possession without knowledge, ignoring the commonly accepted meaning of such possession as that possession annexed by law to legal title or ownership where there is a right to immediate actual possession.⁶²

58. See, e.g., *Colbaugh v. United States*, 15 F.2d 929 (8th Cir. 1926); *Johnson v. State*, 13 Ga. App. 654, 79 S.E. 758 (1913); *City of Jackson v. Gordon*, 119 Miss. 325, 80 So. 785 (1919); *State v. Gates*, 204 N.W. 350 (N.D. 1925); *State v. Harris*, 211 Pac. 944 (Ore. 1923); *Blackburn v. State*, 230 Pac. 276 (Okla. Crim. Ct. App. 1924); *Nelson v. State*, 203 N.W. 343 (Wis. 1925).

59. *State v. Pigg*, 312 Mo. 212, 226, 278 S.W. 1030, 1034 (1925).

60. See, e.g., *State v. Schroetter*, 30 S.W.2d 631 (Spr. Ct. App. 1930); *State v. Cooney*, 299 S.W. 828 (St. L. Ct. App. 1927); *State v. Compton*, 297 S.W. 413 (Spr. Ct. App. 1927); *State v. Blocker*, *supra* note 53; *State v. Ware*, 274 S.W. 853 (Spr. Ct. App. 1925); *State v. Price*, 274 S.W. 500 (Spr. Ct. App. 1925); *State v. Edmonds*, 270 S.W. 433 (St. L. Ct. App. 1925); *State v. Kiely*, 255 S.W. 343 (K.C. Ct. App. 1923).

61. See note 60 *supra*. In one Missouri case involving a fact situation not likely to arise under the new state law the court held that the whiskey in possession of a physician was "of such a low grade that no reputable physician would either prescribe or dispense it as a medicine." *State v. Ryan*, 217 Mo. App. 538, 547, 269 S.W. 627, 629 (Spr. Ct. App. 1925). Possession by druggists and the prescribing by physicians of intoxicants were lawful in Missouri, Mo. Laws 1921, at 417, § 6592a.

62. *State v. Cooper*, 32 S.W.2d 1098 (K.C. Ct. App. 1930). *Contra*, *State v. Parent*, 123 Wash. 624, 212 Pac. 1061 (1923) and *State v. Spillman*, 110 Wash. 662,

or the building or chattel in which it was discovered⁶⁹ as a factor essential to the establishment of possession.⁷⁰

*B. The Relation of the Proximity of the Intoxicating Liquor
to the Person Charged With Possession*

In spite of the fact that numerous decisions of the Missouri courts dealt with fact situations involving intoxicants found on the person of the party charged with possession, a mere physical holding of the liquor, standing alone, seems not to have been controlling in any of the convictions for possession under the prohibition statute. As indicated earlier⁷¹ an actual physical holding of the liquor by the accused was not a necessary element of the crime of possession.

In *State v. Stroud*⁷² a deputy sheriff keeping watch from a distance over a keg of whiskey in a brush pile about seventy feet from a public road, observed the defendant leave his car, climb the fence and walk to the exact location of the whiskey. After looking around, the defendant picked up the container and was arrested as he was lifting it across the fence. The Springfield Court of Appeals upheld a conviction on a charge of possession of the whiskey. It would be difficult to say, however, to what extent the court was influenced, in addition to the established fact of the physical holding, by the defendant's suspicious actions and by his novel defense that he thought he was a deputy authorized to seize intoxicating liquor and that it was his plan to pour out the contents and use the empty barrel on his farm.

The Missouri decisions that involved a physical holding of intoxicating liquor by the defendant were usually complicated by the introduction of additional evidence as suggestive of the defendant's guilt. A common class of such decisions were those in which the defendant was arrested while attempting to dispose of the intoxicants by breaking the bottle,⁷³ or in which the accused upon apprehension

69. "[T]he presumption is that the person in possession of such property [automobile] is guilty of possession of intoxicating liquor The ownership of the car is immaterial." *State v. Murdock*, 27 S.W.2d 730, 732 (K.C. Ct. App. 1930).

70. For a helpful discussion of the problem of property rights in illegally possessed intoxicating liquor and the question of whether intoxicants can be possessed in the proprietary sense, see Shartel, *Meanings of Possession*, 16 MINN. L. REV. 611, 629 (1932). See also *Murphy v. St. Joseph Transfer Co.*, 235 S.W. 138, 139 (K.C. Ct. App. 1921) to the effect that intoxicating liquors lawfully acquired and held under the Volstead Act are "as much surrounded and protected by the laws affecting property rights as any other property."

71. See note 30 *supra*.

72. 275 S.W. 58 (Spr. Ct. App. 1925). But note decision of the same court in *State v. Galliton*, 176 Mo. App. 115, 161 S.W. 848 (Spr. Ct. App. 1913) upholding a conviction under § 7227, RSMo 1909, making it illegal to *keep* intoxicating liquor for another in a county operating under the local option law. Defendant was apprehended in possession of a suitcase containing whiskey. Held: the state established a prima facie case and the jury was required to find from the evidence that the accused retained possession of the suitcase with knowledge that it contained intoxicating liquor.

73. See, e.g., *State v. Ware*, 274 S.W. 853 (Spr. Ct. App. 1925); *State v. Edmonds*, 270 S.W. 433 (St. L. Ct. App. 1925); *State v. Kiely*, 255 S.W. 343 (K.C. Ct. App. 1923).

abandoned the liquor and attempted flight.⁷⁴ In a decision rendered by the Missouri Supreme Court toward the end of the prohibition era involving a defendant found with three bottles of liquor on his person and one bottle of whiskey under a sack in his yard, it was held that the evidence was amply sufficient to support a conviction for possession.⁷⁵ The court did not indicate, however, whether the mere presence of the liquor on the person of the accused would have supported a conviction.

1. Drinking From the Bottle of Another

A frequent source of litigation in Missouri, as well as in other jurisdictions, resulted from the arrest of parties engaged in drinking from the bottles of generous companions. In dealing with this problem the Missouri Supreme Court⁷⁶ quoted with approval a 1922 ruling of the Kansas Supreme Court in the often cited case of *State v. Munson*.⁷⁷

In this instance, possession may not be attributed to the defendant, because an essential element of possession is lacking. The person having custody simply handed the liquor to the defendant to take a drink. The liquor was accepted for that purpose only. The quantity appropriated, if any, was consumed by the act of appropriation, and the remainder, if any, was not held under any continuing claim to exclusive use.⁷⁸

Following its analysis of the Kansas decision the Missouri court called attention to the fact that no statute in Missouri had ever been passed making it a crime to drink intoxicating liquor.⁷⁹

There appear to have been no deviations in Missouri from the doctrine that taking a drink at the invitation of the owner or possessor of the liquor did not constitute the prohibited possession contemplated in the Missouri prohibition statute.⁸⁰ The vast majority of jurisdictions took the same view of this problem.⁸¹

74. In *State v. Cooney*, 299 S.W. 828 (St. L. Ct. App. 1927) defendant was observed by witness at lunch counter in possession of a bottle containing about two inches of a light colored liquid. Defendant, intoxicated and belligerent, put the bottle in his coat pocket and left the premises. The witness followed defendant and as the latter walked from an alley, a bottle rolled out of the alley and across the sidewalk. No other person was in the vicinity. The bottle, later determined to contain whiskey, appeared to be the one exhibited earlier at the lunch counter. Held: evidence sufficient to uphold conviction of possession. See also, *State v. Pleake*, 290 S.W. 82 (Spr. Ct. App. 1927).

75. *State v. England*, 11 S.W.2d 1024 (Mo. 1928).

76. *State v. Jenkins*, 321 Mo. 1237, 14 S.W.2d 624 (1929).

77. 111 Kan. 318, 206 Pac. 749 (1922).

78. 321 Mo. at 1243, 14 S.W.2d at 626.

79. *Ibid.*

80. See, e.g., *State v. Lane*, 221 Mo. App. 148, 151, 297 S.W. 708, 709 (Spr. Ct. App. 1927) in which the court stated: "We have found no case either in this State or in any of our sister states which holds that a 'fleeting and shadowy' possession, such as is experienced in the mere act of taking a drink from a bottle of whiskey, is such possession as is contemplated in the criminal statute relative to the possession of intoxicating liquor."

81. See, e.g., *United States v. Mulkis*, 39 F.2d 664 (W.D. Wash. 1930), 11 B.U.L. REV. 116 (1931); *Colbaugh v. United States*, 15 F.2d 929 (8th Cir. 1926);

2. Intoxication as Evidence of Possession

The Missouri decisions contain several unequivocal pronouncements to the effect that intoxication per se was not evidence of sufficient weight to support a conviction for the possession of intoxicating liquor. "The evidence does establish . . . that appellant was intoxicated," said the Missouri Supreme Court in *State v. Huff*,⁸² but "this evidence, together with all the other evidence favorable to the state, does not establish that *possession, dominion* and *control* which the law condemns."⁸³ "Evidence of intoxication alone," concluded the Springfield Court of Appeals, "does not tend to establish the charge that defendant is in possession."⁸⁴ The Missouri position was stated with somewhat more color by the same court in *State v. Keltner*.⁸⁵

There was sufficient evidence to find defendant guilty of drunkenness, but that would not tend to establish the charge of possession of intoxicating liquors, although his skin may have been saturated therewith.⁸⁶

The Kansas City Court of Appeals expressed the following view:

It is charged the court erred in admitting in evidence the testimony of Mrs. W. L. Meyers, to the effect that she met the defendant in the hallway of the school building at the time the misdemeanor is alleged to have been committed, and that she smelled whiskey on his breath. We are unable to say this testimony was improper. It certainly tends to *support* the charge of possession.⁸⁷ (Emphasis added.)

This case can be reconciled with the holdings of the Supreme Court and the Springfield Court of Appeals in that the latter two courts would not accept the fact of intoxication standing by itself as *establishing* the charge of possession, while

Skidmore v. Commonwealth, 204 Ky. 451, 264 S.W. 1053 (Ct. App. 1924); *People v. Leslie*, 239 Mich. 334, 214 N.W. 128 (1927), Note, 28 COLUM. L. REV. 103 (1928); *People v. Ninehouse*, 227 Mich. 480, 198 N.W. 973 (1924); *Brazeale v. State*, 133 Miss. 171, 97 So. 525 (1923); *Harness v. State*, 130 Miss. 673, 95 So. 64 (1923); *State v. Williams*, 117 Ore. 238, 243 Pac. 563 (1926); *Thomas v. State*, 89 Tex. Crim. 609, 232 S.W. 826 (1921); *Hitt v. Commonwealth*, 131 Va. 752, 109 S.E. 597 (1921); *State v. Jones*, 114 Wash. 144, 194 Pac. 585 (1921). See also Note, 14 KY. L.J. 169 (1926); Note, 2 TEMP. L.Q. 188 (1928). *Contra*, *Harbin v. State*, 210 Ala. 55, 97 So. 426 (1923) ("possession prohibited includes any possession by manucaption or physical dominion, of however brief duration, and in whatever capacity the possession may be held, if it be for the use, benefit, or enjoyment of himself or any other person, and not merely for the purpose of inspection or destruction"); *Daniels v. Commonwealth*, 212 Ky. 161, 278 S.W. 577 (Ct. App. 1925) upholding a conviction of defendant who when surprised by arresting officers while drinking from a companion's jug, ran across the road and threw the jug away.

82. 317 Mo. 299, 296 S.W. 121 (1927).

83. *Id.* at 302, 296 S.W. at 122.

84. *State v. Nelson*, 21 S.W.2d 190 (Spr. Ct. App. 1929). See also, *State v. Compton*, 297 S.W. 413 (Spr. Ct. App. 1927); *State v. Mackey*, 267 S.W. 5 (Spr. Ct. App. 1924).

85. 278 S.W. 825 (Mo. 1926).

86. *Id.* at 826.

87. *State v. Hull*, 279 S.W. 221, 223 (K.C. Ct. App. 1926).

the Kansas City Court of Appeals allowed evidence of intoxication as *supporting* such a charge.

Yet the Kansas City appellate court appeared both on this and on other occasions to be somewhat more concerned than the other courts with the virtue of sobriety. *State v. Scovill*,⁸⁸ decided by the Kansas City court, was concerned with a trespasser found drunk and asleep on a pile of straw in a shed and with a jug of whiskey within arms distance. The court held this evidence to be sufficient to sustain a conviction for possession of the whiskey. In deciding the *Scovill* case the court distinguished the case of *State v. Whitsell*,⁸⁹ decided by the Springfield Court of Appeals, in which the defendant was arrested within three feet of a box containing whiskey. The defendant in the *Whitsell* case, said the Kansas City court, was not intoxicated and, in addition, there was no evidence that he and the whiskey arrived on the spot together. No Missouri cases have been found where the bare fact of drunkenness was considered sufficient to support a conviction under the statute making the possession of intoxicating liquor a criminal act.

3. Liquor Found Near the Party Charged With Possession

With the Missouri courts unwilling to consider either intoxication, a holding in the stomach or bloodstream, or an actual personal holding of the bottle containing the liquor as evidence of sufficient weight to establish guilt, it is somewhat less than startling to discover that the presence of intoxicants near the defendant at the time of his arrest raised no more than a suspicion of his guilt. In *State v. West*,⁹⁰ one of the last cases to reach the appellate level under the prohibition statute, the court held:

The fact the jug of whiskey was found near the spot where the defendants were seen and that defendants ran from the place on appearance of the officers, may properly be considered suspicious circumstances, but such evidence is not sufficient to establish a case of possession and warrant submission to the jury.⁹¹

C. *The Relation of the Proximity of the Intoxicating Liquor to the Dwelling House or Business Place of the Person Charged With Possession*

1. Intoxicating Liquor Found Within the Dwelling House or Business Premises of the Accused.

While the Missouri courts appeared to adopt a policy of leniency toward the defendant arrested with intoxicating liquor on, in or near his person, and rather consistently failed to sustain lower court holdings in this area when the evidence resulted in a strong suspicion of the defendant's guilt, a sterner attitude runs through those decisions in which the evidence established a physical relationship

88. 15 S.W.2d 931 (K.C. Ct. App. 1929).

89. 245 S.W. 597 (Spr. Ct. App. 1922).

90. 226 Mo. App. 1149, 49 S.W.2d 274 (K.C. Ct. App. 1932).

91. *Id.* at 1151, 49 S.W.2d at 275.

between the intoxicants and the dwelling house or place of business of the accused. The defendant arrested in a public place while drunk and holding a bottle was at times accorded a sympathetic understanding denied the sober defendant when a search of his home yielded a few bottles of home brew secreted in the privacy of his cellar. The general rule of law followed by the Missouri courts in dealing with intoxicating beverages discovered in the defendant's home or place of business was set out in *State v. Kurtz*,⁹² decided by the Springfield Court of Appeals in 1926:

We have adhered to the rule that one in possession of a building or exercising proprietary authority over a dwelling in which intoxicating liquor is found, is prima facie guilty of possessing such liquor.⁹³

The Kansas City Court of Appeals pronounced the same rule in *State v. Scovill*.⁹⁴

It is the law in this state that, when intoxicating liquor is found within a building which is occupied and controlled by the defendant, then he is presumed to be in possession of everything within the building, including the liquor.⁹⁵

Two other doctrines should be noted in reference to the problem of the possession of intoxicants within a building: first, a holding by the Missouri Supreme Court that discovery of intoxicating liquor within an occupied building raised no presumption of guilt that the liquor was in the possession of one found in the building absent any possessory or proprietary claim to the premises;⁹⁶ second, the previously discussed modification of the rule set out in the *Kurtz* and *Scovill* cases when applied to cover hotels, rooming houses and certain other public places.⁹⁷

Convictions have been upheld by the appellate courts of Missouri against defendants discovered with intoxicants in "every room in the house except the kitchen,"⁹⁸ under the floor of the bedroom and under the porch,⁹⁹ in the defendant's bedroom,¹⁰⁰ in the refrigerator,¹⁰¹ on the window sill,¹⁰² and while being moved within the residence¹⁰³ or being carried out of the home in an apparent effort to avoid discovery.¹⁰⁴ The same rebuttable presumption linked the party in posses-

92. 286 S.W. 135 (Spr. Ct. App. 1926).

93. *Id.* at 136.

94. 15 S.W.2d 931 (K.C. Ct. App. 1929).

95. *Id.* at 933.

96. *State v. Huff*, 317 Mo. 299, 296 S.W. 121 (1927). See also *State v. Parks*, 13 S.W.2d 1107 (K.C. Ct. App. 1929).

97. See cases cited in notes 55 and 56 *supra*.

98. *State v. Chambers*, 286 S.W. 744 (Spr. Ct. App. 1926). See also *State v. Huff*, *supra* note 96; *State v. Price*, 274 S.W. 500 (Spr. Ct. App. 1925).

99. *State v. Huckabe*, 269 S.W. 691 (Spr. Ct. App. 1925).

100. *State v. Perry*, 256 S.W. 512 (Spr. Ct. App. 1923) in which the defendant insisted that the liquid found in his possession was for use in the radiator of his automobile. It was defendant's habit to carry a pint bottle of the "denatured alcohol" with him to satisfy his thirsty radiator when driving.

101. *State v. Cook*, 322 Mo. 1203, 18 S.W.2d 58 (1929).

102. *State v. Schroetter*, 30 S.W.2d 631 (Spr. Ct. App. 1930).

103. *State v. Price*, 274 S.W. 500 (Spr. Ct. App. 1925).

104. *State v. Edmonds*, 270 S.W. 433 (St. L. Ct. App. 1925).

sion of a business building to the intoxicating liquor found therein and was applied by the Missouri courts in decisions involving a garage,¹⁰⁵ pool hall,¹⁰⁶ barber shop,¹⁰⁷ restaurant,¹⁰⁸ the "Whiz Bang" Cafe¹⁰⁹ and other places of business the exact nature of which was not clear from the decisions.¹¹⁰

Other jurisdictions generally followed the rule adopted by the Missouri courts in dealing with intoxicating liquor brought to light in the house or business place of the defendant.¹¹¹

2. Intoxicating Liquor Found Without the Dwelling House or Business Premises of the Accused, but on Land Under His Possession

In *State v. Mohr*,¹¹² a 1926 decision involving the defendant owner of a 180 acre farm on which the deputy sheriff discovered three gallons of "moonshine whiskey" a distance of 1491 feet from the defendant's house and 48 quarts of "home brew" approximately a quarter of a mile from the residence, the Missouri Supreme Court held:

105. *State v. Heilman*, 246 S.W. 622 (K.C. Ct. App. 1923).

106. *State v. Brokaw*, 281 S.W. 105 (Spr. Ct. App. 1926).

107. *State v. Hayes*, 224 Mo. App. 687, 689, 26 S.W.2d 1002, 1003 (K.C. Ct. App. 1930) in which defendant overcame the presumption. If the liquor "had been discovered back of or surrounded by the toilet articles which were kept for the use of the barber, or in a locked room, or in a drawer where he kept his linens, we would not hesitate to hold that a case was made for the jury, because the circumstances would indicate that the particular place where the liquor was found was under the exclusive control of the defendant, notwithstanding the fact that portions of the barbershop were open to the public."

108. *State v. West*, 324 Mo. 710, 24 S.W.2d 1005 (1930).

109. *State v. Griffin*, 45 S.W.2d 83 (K.C. Ct. App. 1931).

110. See, e.g., *State v. Johnson*, 34 S.W.2d 712 (Spr. Ct. App. 1931); *State v. Ward*, 9 S.W.2d 253 (Spr. Ct. App. 1928); *State v. Ledbetter*, 285 S.W. 793 (Spr. Ct. App. 1926).

111. See, e.g., *State v. Kepler*, 77 Mont. 309, 250 Pac. 603 (1926); *State v. Harris*, 106 Ore. 211, 211 Pac. 944 (1923); *State v. Kempesti*, 102 Vt. 152, 147 Atl. 273 (1929). On the general problem of the possession of intoxicants in relation to the possession of buildings in which the liquor was found, see, e.g., *State v. Bozick*, 122 Kan. 517, 253 Pac. 554 (1927) holding as erroneous an instruction that defendant should be convicted if he permitted another to keep or use intoxicating liquor on premises owned or controlled by defendant. *State v. Woods*, 163 Wash. 224, 1 P.2d 219 (1931) held that a hotel owner who knowingly allowed a guest to make gin in his room was guilty as a principal; accord, *State v. Thomas*, 156 Wash. 583, 287 Pac. 667 (1930). *Treadway v. State*, 18 Ala. App. 409, 92 So. 529 (1922) held that a defendant was guilty of possession of intoxicating liquor if he allowed another to place it in his room, even though he had no other connection with the liquor. *Blackburn v. State*, 28 Okla. Crim. 288, 230 Pac. 276 (1924) held that liquor left at a person's house without his knowledge or consent did not make him guilty of possession. See also Note, 16 VA. L. REV. 293 (1930); Note, 10 B.U.L. REV. 237 (1930). As a practical matter the possession of intoxicants in a private dwelling under the provisions of the Volstead Act, 41 Stat. 308 (1919) was an unlawful act immune from prosecution. The act provided that no search warrant should issue to search a *bona fide* dwelling unless intoxicating liquor contained therein was being used for commercial purposes. This problem is discussed in Comment, 5 U. CINC. L. REV. 103 (1931).

112. 316 Mo. 204, 289 S.W. 554 (1926).

It would be a startling proposition, should we announce—as contended for by the state in this case—that a farmer, with a good reputation for being a law-abiding citizen, might be convicted of crime solely on proof that intoxicating liquors had been found on some portion of his 180-acre farm, in the teeth of his sworn testimony that he was not aware of its presence on his premises . . . the evidence in this case . . . does not even rise to the dignity of respectable conjecture.¹¹³

When liquor was discovered across the road and 220 yards north of the defendant's residence, the Springfield Court of Appeals held that if a *prima facie* case of possession could be made under these circumstances no citizen who lived along a public highway and near a woodland would be safe from prosecution.¹¹⁴ At a somewhat later date the Kansas City Court of Appeals pronounced the dictum that there was no presumption that liquor found on any and every portion of a farm was in the possession of the party in possession of the farm. As to outlying lands, said the court, the owner or lessee lacks that "immediate and exclusive control which he has over his own residence and the outbuildings adjacent and appurtenant thereto."¹¹⁵ The appellate courts consistently displayed a reluctance to uphold convictions predicated on the apparent theory that the discovery of intoxicating liquor in a location *remote* from the defendant's residence established the legal conclusion referred to as possession. For example, it was held that fifteen one-half pints of whiskey found in a treetop across the road from defendant's residence would not establish his guilt despite the existence of a well worn path connecting the tree with his residence.¹¹⁶

On the other hand when the intoxicants discovered were on land in possession of the defendant and in *close* proximity to his dwelling the same courts were quite willing, with equal consistency, to uphold lower court convictions based on a finding that possession of the premises encompassed possession of the liquor found thereon. This conclusion was bolstered by the presumption of knowledge on the part of the defendant of intoxicants on his premises. Lower court convictions were sustained in cases involving intoxicants found under a sack in the defendant's yard,¹¹⁷ in a woodshed six feet from the defendant's porch,¹¹⁸ buried in the ground by the side of a small barn near the home of the accused,¹¹⁹ buried some ninety feet from defendant's dwelling,¹²⁰ in a calf lot near the home of the defendant¹²¹ and discovered in a corncrib within a short distance of defendant's house.¹²²

113. *Id.* at 209, 289 S.W. at 556.

114. *State v. Bailey*, 286 S.W. 422 (Spr. Ct. App. 1926).

115. *State v. Scovill*, 15 S.W.2d 931, 933 (K.C. Ct. App. 1929).

116. *State v. Haynes*, 293 S.W. 507 (Spr. Ct. App. 1927).

117. *State v. England*, 11 S.W.2d 1024 (Mo. 1928). In this case three pint bottles of whiskey were also found on defendant's person.

118. *State v. Chapman*, 10 S.W.2d 962 (K.C. Ct. App. 1928).

119. *State v. Eddington*, 286 S.W. 143 (Spr. Ct. App. 1926).

120. *State v. Lee*, 298 S.W. 1044 (St. L. Ct. App. 1927).

121. *State v. Gatewood*, 264 S.W. 42 (Spr. Ct. App. 1924).

122. *State v. Fortner*, 297 S.W. 177 (Spr. Ct. App. 1927). The conviction of one Ed Smith, a second defendant who roomed and boarded with Fortner, was reversed.

D. *Intoxicating Liquor Discovered in or Witnessed Being
Thrown from Automobiles*

Many of the fact situations presented to the courts under the Missouri prohibition laws concerned the possession of intoxicating liquor discovered in automobiles or observed sailing through the air as the occupants of the automobiles used their pitching arms to frustrate the efforts of the arresting officers to collect the evidence necessary for conviction. In view of the greatly increased use of automobiles since the prohibition era and in view of the age group prohibited from possessing intoxicating liquor under the new state law, it would seem not unlikely that many of the situations brought to trial under the existing statute will involve the problem of what constitutes the possession of intoxicants in an automobile.

The Missouri Supreme Court held¹²³ in a 1932 decision that liquor in a car belonging to the defendant had to be in the possession of either the defendant, his wife, or both, since they were the only occupants of the automobile. "Indubitably," said the court, "one or both had possession of and dominion over it."¹²⁴ It was the reasoning of the court that if

defendant himself or he and his wife jointly had such possession, he is guilty. If she was violating the law in his presence and with his connivance and assistance, he is guilty. An accessory to a crime may be charged and convicted as a principal.¹²⁵

In *State v. Murdock*¹²⁶ the Kansas City Court of Appeals held that one found in possession of an automobile containing intoxicating liquor was presumed to be in possession of the liquor. A decision of the Springfield Court of Appeals is in accord.¹²⁷

Several Missouri cases in this area are worthy of separate treatment. In *State v. Lunfrunk*¹²⁸ the conviction of three defendants, en route from Kansas City to Sedalia for the purpose, according to the state's witness, of permitting certain prospective customers to sample the whiskey they were transporting, was upheld on the ground that each of the defendants drank from the bottle and exercised dominion over the contents. The fact of a joint business mission seems to have influenced the court in finding control, management, care and hence possession in all three defendants.

In *State v. Compton*,¹²⁹ defendant Compton was riding in the front seat and defendant Blansit was sitting alone in the rear seat. When apprehended, Compton

123. *State v. Brown*, 331 Mo. 556, 56 S.W.2d 405 (1932).

124. *Id.* at 564, 56 S.W.2d at 409.

125. *Ibid.*

126. 27 S.W.2d 730 (K.C. Ct. App. 1930).

127. *State v. Nelson*, 21 S.W.2d 190, 190-91 (Spr. Ct. App. 1929). "The car belonged to another who was present and in control thereof, and the presumption would prevail that possession of the liquor went with ownership and possession of the car."

128. 279 S.W. 733 (K.C. Ct. App. 1926).

129. 297 S.W. 413 (Spr. Ct. App. 1927).

had two jugs of whiskey under his immediate control, one of which he was successful in breaking. The court upheld the conviction of Compton, but not that of Blansit. Evidence was introduced to indicate the whiskey was owned by Compton. A third party, the owner-driver of the automobile, and the person apparently in possession of the automobile, fled in the general confusion at the time of the arrest and was never apprehended.

Witnesses testified in *State v. Cooper*¹³⁰ that while the car in which the defendant was a passenger was being followed in hot pursuit by the sheriff and his deputy, an article or object was thrown from the car of the pursued. A search of the area where the object or article appeared to land led to the discovery of a bottle of "moonshine whiskey." The conviction of the trial court was reversed and the defendant was discharged on the theory that even though there was a bottle of whiskey in the car, that bare fact was insufficient to prove the occupants of the car had entered into a conspiracy to possess the liquor, and that the defendant's presence in a car from which whiskey was thrown would not establish that he was ever in possession of the whiskey.

In *State v. Roten*¹³¹ the defendant's conviction was upheld by the appellate court under facts similar to those in the *Cooper* case. However, the latter case can be distinguished from *State v. Roten*. In the *Roten* case the defendant was the owner-driver of the car. It is not clear whether he was alone or riding in company with his wife. Both the ground and the jug of wine presumably thrown from the car showed scuff marks indicating that the latter might have struck the former with considerable force. A search of the area revealed no other objects that might have been thrown from the car and, in addition, evidence was introduced to show that no other car had passed the location where the wine was found during the period in question.

Other Missouri cases involved the discovery of intoxicating liquor in the vicinity of automobiles, but appear to have been decided on grounds other than that of the ownership, possession or occupancy of the means of transportation.¹³²

130. 32 S.W.2d 1098 (K.C. Ct. App. 1930).

131. 266 S.W. 994 (Spr. Ct. App. 1924).

132. See, e.g., *State v. West*, 226 Mo. App. 1149, 49 S.W.2d 274 (K.C. Ct. App. 1932); *State v. Lane*, 221 Mo. App. 148, 152, 297 S.W. 708, 710 (Spr. Ct. App. 1927) in which it was stated that the "drinking party, composed of the occupants of the Ford roadster, had been driving over the town for a considerable time prior to the incident when defendant was observed [standing by the parked car] taking a drink He had not been in their company . . . prior thereto. There is no evidence that defendant had any control of the liquor, or that he had been in control" (A "man in the car" to whom the defendant handed the bottle of "moonshine whiskey" after satisfying his thirst, plead guilty of possession of the whiskey. He was convicted and fined \$200); *State v. Kiely*, 255 S.W. 343 (K.C. Ct. App. 1923). See also, *Reynolds v. State*, 92 Fla. 1038, 111 So. 285 (1927); *Simmons v. Commonwealth*, 210 Ky. 33, 275 S.W. 369 (Ct. App. 1925) holding that whether a party is in possession of intoxicants found in his automobile may be inferred from circumstances in the absence of contrary evidence.

*E. The Bearing of the Employer-Employee Relationship on
the Possession of Intoxicating Liquor Discovered in
or Near the Place of Employment*

Certain of the Missouri cases in which multiple defendants were charged with the possession of intoxicants involved a judicial determination of whether by virtue of the employer-employee relationship the employee, the employer, or both, were guilty of said possession. None of the examined decisions strayed from the orthodox view that a servant is not, under ordinary circumstances, in possession of the goods of his master. The conventionality of the Missouri courts in this respect is set out clearly in *State v. Brinkley*,¹³³ decided by the Springfield Court of Appeals in 1927. In the *Brinkley* case the arresting officer entered a restaurant in the absence of the owner while defendant employee was in charge of the premises. Whiskey was found under one corner of the building and in a sweater pocket. The court held:

[D]efendant was merely an employee in the restaurant. No liquor was found in his immediate possession. There was no evidence that he owned or was in possession of the sweater . . . hence he cannot be convicted of having liquor in his possession unless it be upon the theory that, because the owners of the restaurant were not there at the time the liquor was found and he was there, he was, by reason of that fact, in possession of both the sweater and the liquor. . . . The same thing may be said as to the liquor found under the house. To sustain a conviction for possession of liquor against an employee or clerk in a store or restaurant there must be something more than proof that the proprietor who employed him was absent from the premises at the time the liquor was found. The possession of the building and its contents does not lodge in a mere employee engaged in work on the premises.¹³⁴

In a decision involving an employee who was discovered in the act of pouring coal oil into a jug of "white mule" belonging to his employer, the court held the employee to be not in possession of the whiskey.¹³⁵

Nor did the courts, when the actual illegal possession was found in the employee, hold that the servant's guilt could be transferred to the master. In *State v. Suter*¹³⁶ defendants Lorantos and Suter, the operator of a rooming house and his caretaker employee respectively, were convicted by the trial court for possession of intoxicating liquor found in quarters of the rooming house occupied by Suter. The conviction of Suter was upheld and that of Lorantos was reversed on the theory that evidence was lacking to prove the latter had ever been in Suter's room or had any knowledge of its contents. And when a defendant employee was apprehended at the rear of the defendant employer's place of business with a bottle of whiskey in his possession and in company with several other men, the Springfield

133. 297 S.W. 712 (Spr. Ct. App. 1927).

134. *Id.* at 712-13.

135. *State v. Blocker*, 274 S.W. 1097 (Spr. Ct. App. 1925).

136. 294 S.W. 448 (K.C. Ct. App. 1927).

Court of Appeals¹³⁷ reversed a lower court conviction of possession of intoxicating liquor as to the employer on the ground that he "certainly is not responsible for what his servant may have done without his knowledge or consent and in a place not under his control."¹³⁸

F. *The Liability of the Husband When the Wife is the Party in Actual Possession of the Intoxicating Liquor*

Although it was well established in several jurisdictions that a husband who knowingly permitted his wife to keep liquor in the home was personally liable for the possession of the liquor so kept,¹³⁹ there appear to have been no clear cut Missouri decisions on this question.¹⁴⁰ It is suggested that modern thinking plus the statutory emancipation of married women would militate against any holding today that a husband as lord and master of the household was ipso facto in possession of liquor held on the premises by his wife without his knowledge. It should be recalled, however, in reference to the requirement of knowledge as an element of possession, the Missouri courts embraced the rule that possession of the premises carried with it the rebuttable presumption that such possession included intoxicants discovered thereon.¹⁴¹

137. *State v. Ledbetter*, 285 S.W. 793 (Spr. Ct. App. 1926).

138. *Id.* at 794. A truck driver who transported intoxicating liquor for the owner and who loaded and unloaded the cargo was held not guilty of "having" the liquor, *Rex v. Cramer*, 48 Ont. L.R. 21 (1920).

139. See, e.g., *People v. Duchow*, 331 Ill. 636, 163 N.E. 352 (1928); *Commonwealth v. Barry*, 115 Mass. 146 (1874); *People v. Sybisloo*, 216 Mich. 1, 184 N.W. 410 (1920); *State v. Arrigoni*, 119 Wash. 358, 205 Pac. 7 (1922); Annot., 19 A.L.R. 136 (1922). *People v. Tripp*, 248 Mich. 225, 228, 226 N.W. 834, 835 (1929) is an interesting case in this area. Defendant husband found his wife and several friends in his home engaged in a drinking party. The defendant protested, then left the premises to return and protest a second time; held: defendant "was not under obligation to enter into a knockdown and drag out fight with his wife, sister or the three men, else be held to have possession of the very thing he was trying to avoid." The liability of the husband for the wife's possession appeared to rest on the theory that he had a right to control his household and was accordingly to be held accountable when he knowingly permitted his spouse to possess intoxicating liquor on the premises. For an attack on this theory, see *Doscher v. State*, 194 Wis. 67, 71, 214 N.W. 359, 360 (1927) holding that such a doctrine had long since been relegated to the "chamber reserved for the slumber of the innocuous desuetudes."

140. Several Missouri decisions relate indirectly to the problem. See, e.g., *State v. Schroetter*, 30 S.W.2d 631 (Spr. Ct. App. 1930); *State v. Price*, 274 S.W. 500 (Spr. Ct. App. 1925). For a decision holding the wife not liable for the possession of intoxicating liquor discovered on premises controlled by her husband, see *State v. West*, 324 Mo. 710, 713-14, 24 S.W.2d 1005, 1006 (1930) holding that there "must be something more to convict a married woman of the possession of whiskey than the fact that she was washing dishes on premises controlled and operated by her husband, even though she was aware that whiskey in violation of the law was stored on the premises. . . . We note that defendant by subterfuge attempted to prevent the officers from discovering the . . . [whiskey] but this may be attributed to the desire to protect her husband."

141. See cases cited notes 53 and 54 *supra*.

IV. CONCLUSION

In arriving at the fact of possession under the state prohibition laws the Missouri courts required the union of a physical relationship between the person charged with possession and the intoxicating liquor, and an intent by that person to exercise control over the liquor to the exclusion of others. In so doing the Missouri courts adhered to the common law concept of the possession of a chattel. As the courts make similar determinations under the new state law prohibiting the possession of intoxicating liquor by persons under the age of twenty-one, it is expected that the orthodox views of possession adopted in the earlier decisions will be followed.

Under the Missouri prohibition statute the possession of intoxicants was a crime *malum prohibitum*. Knowledge of the presence of the intoxicating liquor was a necessary element of the crime of possession, but such knowledge was often inferred from circumstances. The quantity of the liquor possessed was of no consequence in the determination of the defendant's guilt. The prosecution was not required to prove ownership of the liquor although such evidence was readily admissible.

Neither the mere physical holding of the container in which the whiskey was discovered, the drinking from such a container, the nearness of the container to the defendant when arrested nor the bare fact of intoxication, without corroborative evidence, was sufficient to convict.

With certain common sense modifications the courts presumed that intoxicants found within a dwelling house or place of business were in the possession of the party in possession of the premises. The presumption was rebuttable. The same presumption was followed by the courts in decisions involving intoxicating liquor found near the premises of the accused, but the presumption was not stretched to cover intoxicants found on any and all portions of the land in possession of the defendant. The courts wisely refrained from defining the precise distance covered by the presumption in such cases.

The Missouri appellate courts approved the presumption that intoxicating liquor discovered in an automobile was in the possession of the party in possession of the automobile. Yet, there are cases holding a mere occupant of an automobile guilty of the possession of intoxicants found in the automobile. As in most of the decisions under the prohibition statute making the possession of intoxicating liquor a criminal offense, the Missouri courts were not troubled either by presumptions, or by the lack of them, when the circumstances and the evidence led elsewhere. The mere presence of the defendant in an automobile in which intoxicants were found would not establish his guilt.

The decisions of the Missouri appellate courts dealing with the concept of possession under the state prohibition statute had both good law and sound reasoning, to commend them. In addition these decisions were in line with those handed down in other jurisdictions during the prohibition era. It seems not unreasonable to predict that in such cases as reach the appellate courts of Missouri under the new state law, the rules, reasoning and presumptions of the earlier prohibition period will be followed.

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