Missouri Law Review

Volume 24
Issue 3 *June 1959*

Article 4

1959

Recent Cases

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CONFLICT OF LAWS—SUPPORT DENIED WIFE AFTER HUSBAND'S EX PARTE NEVADA DIVORCE UNDER NEW YORK STATUTE WHEN WIFE NOT DOMICILED IN NEW YORK

Loeb v. Loeb[1]

Plaintiff, wife, sought in a New York state court a decree of divorce and separation, alimony and counsel fees. She had not been domiciled in New York during marriage but lived in Vermont. As late as August, 1953, she filed notice of retaining residence in Vermont with the town clerk of Windham, Vermont. Her husband had secured a Nevada *ex parte* divorce in 1952. In August of 1953 plaintiff moved to New York pursuant to an agreement between herself, her ex-husband, and/or her ex-mother-in-law. Plaintiff averred that she first formed an intent to become a New York resident in October, 1953, more than one year after the Nevada divorce. Plaintiff had instituted a suit in Vermont and the decision was still pending at the time she brought her suit in New York for the same relief. The Vermont supreme court later denied plaintiff relief.[2] The New York supreme court entered judgment for the defendant.[3] The supreme court, appellate division, affirmed but granted plaintiff leave to appeal.[4] The New York court of appeals ruled that plaintiff's case did not place her within the New York Civil Practice Act so as to be awarded maintenance under section 1170-b.[5] The apparent rule was that convenience and a jurisdiction in which a divorcee will enjoy greater rights than she might in another state is not enough to place her within the ambit of section 1170-b if her matrimonial domicile is not New York.

The area of domestic relations in conflict of laws is fraught with complexities. In recent years it has undergone many changes and the courts of the land have made significant contributions thereto, casting aside the federal concepts of the

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1. 4 N.Y.2d 542, 152 N.E.2d 36, 176 N.Y.S.2d 590 (1958).
2. Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955).
3. Loeb v. Loeb, 3 Misc. 2d 622, 155 N.Y.S.2d 473 (Sup. Ct. 1956).
4. Loeb v. Loeb, 3 App. Div. 2d 834, 163 N.Y.S.2d 398 (1957).
5. 6A GILBERT-BLISS, CIVIL PRACTICE OF NEW YORK 74 (1944, Supp. 1958).
   In an action for divorce, separation or annulment . . . where the court refuses to grant such relief by reason of a finding by the court that a divorce . . . declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person . . . was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife.

martial relationship and charting a course which does not offend the dignity of logic. The statute here under consideration offered the state of New York an opportunity to advance in this field. Cases interpreting this statute show the New York courts did not take full advantage of this opportunity.

The doctrine of divisible divorce is now well established by the case of *Estin v. Estin*.[6] In this case the Supreme Court of the United States decided that a proper *ex parte* divorce decree *must* be given full faith and credit as to the termination of the termination of the marial status of husband and wife, but affirmed the power of the state of New York to grant support to Mrs. Estin pursuant to a separation order, which had support provisions, obtained prior to the Nevada *ex parte* divorce gained by Mr. Estin. As a result, the divorce was held divisible into the portion representing marial status and that involving economic status.

However, protection of the rule in the *Estin* case has been denied to wives who participated in foreign divorce proceedings after a separation judgment in their favor had been awarded by a New York court.[7]

Before rule 1170-b was enacted there was no procedure enabling a wife to protect her support rights unless prior to the foreign divorce she had obtained alimony in a separate suit in the state of New York. Thus in 1953 the Law Revision Commission directed its attention to overcoming this procedural bar and recommended section 1170-b.[8]

The *Vanderbilt*[9] case upheld the constitutionality and validity of section 1170-b and its extension of the divisible divorce concept to situations where the divorced wife did not have a prior support decree. The New York court of appeals stated: "There is nothing in the statute's language to suggest that it was intended to apply only to marriages where the parties had lived together in this State as their matrimonial domicile."[10] But the court further recognized that when the husband abandoned his wife she set up domicile in New York *before* the Nevada judgment was entered and stated: "We need not decide whether she would have the same right to come into New York, even after a foreign-State divorce, to take advantage of section 1170-b."[11]

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6. 334 U.S. 541 (1948), *affirming* 296 N.Y. 308, 73 N.E.2d 113 (1947).

7. Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748 (1951), wherein husband and wife were separated by New York decree in favor of wife, husband later filed for divorce in foreign state and wife appeared to contest personally and with counsel; Polk v. Polk, 277 App. Div. 885, 98 N.Y.S.2d 36 (1950); Ehrenpreis v. Ehrenpreis, 106 N.Y.S.2d 568 (Sup. Ct. 1951); Glennan v. Glennan, 97 N.Y.S.2d 666 (Sup. Ct. 1950); Berkowitz v. Berkowitz, 92 N.Y.S.2d 363 (Sup. Ct. 1949); Goodman v. Goodman, 82 N.Y.S.2d 318 (Sup. Ct. 1948).

8. NEW YORK LAW REVISION COMMISSION, REPORT FOR 1953, 463-80; Weintraub v. Weintraub, 302 N.Y. 104, 96 N.E.2d 724 (1951); Johnson v. Johnson, 206 N.Y. 561, 100 N.E. 408 (1912); Erkenbrach v. Erkenbrach, 96 N.Y. 456 (1884); Ramsden v. Ramsden, 91 N.Y. 281 (1883).

9. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), *affirming* 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956).

10. Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 349, 135 N.E.2d 553, 556, 153 N.Y.S.2d 1, 6 (1956).

11. *Id.* at 351, 135 N.E.2d at 558, 153 N.Y.S.2d at 8.

Cases interpreting section 1170-b show the conservative attitude of the New York courts. In *Methfessel v. Methfessel*[12] the supreme court of New York, Kings County, held that when the husband had secured an *ex parte* divorce several months before the effective date of section 1170-b the act could not be applied retroactively to protest the wife. In *Axelrod v. Axelrod*[13] the supreme court of New York, Kings County, held, after a study of the section, that it was a condition precedent to the exercise of discretion in the wife's favor under the proviso "as justice may require" that plaintiff establish proof "that but for the foreign decree she would be entitled to a judgment of separation and would not be barred therefrom by any proof in the record."[14] The wife was denied maintenance as she had committed an act of violence upon her husband. In *Edell v. Edell*[15] the husband had instituted an action for divorce and the wife counterclaimed for separation and was awarded alimony and counsel fees. The husband went to Florida and moved to discontinue the New York action. The motion was dismissed and later the husband was enjoined from prosecuting a divorce action in Florida while this action was pending. Therafter he procured his Florida divorce decree. The supreme court of New York, Monroe County, would not allow the husband to use this out-of-state divorce as a ground to terminate the New York action. The court reasoned that if the husband were allowed to terminate this action by use of the Florida decree and the wife could not prove the divorce a fraud upon the Florida court, it would bar her claim for alimony previously granted to her and section 1170-b would not apply as it is not retroactive in nature. However, *Canty v. Canty*[16] held under section 1170-b that a wife should have alimony and counsel fee prior to a judgment when her husband claimed a foreign divorce.

The majority decision announced by Judge Froessel in the case under consideration looked behind the Civil Practice Act legislation and found the intent was to protect New York wives and afford them a remedy as to their property rights which might be endangered by *ex parte* divorces. The court reasoned that section 1170-b was not intended to afford a haven for unfortunate divorcees from states which granted them no support remedies. The court commented that living in New York was not the result of an agreement between the plaintiff and the defendant but only because the ex-mother-in-law was an exceedingly kind woman. The court also mentioned that plaintiff was pursuing her martial rights in the courts of Vermont, and concluded that plaintiff in no way could be considered a New York wife entitling her to relief under section 1170-b.

A very strong dissenting opinion written by Judge Desmond points out that in the aforementioned *Vanderbilt* decision the New York court did not determine whether section 1170-b was available to a woman who came to New York to live after a foreign decree. He further points out that the court did not at this time have

12. 124 N.Y.S.2d 663 (Sup. Ct. 1953).
13. 2 Misc. 2d 79, 150 N.Y.S.2d 633 (Sup. Ct. 1956).
14. *Id.* at 81, 150 N.Y.S.2d at 636.
15. 6 Misc. 2d 631, 159 N.Y.S.2d 855 (Sup. Ct. 1957).
16. 123 N.Y.S.2d 545 (Sup. Ct. 1953).

to decide whether under "any and every possible circumstance the remedy can be demanded by divorced wife who for her own reasons selects New York as a forum."[17] He discloses the real issue to be whether New York had "sufficient contacts" with the marriage to permit jurisdiction of this suit. This question he answers in the affirmative, interpreting her moving to New York as a result of agreement and at the request of the husband and not as a result of shopping for an advantageous jurisdiction.

It is this author's contention that the logical approach is taken by the dissent. Here is a woman who obviously moved to New York because of an agreement with her ex-husband or as a result of the economic crisis which he forced upon her. Prior to her marriage she was a resident of New York. He had assets within the state. The moral and social equities rested solely with her. The New York act was passed with the express purpose of giving a remedy to a woman who had sufficient relation to the state of New York to merit the aid. And certainly the Commission had in mind keeping a dependent woman off the relief doles of the state.

The forward progressive legislation of Civil Practice Act, section 1170-b, with all of its conceivable positive social ramifications has been narrowed and withered by this decision. But it may well serve as a guidepost to legislative bodies of other states considering similar legislation to spelling out in more comprehensive terms that the *relationship* to or *contact* with the state need not be one so unimaginative as the New York decision compels.

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CONTRACTS—MISSOURI—OPTION TO PURCHASE—TENDER OF PERFORMANCE EXCUSED

Cooper v. Mayer[1]

Defendants, husband and wife, gave plaintiff a five year lease containing an option to purchase the leased premises at any time within the five year period upon the payment of the sum of $1,000.00. Before the lease expired, plaintiff had expressed to defendants his intention to exercise his option to purchase unless defendants renewed the lease on the same terms. Both defendants then repudiated the agreement. Thereafter the purchase price was tendered to defendant-husband two days before the option terminated, but he refused to accept it on the ground that the property was his wife's. At that time an arrangement was made for the parties to meet later that day. The plaintiff was present at the agreed time and place but neither of the defendants appeared. A written demand, containing a notice of acceptance of the option was then given to the city marshal who made a diligent but unsuccessful effort to find the defendants before the lease and option expired.

17. 4 N.Y.2d at 552, 152 N.E.2d at 41, 176 N.Y.S.2d at 596-97.

1. 312 S.W.2d 127 (Mo. 1958).

The trial court, in an action by plaintiff for specific performance of his option to purchase, found that plaintiff had duly exercised his option, ordered the plaintiff to deposit the purchase money in court, and ordered the defendants to execute a proper deed of conveyance to the plaintiff. On appeal, *held,* affirmed.

The Supreme Court of Missouri held: (a) that where a party to a contract has shown that he will not perform his promise, the fulfillment of a condition precedent to that promise is excused; and therefore (b) that it was unnecessary to examine the issue of whether defendant-husband was the agent of his wife to accept tender of performance.

Plaintiff gave as consideration for this lease and option his promise to take the lease and assume obligations thereunder. If this promise was primarily given to secure the privilege of purchasing the land at any time within five years, upon payment of $1,000.00, this option could be properly interpreted as a conditional contract to sell. Thus treated, the defendants' repudiation of the agreement would excuse timely performance of the condition, *i.e.* tender of the purchase price,[2] and there could be little doubt as to the soundness of this decision. However, if plaintiff's promise was given primarily for the use of the premises and only incidentally for the right to purchase, then it would appear that the option was an irrevocable offer to sell[3] which would require timely acceptance, and defendants' prior repudiation would not excuse it. This analysis would require consideration of defendant-husband's authority to arrange for a subsequent meeting and accept payment.

A search of the cases indicates that an option to purchase, embodied in a lease, is generally treated as an irrevocable offer.[4] The consideration needed to render such an option or offer irrevocable, if not recited in the lease, has been found in the payment of rent by the lessee or optionee.[5] Interpreted as an offer, unconditional acceptance[6] must be tendered within the time specified.[7] If it is not so accepted, the offer or option is terminated through lapse of time.[8] Missouri courts have traditionally interpreted leases, containing options to purchase, in this manner.[9]

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2. 5 CORBIN, CONTRACTS § 1175 (1950); 12 AM. JUR. *Contracts* § 330 (1938); 17 C.J.S. *Contracts* § 481 (1939).

3. This distinction has been noted in McGovney, *Irrevocable Offers,* 27 HARV. L. REV. 644, 648-49 (1914). See also 1 CORBIN, CONTRACTS § 262 (1950); GRISMORE, CONTRACTS § 31 (1947).

4. "In such contracts [options in leases] two elements exist, an offer to sell which does not become a contract until accepted, and a contract to leave the offer open for a specified time." Blonde v. Weber, 6 Ill. 2d 365, 374, 128 N.E.2d 883, 888 (1955). Sweezy v. Jones, 65 Iowa 272, 21 N.W. 603 (1884) (judgment lien could not be established on land held under lease with option); Carter v. Frakes, 303 Ky. 244, 197 S.W.2d 436 (1946) (option held mere right to exercise privilege, becoming binding contract only when privilege exercised); Trotter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946) (argued that option lacked mutuality necessary for specific performance; held option not enforced but rather contract resulting from acceptance of continuing offer); Shayeb v. Holland, 321 Mass. 429, 73 N.E.2d 731 (1947) (an option to buy in lease, where price was in doubt, held to be offer to sell for "fair and reasonable" price); Cox v. McGregor, 330 Mich. 260, 47 N.W.2d 87 (1951)

CRIMINAL LAW—BURGLARY—ENTRY DEFINED

State v. Pigques[1]

The defendant, after working hours, broke open the outer doors of a garage owned by the poultry company of which he was an employee and in which he had placed two crates of dressed chickens prior to the end of the working day. When apprehended by the police, he was standing in the recessed space between the outer doors, sealed by timbers, and a wire mesh screen, also braced by timbers but placed one foot to the rear of the doors. There was no indication that he had tampered with the wire mesh screen. The defendant was charged with and found guilty of attempted burglary in the second degree. On appeal, *held,* reversed for procedural reasons,[2] but the defendant's contention that the crime had been completed was denied.[3]

The court's decision that the crime of burglary was not completed raises two questions:

1. With what purpose or state of mind must a person, after the commission of a breaking, physically insert himself into a building to be guilty of burglary?

2. At what point, or across what line of demarcation, does a physical insertion of the body become an entry?

Examining the first question, it would seem evident that the conviction of the defendant by the trial court determined that he had the intent necessary to commit

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(Soldiers' and Sailors' Relief Acts did not protect option to purchase in a lease; acts applied only to forfeitures of existing contracts); Durfee House Furnishing Co. v. Great Atl. & Pac. Tea Co., 100 Vt. 204, 136 Atl. 379 (1927) (plaintiff in ejectment held part of city block with option to purchase entire block; before exercise, defendant was given a lease for other part; *held,* plaintiff's contract took effect from date of acceptance and not from date of offer).

5. Rockhill Tennis Club v. Volker, 331 Mo. 947, 56 S.W.2d 9 (1932); Texas Co. v. Butler, 256 P.2d 259 (Ore. 1953).

6. Rice v. Sinclair Ref. Co., 256 Ala. 565, 56 So. 2d 647 (1952); Hafemann v. Korinek, 266 Wis. 450, 63 N.W.2d 835 (1954).

7. Mason v. Payne, 47 Mo. 517 (1871); Kottler v. Martin, 241 N.C. 369, 85 S.E.2d 314 (1955).

8. Lux v. Lewis, 213 S.W.2d 315 (Mo. 1948).

9. Options contained in leases were treated as offers or continuing offers to sell in the following cases: Chapman v. Breeze, 355 Mo. 873, 198 S.W.2d 717 (1946); Tebeau v. Ridge, 261 Mo. 547, 170 S.W. 871 (1914); Elliott v. Delaney, 217 Mo. 14, 116 S.W. 494 (1909); Warren v. Castello, 109 Mo. 338, 19 S.W. 29 (1892); Mason v. Payne, 47 Mo. 517 (1871); *cf.* Suhre v. Busch, 343 Mo. 170, 120 S.W.2d 47 (1938) (option to repurchase stocks held to be irrevocable offer). See also Cummins v. Dixon, 265 S.W.2d 386 (Mo. 1954).

1. 310 S.W.2d 942 (Mo. 1958).

2. The trial court refused permission to defendant to show interest and animus of prosecuting witness who was defendant's employer.

3. If the crime had been completed the defendant would thus come under § 556.160, RSMo 1949: "No person shall be convicted of an assault with an intent to commit a crime, or of any other attempt to commit any offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time of such assault or in pursuance of such attempt."

burglary. But the court in the principal case ruled that the defendant had not committed burglary, and based its conclusion in part on *State v. McCalls*:[4]

> In such cases the entry may be said to be made with the intent rather to *procure admission into the dwelling house,* than *to commit a felony,* which we have seen is an indispensable constituent of the crime of burglary.[5]

However, it is the common law rule, that a burglary is committed if the hand or any part of the body is inserted into a building with the ultimate intent to commit a felony, although the immediate intent may be to make an opening for the body.[6] The court in essence approved this definition.[7] Therefore, the court's decision was not based upon any question of Pigque's intent as the quotation may lead one to believe, but rather it decided that he had made no physical entry *within the building.*

This raises the second question. As pointed out above, the court stated that an entry sufficient to commit burglary is an insertion of any part of the body within the building. It would seem obvious that the defendant had effected an entry when he was apprehended in the recessed space between the outer doors and the wire mesh screen of the garage. But the court went on to quote *State v. McCall:*

> To constitute burglary, an entry must be made into the house with the hand, foot, or an instrument with which it is intended to commit a felony. In the present case there was . . . no entry beyond the sash window. The threshold of the window had not been passed, so as to . . . consummate a felonious intention.[8]

The court's reasoning that the defendant had made no entry followed the reasoning of the *McCall* case. The wire mesh screen was the line of demarcation for being within the building and the defendant, by failing to pass through this screen, did not enter the building. Hence, the theory of entry is narrowed in respect that any insertion of the body is not within the building until the final or supreme barrier, which is designed to hinder breakings and physical insertions through the roof, floor or walls and which is not distantly removed from them, is broken.

The Missouri statute[9] which would have forced a reversal if the supreme court had decided that the burglary was completed can be found verbatim in the Missouri statutes of 1835.[10] It was a clarification and restatement of the common law of England[11] based upon two principles:

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4. 4 Ala. 643 (1843). In this case defendant was apprehended after he had breached an outside shutter protecting a window of a dwelling but before he had tampered with the window.
5. 310 S.W.2d at 947.
6. Commonwealth v. Glover, 111 Mass. 395 (1873); see Fisher v. State, 43 Ala. 17 (1869).
7. 310 S.W.2d at 945.
8. *Id.* at 947.
9. See statute quoted note 3 *supra.*
10. § 2, at 212, RSMo 1835.
11. See Queen v. Nicholls, 2 Cox Crim. Cas. 182 (Assize 1847); Rex v. Harmwood, 1 East, P.C. 411 (Assize 1787).

1. An attempt is a separate offense with the element distinguishing it from the completed crime being the failure to consummate it.[12]

2. Conviction of a misdemeanor is forbidden where the offense charged is a felony.[13]

The effect of the first principle, as seen in the statute, is that if the crime is completed, one of the elements necessary to find the accused guilty of the commission of an attempt would be lacking. This reasoning may still be sound in other states,[14] but Missouri authorizes a conviction for any lesser offense included in the crime charged.[15] Also Missouri courts have determined that an attempt is a lesser included crime of the crime charged,[16] and therefore the statute is no longer supported by its original reasoning. This fact has been aptly pointed out in two cases of the Missouri supreme court.[17]

The second principle, as it applied to attempt, was important because at the time of the origin of the statute an attempt was a misdemeanor at common law in England.[18] Therefore when an attempt was charged, if the evidence showed the crime was completed, the attempt merged into the felony. However, in Missouri attempts are not classified as misdemeanors but their classification depends upon the punishment of the crime intended.[19] Hence this principle would not apply to attempts.

There seems to be little need to retain the statute except that it prevents a person from receiving a lighter punishment than he deserves.[20] It could be a liability to the administration of justice as observed by Lord Denman, C.J., remarking on the doctrine of merger:

> The felony may be pretended to extinguish the misdemeanor, and then may be shown to be but a false pretence: and entire impunity has sometimes been obtained by varying the description of the offense according to the prisoner's interest; he has been liberated on both charges, solely because he was guilty upon both.[21]

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12. Rex v. Higgins, 2 East 5, 102 Eng. Rep. 269 (K.B. 1801). See also Sayre, *Criminal Attempts,* 41 HARV. L. REV. 821 (1928), for a historical review of the doctrine of attempts.

13. Cases cited note 11 *supra.*

14. See Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction,* 40 YALE L.J. 53, 73 n.66 (1930).

15. § 556.230, RSMo 1949. This statute is not in conflict with § 556.160, RSMo 1949, according to State v. Scott, 172 Mo. 536, 72 S.W. 897 (1903); State v. Lacey, 111 Mo. 513, 20 S.W. 238 (1892).

16. State v. Whitaker, 275 S.W.2d 316 (Mo. 1955); State v. Frank, 103 Mo. 120, 15 S.W. 330 (1891).

17. State v. Bell, 194 Mo. 264, 91 S.W. 898 (1905); State v. Lacey, *supra* note 15.

18. Rex v. Harmwood, *supra* note 11.

19. § 556.020, RSMo 1949, states that a felony is any offense for which the punishment is either death or imprisonment in the penitentiary only. According to § 556.150, RSMo 1949, an attempt carries approximately a maximum of one-half the punishment of the intended crime; therefore if the crime attempted would be a felony, the attempt of that crime would also be a felony.

20. See State v. Gadwood, 342 Mo. 466, 491, 116 S.W.2d 42, 56 (1938).

21. Regina v. Button, 11 Q.B. 929, 948, 116 Eng. Rep. 720, 727 (1848).

Except in this instance, Missouri follows the doctrine that the defendant should not be heard to complain that he was convicted of a lesser crime than the one of which he was guilty.[22]

CONCLUSION

The definition given to a successful entry by this court may have no effect on subsequent cases with a similar problem, as each case could be distinguished from this one on the basis of dissimilar facts. But it does illustrate the need for a reconsideration of an outdated statute which does not allow a conviction for an attempted offense even though the evidence discloses that at least that crime has been committed.

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CRIMINAL LAW—MISSOURI—ARSON—INTENT GIVEN TO STATUTORY REQUIREMENTS

State v. Varsalona[1]

Defendant was convicted in the Circuit Court of Jackson County, Missouri for arson in connection with burning his own insured liquor store. The state's evidence tended to show that the fire was of incendiary orgin and the building and contents were insured for $55,000. However the defendant was not charged under the statute relating to defrauding an insurer[2] but was tried and convicted under section 560.020,[3] which reads in part:

> Every person who shall willfully set fire to or burn any shop, warehouse . . . shall be deemed guilty of a felony and upon conviction therefor shall be punished by imprisonment in the penitentiary for a term not less than two nor more than ten years.

On appeal, *held,* reversed on the grounds that the information was fatally defective in that it failed to charge an offense.

The information defendant was tried under essentially follows section 560.020,[4] but an information in the language of a statute does not charge an offense if the

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22. State v. Hamey, 168 Mo. 167, 67 S.W. 620 (1902); State v. Gates, 130 Mo. 351, 32 S.W. 971 (1895); State v. Schieller, 130 Mo. 510, 32 S.W. 976 (1895).

1. 309 S.W.2d 636 (Mo. 1958).

2. § 560.025, RSMo 1949. This section includes burning one's own property with intent to defraud another person or corporation. § 560.030, RSMo 1949, makes it a crime to burn one's own insured personal property.

3. All statutory references, unless otherwise indicated, are to RSMo 1949.

4. The only material difference between the statute and the information is that the statute refers to a person who "willfully set fire to," while the information charges the defendant did "unlawfully, feloniously, willfully, and maliciously set fire to" a shop. 309 S.W.2d at 638.

statute does not contain all the constituent elements of an offense.[5] The supreme court decided the legislature intended section 560.020 to define a crime *only* when the burning of one's own property was likely to endanger human life, or property of another, or done with intent to injure or defraud; therefore in omitting these constituent elements of the offense it became impossible to draft an effective information in the language of the statute.

The court found the intent of the legislature by examining section 560.020 in connection with the other "arson" sections.[6] These sections specifically set forth the circumstances under which burning one's own property is a felony and the court can find no reason why the legislature would have enumerated these circumstances,[7] and also intend by the broad unrestricted language of section 560.020 to make any burning of one's own property a felony regardless of whether a danger was threatened. They conclude that section 560.020 does not set forth the necessary elements of the offense, such as danger to human life, or property of another, or that it was done with intent to injure or defraud, and an information in the language of this section is fatally defective because it does not inform the defendant sufficiently as to the nature of the offense for which he is being tried.

The court cites *State v. Greer*[8] in support of its conclusion that the legislature had no intention of making section 560.020 as inclusive as it might appear. This case, decided in 1912, held it was not a crime to burn one's own uninsured shop under the 1909 "arson" statues.[9] Then is was only a crime to burn one's own property if it was a dwelling house or a part thereof, or done with intent to defraud an insurer. When section 560.025[10] was enacted in 1929 it also became a crime to burn one's own property with intent to injure another or damage another's property. The court reasoned that if the legislature intended to make it a crime to burn one's own property when there was no intent to harm the person or property of another, the change would have been made specifically as was done in section 560.025.

The court arrived at the conclusion that section 560.020 requires more than the willful burning of one's own shop to commit a crime. This decision means in effect

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5. State v. Mitnick, 339 Mo. 127, 96 S.W.2d 43 (1936); State v. Wade, 267 Mo. 249, 183 S.W. 598 (1916); State v. Kentner, 178 Mo. 487, 77 S.W. 522 (1903).

6. §§ 560.010-.035, RSMo 1949.

7. § 560.010, RSMo 1949. This section makes it arson to burn one's own dwelling house or part thereof. § 560.025, RSMo 1949. This section makes it a felony to burn one's own property with intent to injure or destroy other property, or with intent to injure or defraud another. § 560.030, RSMo 1949. This section makes it a felony to burn one's own personal property to defraud an insurer.

8. 243 Mo. 599, 147 S.W. 968 (1912).

9. §§ 4505-13, RSMo 1909.

10. This section has to do with burning public and private property in general and burning one's own property with intent to injure or destroy any other property, or with intent to injure or defraud another. From the construction of this section it is a little difficult to determine exactly what property is intended to be covered.

that the burning must be willful *and* malicious,[11] but it is not sufficient that the information charge a willful and malicious act. The specific danger threatened must be charged in the information to inform the defendant of the nature of the offense for which he is tried.

The same problem of determining the intent of the legislature is not present in interpreting section 560.010,[12] although it is similar to section 560.020 in the sense that each make it a crime to willfully burn "any" property. The intention of the legislature to protect the security of habitation, or human life, is manifested in using the term "dwelling house"[13] and an information in the language of this section adequately informs the defendant of the nature of the offense and in effect charges the defendant with endangering human life. As the gist of this section is the protection of human life, a person should not be convicted under this section for burning his own dwelling when precautions are taken to make sure human life cannot be endangered.[14]

In conclusion it is clear that Missouri's "arson" statutes need revision. Several sections, including section 560.020 are ambiguous and difficult to interpret and the fact that section 560.020 does not contain the constituent elements of an offense should be reason enough for a revsion. Until a revision does occur it is wise to remember that section 560.020 does not contain all the constituent elements of an offense and an information in the words of this section alone will be fatally defective.

JULIUS F. WALL

ELECTIONS—PROPER MARKING OF BALLOT—VOTING FOR MORE CANDIDATES THAN TO BE ELECTED

Conner v. Idol[1]

Appellee Earle, Republican, defeated appellant Conner, Democrat, by a majority of four votes for the office of councilman in Middlesboro, Kentucky. There were six candidates for councilman in both the Republican and Democratic columns; the voter could only vote for a total of six. Seven ballots were in controversy, four falling into the same category. On the four ballots there was an X in the

11. BLACK, LAW DICTIONARY (4th ed. 1951). Any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person "malicious". See also People v. Mooney, 127 Cal. 336, 59 Pac. 761 (1899) for a discussion of the use of the words "willfully, unlawfully, feloniously, and maliciously" in an information charging arson.

12. "Every person who shall willfully set fire to or burn any dwelling house or kitchen, shop . . . or other outhouse that is a parcel thereof . . . the property of himself or of another shall be adjudged guilty of arson. . . ."

13. § 560.015, RSMo 1949. "Every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein, shall be deemed a dwelling house. . . ."

14. Reading section 560.010, *supra* note 11, literally, it would appear the same result could be reached as was reached in the principal case, *i.e.*, that the section does not contain the constituent elements of an offense because it omits the specific danger threatened.

1. 307 S.W.2d 913 (Ky. 1957). Cammack, J., dissented.

Republican circle at the top of the ballot. Also on these ballots there was an X after the name of Conner and an X after either two or three Republican candidates' names. None of these were after Earle's name, nor had the voter marked a total of six candidates on any ballot. The trial court held that the ballots were spoiled and that no votes could be counted for any of the council candidates. On appeal, this decision was affirmed. The court stated that the X mark in the Republican circle constituted a vote for each Republican candidate for councilman,[2] and that when the voter crossed to the Democratic ticket and put an X after the name of Conner, this constituted voting for seven candidates when he could vote for only six.

The Kentucky court pointed out that the Kentucky statute provides that an X under the party emblem is a vote for all the candidates on that ticket; the vote for an individual may be cancelled, however, by voting for the opposing candidate.[3] The problem was to determine who the voter voted against. Obviously he intended to vote against someone, but there was no indicatioin as to whom.

The Kentucky court recognized that the voter probably intended to abandon his "straight vote" as to the councilmen's race.[4] But the court thought so counting the ballot would be contrary to the statute and would create endless problems in determining the intent of the voter of each ballot. If the voter had "scratched" one of the Republican's names, it would permit the ballot to be counted for the five remaining Republicans, and appellant Conner.

Missouri provides for situations such as this by statute declaring the proper way to "scratch" a ballot after placing an X mark under the party device, the statute reads:

> (3) Where there are two or more candidates for like office in a group, a cross (X) mark in the square to the left of a candidate's name automatically votes against the candidate whose name appears within the same horizontal lines in the column under the circle in which appears the cross (X) mark,

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2. In Bradley v. Cox, 271 Mo. 438, 451, 197 S.W. 88, 91 (1917) (en banc), it was held "a party ballot, voted and cast as printed, must be held conclusively to show the voter's intent to vote for the nominee of that party and that it must be counted . . . for the party nominee therefor regardless of what name appears in the particular space devoted to that office." B was party nominee for the office, yet J's name appeared as the nominee. Ballots were counted for B. In Steel v. Meek, 312 Ky. 87, 226 S.W.2d 542 (1950), where the voter put an X mark under both party devices and also marks before names of candidates for offices on both tickets, the Kentucky court held there was no difficulty in arriving at the voter's intention and the X marks under the party devices would be ignored.

3. KY. REV. STAT. § 118.280 (1956):

> If a cross mark is made in the circle under the device of a party, and a cross mark is also made in the square after the name of . . . candidates of a different party, the vote shall be counted for the candidates so marked, and not for the candidates for the same offices of the party so marked, but the vote shall be counted for the other candidates under the party device.

4. Barclay, C.J., dissenting in Hope v. Flentge, 140 Mo. 390, 412, 41 S.W. 1002, 1010 (1897) (en banc): "Both the foreign and American courts have sanctioned many irregular markings, in obedience of the well recognized doctrine that the paramount object of such a law is to get at and effectuate the intention of the voter."

unless the voter indicates another candidate to be voted against by drawing a line through such candidates's name.[5]

Illinois and Iowa have reached a different result on similar facts and with statutes like the Kentucky statute. Three candidates for the office were to be elected and each ticket had three nominees. The ballots contained an X in the circle at the top of ticket "A" and an X before the name of one candidate on ticket "B". The Illinois and Iowa courts both held that the vote could be counted for the candidate on ticket "B". The courts reasoned that the mark in the party circle manifested an intent to vote for the candidates on ticket "A" except as that intent might later be changed. The mark before the candidate on ticket "B" showed this changed intent. It was a ballot marked for four candidates, the Iowa and Illinois courts ruled, one of which was clearly pointed out and should receive the vote, but as to the candidates on ticket "A" it was impossible to determine which of the three the elector intended to vote for, so no votes could be counted for those candidates.[6]

This view seems preferable. The intention of the voter is the paramount consideration.[7] Unless the ballot marking violates an explicit statute, the voter's intent, if at all possible, should be given effect.

The question of what mark the voter may use to signify his intent has arisen many times. Many marks used have been held to invalidate the entire ballot as "distinguishing marks."[8] "A 'distinguishing mark' upon a ballot is a marking or embellishing of the ballot which will distinguish it from others and impart knowledge of the person who voted it."[9] The St. Louis Court of Appeals in *Riefle v. Kamp*[10] held that a mark in the shape of a "V" was valid,[11] as were X marks with one or both of the cross lines marked twice. The Missouri court found these not to be distinguishing marks because upon examination of the ballot they appeared to be made without

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5. § 111.580, RSMo 1959. If X marks are placed before the names of three candidates when only two are to be elected, the ballot is void as to that race. Riefle v. Kamp, 241 Mo. App. 1151, 247 S.W.2d 333 (St. L. Ct. App. 1952).

6. Pires v. Bracken, 412 Ill. 416, 107 N.E.2d 706 (1952); Whittam v. Zahorik, 91 Iowa 23, 59 N.W. 57 (1894).

7. "As a basic proposition the law favors the right to vote and seeks to give effect to the expressed will of the electorate." Bryan v. Barnett, 35 N.M. 207, 211, 292 Pac. 611, 612 (1930).

8. "Any deliberate marking of ballot by voter that is not made in attempt to indicate his choice of candidates and which is also effective as mark by which his ballot may be distinguished." BLACK, LAW DICTIONARY (4th ed. 1951). "Whether a given marking is a distinguishing mark is largely a question of fact to be determined from inspection of the original ballot. . . . Some distinguishing characteristic might well be pointed out on every ballot. If the mark appears, upon examination and with regard to other ballots, to have been made without intent to identify the ballot it should not be rejected for that reason." Riefle v. Kamp, 241 Mo. App. 1151, 1159, 247 S.W.2d 333, 338 (St. L. Ct. App. 1952).

9. MCCRARY, ELECTIONS 400 n.2 (4th ed. 1897).

10. *Supra* note 8.

11. Wisconsin provides that "if an elector shall mark his ballot with a cross mark (X), or any other marks as 1, A, V. O, /, √, + . . . it shall be deemed a sufficient vote." WIS. STAT. ANN. § 6.42, tit. 2 (1957).

intent to identify the ballot.[12] The Supreme Court of Indiana held a mark similar to the last one invalid, as was a mark resembling a nine-point star. A mark in the form of a reverse K was held valid, however.[13] A ballot on which the voter had erased the name of a candidate so vigorously as to cause a hole in the paper was held invalid by the Indiana court as a distinguished mark.[14] The Kentucky Court of Appeals said that a mark becomes a distinguishing mark only when it indicates a plan or scheme by which the voter could be identified.[15] In keeping with this principle that court has ruled that since many voters were inept in handling the stencil, a blur instead of a cross would be sufficient to indicate the voter's choice.[16] The Kentucky court, however, held a ballot invalid on which the voter had written in the candidate's name below the place the candidate's name was printed.[17] The writing of the name was considered a distinguishing mark. Where the voter put an X at the right of A's name and an "O" at the right of B's name, the Supreme Court of Wisconsin held the ballot should be counted for A, saying that the method was consistent and showed the voter's intent.[18]

The desirable end would be to give effect to the voter's intent, without permitting marks which could identify the voter. This end has not always been achieved as the principal case indicates. Much lies within the discretion of the court. The decisions, in some instances, rest not so much on the shape of the mark as the way in which it was made. Infirmities, bad light, and poor eyesight all lead to irregular and imperfect markings. These are usually overlooked. Where the mark clearly and intentionally differs from that prescribed, the counts apply more stringent tests for determining the validity of the marks. The St. Louis Court of Appeals has declared: "If the voter's intent can be gathered from his ballot, without laying down a rule which may lead to a destruction of its secrecy, and the voter has substantially complied with the statute, his intention should be given effect."[19] Some courts have held that any mark other than that prescribed by the statute invalidates the ballot.[20]

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12. The lines were irregular and uneven. The court pointed out "the logical conclusion is that the voter was retracing the cross marks . . . in order that it might be more clearly seen." 241 Mo. App. at 1157, 247 S.W.2d at 337. *Contra,* Telles v. Carter, 57 N.M. 704, 710, 262 P.2d 985, 989 (1953). In holding a check mark invalid, the New Mexico court said, "If a check mark is sufficient, why not any other mark which appeals to the individual voter."

13. Conley v. Hile, 207 Ind. 488, 193 N.E. 95 (1934).

14. Wade v. McKibben, 226 Ind. 76, 78 N.E.2d 148 (1948). *Contra,* Doll v. Bender, 55 W. Va. 404, 47 S.E. 293 (1904). A ballot which the voter had defaced to the extent of cutting the names of four candidates from it with a pen knife was recognized by the West Virginia court as good as to the remainder of the ballot.

15. Howard v. Rowland, 261 S.W.2d 280 (Ky. 1953).

16. Hehman v. City of Newport, 239 Ky. 517, 39 S.W.2d 978 (1931). A ballot was also held valid where voter used wrong end of stencil, Brown v. St. Clair, 311 Ky. 24, 223 S.W.2d 173 (1949).

17. Kash v. Hurst, 189 Ky. 233, 224 S.W. 757 (1902).

18. *In re* Burke, 229 Wis. 545, 282 N.W. 598 (1938).

19. Riefle v. Kamp, 241 Mo. App. 1151, 1158, 347 S.W.2d 333, 337 (St. L. Ct. App. 1952).

20. Whittam v. Zahorik, 91 Iowa 23, 59 N.W. 57 (1894); Strosnider v. Turner, 29 Nev. 347, 90 Pac. 581 (1907); *In re* Vote Marks, 17 R.I. 812, 21 Atl. 962 (1890).

Unintentional deviations will often be overlooked, particularly if they are of minor importance. However, the voter should make a conscious effort to vote correctly and in accordance with statutory provisions, as improper balloting is, in truth, self-disfranchisement. "No act of the officers contributed to the violation of the statute, but the voter through inattention, ignorance, or purposely, failed to mark (the ballot properly) . . . and can complain of no one if he thereby lost his vote."[21]

JAMES W. RINER

EMINENT DOMAIN—COMPENSATION FOR "DAMAGE" TO PROPERTY—CHANGE OF POSITION BY LANDOWNER AFTER PROPOSED CONDEMNATION AND PRIOR TO ABANDONMENT OF CONDEMNATION

Hamer v. State Highway Commission[1]

Plaintiff stated in his petition that he was the owner of two hundred and fifty acres of land which he had started to develop into a subdivision. In doing so he laid out, planned and located the lots, streets and sewer ways. Shortly thereafter he was told by agents of the Missouri Highway Commission that a new limited access highway was to be constructed over a part of his land. Plaintiff examined the plans of the Commission and changed his plan of subdividing to make provision for the new highway. In April, 1955 a representative of the Commission attempted to negotiate with him for the purchase of a right-of-way over his land. Plaintiff declined because he needed more time to determine the proper price. Two weeks later he was told that the Highway Commission had changed its mind, that the location of the proposed highway had been changed, and that no land of his was to be taken. Plaintiff prayed for damages. Defendant moved to dismiss the petition for failure to state a claim upon which relief could be granted. The trial court sustained the motion dismissing the petition. On appeal, *held,* affirmed.

Plaintiff stated in his brief that his action was based solely on article I, section 26, of the Missouri constitution.[2] The part material to this case provides, "That private property shall not be taken or damaged for public use without just compensation." The court stated that there can be no recovery for loss or expense resulting from voluntary acts of a landowner in making changes on his premises in expectation that condemnation proceedings will be prosecuted to judgment. A mere plotting or planning in anticipation of a public improvement is not a taking or damaging of the property affected. This seems to be the general rule.[3]

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21. Judge Gantt in Hope v. Flentge, 140 Mo. 390, 402, 41 S.W. 1002, 1007 (1897) (en banc).

1. 304 S.W.2d 869 (Mo. 1957).
2. The related provision in the federal constitution states: "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.
3. See Annot., 64 A.L.R. 546 (1929).

The court said that before "damaged" was added to this Missouri constitutional provision there were many cases without a remedy when the corpus of the property was not taken, yet rights connected with the property were injured, but to recover for "damaged" property the owner must show that the property itself or some right or easement connected to it is directly and specially affected. Aside from that statement the court in considering the problem does not distinguish between "taken" and "damaged" property.

The court made a broad survey of this type of problem, citing a great deal of authority. They said that it is not always necessary that there be an invasion or an appropriation of some valuable property right which the landowner has, but there must be some direct disturbance of the landowner's right and he must have sustained special damage in excess of that by the public. The opinion further states that even when condemnation proceedings are abandoned after they are actually started, if there has been no actual disturbance of the occupancy of the land, no damages can be recovered unless there was bad faith or unreasonable delay.[4]

Two Missouri cases not cited by the court have some bearing on the problem. In *Kirn v. Cape Girardeau & C.R.*[5] the defendant railroad had started condemnation proceedings. These proceedings were abandoned after the commissioners' report. The plaintiff asked for compensation for his loss of time in looking after the proceedings and for attorneys fees connected therewith. Both were allowed. However, in *Manley v. State Highway Commission*[6] the Commission instituted a condemnation action and after the assessment of damages they discontinued it. The plaintiff property holder sued for expenses in defending the action. Relief was denied because the defendant was a purely public entity, and not liable for torts. As both of these cases were apparently tort actions, that may be the reason they were not referred to in the principal case.

If Hamer had gone ahead with his original plans and the Highway Commission followed theirs it could have been detrimental to both. The state would have had to pay for any improvement, which in this and many cases could be quite substantial, and when the highway went through this area it very well could have upset the design of the subdivision. This points up the need for a system by which land needed for planned future public use could be limited or frozen in regard to improvements and yet allow the landowners a beneficial use of their land or provide them some compensation in lieu of the unrestricted use of their property.

A New York act providing that after the filing of a map of proposed streets no compensation would be given for any buildings erected should the city later choose to condemn was held unconstitutional.[7] A later act allowing a city to deny a building

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4. Some of the problems in this case are discussed in 11 McQUILLAN, MUNICIPAL CORPORATIONS §§ 32.31, .38, .77 (3d ed. 1950); and 6 NICHOLS, EMINENT DOMAIN § 26.45 (3d ed. 1953).
5. 124 Mo. App. 271, 101 S.W. 673 (St. L. Ct. App. 1907).
6. 82 S.W.2d 619 (K.C. Ct. App. 1935).
7. Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893).

permit was upheld.[8] By this act if a landowner not permitted to improve his property did not get a fair return on his property, provision was made to grant a permit for a building which would to the least practical extent permit a fair return, and which would as far as possible hold down the cost should the land later be taken or would cause as slight a variation as possible in the original plan. The city of Columbia, Missouri has attempted to deal with this type of problem by drawing yard restrictions from lines established for future widening or opening of streets.[9]

Perhaps some legislation could be worked out in this field to protect both the property holder and the public interest in securing needed public improvements at the lowest necessary cost.

JAMES K. PREWITT

INSURANCE—LIABILITY OF INSURER IN EXCESS OF POLICY LIMITS FOR FAILURE TO SETTLE—MISSOURI

Comunale v. Traders & Gen. Ins. Co.[1]

Plaintiffs were struck and injured by a truck operated by the insured, who had liability insurance coverage by defendant-insurer. Because insured was driving a truck which did not belong to him, defendant-insurer denied coverage and refused to defend the suit filed by plaintiffs. Insured retained counsel and defended the action. During the trial plaintiffs offered to settle the case within the policy limits, which offer insured communicated to defendant-insurer, together with a prediction that the verdict would be in excess of the policy limits. Defendant-insurer refused the offer to settle and the case proceeded to judgment for plaintiffs far in excess of the policy limits. Plaintiffs recovered the amount of the policy by direct suit in an earlier action against the defendant. Having obtained an assignment of all the insured's rights against defendant-insurer, plaintiffs brought this action to recover the amount of the judgment in excess of policy limits. The Superior Court of California in and for the County of Los Angeles entered judgment for defendant-insurer, notwithstanding a jury verdict for plaintiffs. On appeal, *held*, reversed. The Supreme Court of California held the insurer had a duty to consider the insured's interest where it had an opportunity to settle a claim within policy limits, there being great risk of recovery above policy limits, and the insurer was not relieved of its obligation to settle because it had wrongfully refused to defend. The court went on to hold that insured's cause of action for the excess over policy limits was assignable to plaintiffs.

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8. Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936).

9. COLUMBIA, MO., REV. ORDINANCES, ch. 19, art. II, § 21 (1952), as amended Aug. 19, 1957, and providing in part as follows:

(2) Where an official line has been established for future widening or opening of a street upon which a lot abuts, then the depth or width of a yard shall be measured from such official line to the nearest line of the building.

1. 328 P.2d 198 (Cal. 1958).

The liability of the insurer for an excess judgment has been held based on its bad faith or its negligence in refusing an offer of settlement, with most jurisdictions stating a requirement of bad faith.[2] However, a more important distinction is whether the insurer may protect its own interest or must also consider the insured's interest in settlement when there is a conflict of interest.[3] The degree of protection which the insurer must give the insured's interest is a point on which there is much disagreement in the cases. Some jurisdictions which purport to require bad faith of the insurer before holding it liable for an excess judgment also require the insurer to give the insured's interest in settlement at least equal consideration with the insurer's own financial interests.[4] Even though this position is fairer to the insured, it still leaves a difficult fact question as to whether the insurer in refusing to settle has given the insured's interest equal consideration with its own.[5] It has been suggested, in order to remove the uncertainty in this area, a rule should be adopted which either does not require the insurer to protect the insured's interest when there is a conflict of interest, or does require the insurer to sacrifice its own interest for that of the insured.[6] The suggestion was never intended as the ideal solution to this difficult problem, but rather as an aid to legal administration. The latter suggested rule would probably be preferable as a matter of social policy in making insurance coverage more certain.

The Supreme Court of Missouri held in *Zumwalt v. Utilities Ins. Co.*[7] that the insurer was liable for bad faith in refusing to settle, and declared that the insurer must sacrifice its own interest to protect that of the insured where there is a conflict of interest.[8] The language of the case is broad and if actually followed may reduce

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2. Annot., 40 A.L.R.2d 168, 171 (1955).

3. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1142 (1954). There is a conflict between the interest of the insured and that of the insurer in each instance where a suit is filed against the insured for damages substantially in excess of policy limits, and an offer is made to compromise the suit for a settlement figure equal to, or slightly less than, policy limits. It is to the advantage of the insured to have the suit settled, whereas the insurer may desire to take its chances on trying the case, as it will have little more to lose, and a possibility of having to pay nothing should it obtain a defendant's verdict. For further explanations of this conflict of interest, see Roos, *A Note on the Excess Problem*, [1952] INS. L.J. 192, reprinted from 26 CALIF. STATE B.J. 355 (1951); Annot., 40 A.L.R.2d 168 (1955).

4. American Fid. & Cas. Co. v. G. A. Nichols Co., 173 F.2d 830 (10th Cir. 1949); Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957); National Mut. Cas. Co. v. Britt, 203 Okla. 175, 200 P.2d 407 (1948).

5. Keeton, *supra* note 3, at 1145. The determination of this question is generally made by a jury which has the advantage of knowing the outcome of the trial which resulted in the judgment in excess of policy limits. It is natural for the jury to decide that since the insurer decided not to settle, it did not give equal consideration to the insured's interest. The insurer's problem was recognized in Georgia Cas. Co. v. Mann, 242 Ky. 447, 451, 46 S.W.2d 777, 779 (1932), where it was pointed out that as yet mere mortals haven't been gifted with prophetic powers.

6. Annot., 40 A.L.R.2d 168, 172 (1955).

7. 360 Mo. 362, 228 S.W.2d 750 (1950), 18 Mo. L. REV. 182 (1953).

8. The Missouri court cited Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 292, 170 S.E. 346, 348 (1933) which declared: "If . . . [insurer's] own interests conflicted with those of [insured], it was bound, under its contract of indemnity, and in good faith, *to sacrifice its interests in favor of those of the* [insured]."

litigation in Missouri over liability of the insurer beyond the policy limit. The insurer will know what it must do—it must settle within the limits of the policy when it has an opportunity to do so, or refuse settlement at its own risk. If the insurer is wrong, it must pay the entire judgment. This, of course, will increase insurance costs as insurers will settle more marginal cases which ordinarily they would have let go to trial. Nevertheless, if the insured is given more real protection up to his stated policy limits, some slight increase in premium might be worthwhile and justified.

In *Radcliffe v. Franklin Nat'l. Ins. Co. of N.Y.*[9] the Missouri *Zumwalt* case was cited as an example of a judicial trend away from earlier decisions such as *St. Joseph Transfer & Storage Co. v. Employers' Indem. Corp.*[10] which allowed the insurer to protect its own interest over that of the insured where there was a conflict. However, the Oregon opinion stated the holding of *Zumwalt* to be that the insurer is not liable unless it is guilty of fraud or bad faith in refusing to settle. The Oregon court found the real issue in this area to be the amount of protection the insurer must give the insured's interest, but ignored that part of the *Zumwalt* opinion which dealt with that question. Perhaps the language in the *Zumwalt* case purporting to require the insurer to sacrifice its own interest for that of the insured is merely dictum. This appears to have been the opinion of the Oregon court in the *Radcliffe* case.

The instant California case holds that the insurer must give insured's interest at least equal consideration with its own. However, it is noteworthy that there the insurer was not conducting the defense of the action. It was not in control of the case. Yet, because insured's counsel communicated offers to the insurer, the Supreme Court of California held the insurer liable for refusal to settle as though the insurer were defending. The court thought an insurer should be in no better position for having wrongfully refused to defend. Proper as it sounds, however, this result is hard to arrive at in theory, since control of the defense and of settlement negotiations by the insurer has been the situation in which the insurer's duty to settle has developed. Modern policies do not require the insurer to settle but merely give it that right. To overcome this obstacle, the California court relied on an implied covenant of good faith which it found to be a part of every contract, including one of insurance, that neither party will do anything which would injure the other. Even though purporting to require only an equal consideration of interests, the result is similar to the Missouri declaration in the *Zumwalt* case that the insurer must sacrifice its interest for that of the insured. This seems to be so mainly because the question as to whether the insurer breached its covenant of good faith will be tried by a subsequent jury having the benefit of hindsight. Since the first jury brought in a verdict in excess of policy limits and the insurer had refused to settle within the limits of the policy, the jury will find it easy to say that the insurer

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In Blue Bird Taxi Corp. v. American Fid. & Cas. Co., 26 F. Supp. 808 (E.D.S.C. 1939), the quoted language was said to be mere dictum.

9. 298 P.2d 1002 (Ore. 1956). This case contains an exhaustive discussion and citation of the authorities in this area.

10. 224 Mo. App. 221, 23 S.W.2d 215 (K.C. Ct. App. 1930).

should have foreseen the likelihood of an excess verdict and have settled when it had an opportunity to do so. The probability of the above result occurring in a trial of the issue of whether insurer breached a covenant of good faith not to injure insured's interest seems greater than where the second jury trial is simply on the issue of insurer's good faith alone. Requiring the insurer to live up to an implied covenant of good faith not to injure the insured seems to be more stringent than merely requiring it to exercise good faith in giving the insured's interest equal consideration with its own. It at least comes close to holding that the insurer must sacrifice its interest for that of the insured where there is a conflict.

The holding in the instant California case that the insured's cause of action against the insurer for the amount of the judgment exceeding the policy limits may be assigned to the injured party is probably a desirable one as it allows the real party in interest to bring the action. There has been no such holding in Missouri, but a strong argument supporting this position could be made based upon the California opinion.

In terms of the traditional distinctions in the cases, Missouri holds that an insurer is liable in excess of the policy limits where it is guilty of bad faith in refusing an offer of settlement within the policy limits. However, on the more important question of whose interest must the insurer protect where there is a conflict of interest, Missouri has language, perhaps dictum, in the *Zumwalt* case that the insurer must sacrifice its own interest for that of the insured. Whether our court should adopt this position, if it has not already done so, is open to much debate. To do so would be to bring about a substantial change in the insurance contract, making the insurer liable for every judgment in excess of policy limits where an offer of settlement within policy limits was refused. As stated above, such a change may be desirable as a matter of social policy to make insurance coverage more certain up to the stated policy limits, but it will increase insurance rates. The decision on this question of social policy is one which the legislature should make. The whole problem of liability for an excess judgment where a settlement offer within the policy limits has been refused, with all its uncertainty as it is now handled, reveals a basic weakness in our system of protection from liability through limited coverage liability insurance. In the absence of any correction by the legislature, the position suggested in the *Zumwalt* case might be adopted by the courts as a partial solution to the problem.

MELVIN E. CARNAHAN

MALICIOUS PROSECUTION IN MISSOURI—PROBABLE CAUSE—ACTION ON DEBT PREVIOUSLY DISCHARGED IN BANKRUPTCY

Standley v. Western Auto Supply Co.[1]

Plaintiff had purchased several items at defendant's store giving his promissory note in payment. Two years later plaintiff obtained a discharge in bankruptcy

1. 319 S.W.2d 924 (K.C. Ct. App. 1959).

listing defendant as one of his creditors. Seven weeks later defendant initiated proceeding against plaintiff for the amount still owed. From the evidence there was no showing that defendant knew plaintiff had been finally discharged in bankruptcy. Plaintiff set up his discharge in bankruptcy as a defense, and defendant dismissed his case. Plaintiff then brought an action for malicious prosecution, but at the end of his evidence the trial court directed a verdict for the defendant. On appeal, *held*, affirmed.

The decisive question was whether plaintiff had affirmatively shown that defendant instituted his action without probable cause.[2] Probable cause in Missouri has come to have a fairly settled meaning:

> Probable cause for the bringing of a civil proceeding is a belief in the cause of action or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence so situated as was the plaintiff who instituted the proceedings.[3]

And, it is clear that the burden of proof is upon the plaintiff to show lack of probable cause.[4]

In determining probable cause in cases like the principal case, the effect of a discharge in bankruptcy comes into play. As stated in the leading case of *Helms v. Holmes*,[5] a discharge in bankruptcy does not extinguish any of the bankrupt's debts; it is simply a bar to their enforcement by legal proceedings. But, in *Gore v. Gorman's Inc.*[6] the court on facts similar to those in the principal case, believed that a discharge in bankruptcy was a complete discharge of the bankrupt's debt and not simply a bar to enforcement. However, it was apparent that the defendant had instituted the action for past liabilities knowing that plaintiff had been discharged. There was also evidence that the defendant had subjected plaintiff to a good deal of harassment. The court found for the plaintiff.

A similar set of facts was present in *Covington v. Robinson*.[7] The court held there was no evidence that the defendant continued to prosecute his suit after he learned of the plaintiff's discharge, and that therefore "no case is made for a charge

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2. The Supreme Court of Missouri has held that five elements are necessary to support an action for malicious prosecution: (1) the initiation of the proceedings by the defendant; (2) the termination of the proceedings in favor of the plaintiff; (3) want of probable cause for the proceedings; (4) malice in initiating the proceedings; (5) resultant damage to the plaintiff. Ripley v. Bank of Skidmore, 355 Mo. 897, 903, 198 S.W.2d 861, 866 (1947). The court in the principal case believed that plaintiff had clearly proved elements (1), (2), (4) and (5) of his cause of action.

3. Lindsay v. Evans, 174 S.W.2d 390, 396 (St. L. Ct. App. 1943). This definition has been approved by the supreme court. Hughes v. Aetna Ins. Co., 261 S.W.2d 942, 949 (Mo. 1953).

4. "Until there is affirmative proof of want of probable cause the defendant is not called on for his defense." Wilcox v. Gilmore, 320 Mo. 980, 986, 8 S.W.2d 961, 962 (1928).

5. 129 F.2d 263, 266 (4th Cir. 1942).

6. 143 F. Supp. 9 (W.D. Mo. 1956).

7. 242 Ala. 337, 6 So. 2d 421 (1942).

of malicious prosecution by persisting in the prosecution of a groundless suit to harass the defendant."[8]

The Kansas City Court of Appeals, in the principal case, observed that a discharge in bankruptcy is only a bar to the enforcement of the bankrupt's debts, citing the *Helms* and *Covington* cases. The court also observed that a discharge in bankruptcy is an affirmative defense under our statutes.[9] Here, as in the *Covington* case, there was no direct evidence that the defendant knew of the discharge when he sued plaintiff. Therefore, the court could have relied on the *Covington* case and held that plaintiff's action must fail because he did not sustain the burden of proof in showing that defendant had knowledge. The court went much further than this in its holding:

> [E]ven though [defendant] knew of the discharge, [defendant could] request plaintiff to pay, and receiving no reply, file suit on the claim as it did here and not be guilty of bringing a suit without probable cause, especially when it dismissed the case a few days after plaintiff first invoked his special defense, and when it thereafter did not further sue or harass him.[10]

Gore v. Gorman's Inc. was distinguished on the ground that there the defendant had subjected plaintiff to harassment, while this fact was not present in the principal case. It seems that the court deemed the absence of harassment as controlling.

TED M. HENSON, JR.

MECHANIC'S LEIN—MISSOURI—APPLICATION OF CONTRACTOR'S PAYMENTS BY MATERIALMAN WHERE SOURCE OF MONEY SHOULD BE KNOWN

Herrman v. Daffin[1]

Defendant owner paid his contractor the balance due on the construction cost of a home. The contractor in turn paid a part of this money to the plaintiff materialman. The contractor was indebted to the materialman for materials furnished on jobs prior to the defendant's The materialman applied the payment to the older debts and then filed suit to forclose a mechanic's lien on the defendant's house.[2] When the owner paid the contractor, he did not specify in any way that his payment was to be applied by the contractor to the discharge of any possible mechanic's liens on the owner's house. When the contractor paid the materialman he did not specify that

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8. *Id.* at 340, 6 So. 2d at 424.
9. § 509.090, RSMo 1949.
10. 319 S.W.2d at 930.

1. 302 S.W.2d 313 (Spr. Ct. App. 1957).
2. § 429.010, RSMo 1949, Henry & Coatsworth Co. v. Evans, 97 Mo. 47, 10 S.W. 868 (1889) (mechanic's lien is not unconstitutional as a deprivation of property without due process of law). See Comment, 17 U. KAN. CITY L. REV. 130 (1949) discussing the history of the statute and suggesting changes.

the payment was to be credited to the part of his debt representing materials furnished for the owner's house. The jury found that the payment should have been so applied by the materialman. On appeal, *held*, affirmed.

The case was decided on the question of whether or not the plaintiffs had knowledge of the source of the payment made to them by the contractor. It was held that the plaintiffs had knowledge of facts which should reasonably have caused them to know or to make inquiry as to the source of the payment. The circumstantial evidence was held to be of sufficient probative force to warrant such a finding.[3] Although there may not have been actual knowledge that it was the defendant's money with which they had been paid, the court held plaintiffs had possession of such facts as to cause the "honest, reasonable and prudent man" to make inquiry.[4] The court examined the past business relationship between the plaintiff and the contractor. The contractor had had difficulty in meeting financial obligations to the plaintiff and to other creditors from the beginning. Plaintiffs maintained individual ledger sheets for each separate job of the contractor. This enabled them to easily determine the amount of credit extended on each project. It was also shown that plaintiffs kept a somewhat close supervision over the actual construction work. Plaintiff's manager testified that he had visited the contractor and discussed the question of payment of the account. There was some indication that the manager knew, at least approximately, the date of completion of the work on defendant's house and had, therefore, some idea of when payment to the contractor could be expected. The court found, after a consideration of these facts, that the jury reasonably could have inferred that the manager had information which should have led him to inquire. This inquiry would have been relatively easy to accomplish. Failure to inquire, stated the court, could have justified the jury in assuming that if the manager did not know, he refrained from inquiring in order that he *would* not know.

It may be that the owner will pay the contractor and direct that the contractor apply that payment to the discharge of any possible mechanic's liens on the owner's property. Does this instruction to the contractor bind the materialman? The Missouri courts apparently have not dealt with this situation. However, there would be little justification for holding the materialman bound by such an agreement. If knowledge, as in the *Herrman* case, is controlling, the materialman should not be held to an agreement to which he was not a party and the existence of which he may not be aware. To hold him to such an agreement would also be contrary to the obvious intent of the mechanic's lien statute to protect the materialman.

If the owner goes to the materialman directly, and informs him that a payment is to be made to the contractor and that it is to be used to discharge existing or possible mechanic's liens, then, as will be noted later, the materialman is bound. But if there is no direction by the owner nor any agreement between the owner and the con-

3. State v. Graves, 144 S.W.2d 91 (Mo. 1940) (en banc); Butler v. City of University City, 167 S.W.2d 442 (St. L. Ct. App. 1943).
4. 302 S.W.2d at 317.

tractor or the materialman then the cases are divided as to the materialman's right to apply a payment as he chooses.[5]

One view is that the materialman can apply the payment to other debts owed by the contractor and thereby keep his mechanic's lien. This view follows the general rule applied to payments by a debtor where no direction has been made as to which of several accounts a payment is to be appropriated.[6] Where the owner has retained a sum larger than the total claim of the materialman to insure that the contractor makes delivery of all items lien free, this theory is strengthened.[7] Other courts have refused to apply this general debtor-creditor rule just noted. Where the party making the payment to the creditor has received the funds constituting the payment from a third party whose property will be subject to a lien in the event that the payment is not applied to the discharge of the debt for materials or lienable items these courts would apply the payment to that debt.[8] Some of these cases ignore the question of knowledge of the source of a payment while others make it the principal issue.[9] Where knowledge is a significant consideration, the materialman with knowledge of the source of the money with which the contractor paid him is required to apply it to the discharge of the lien on the owner's property.

The *Herrman* case is apparently the first Missouri case to be decided on the question of knowledge or lack of knowledge of the source of the payment to the materialman. Reference is made in the *Herrman* decision to the earlier Missouri appeals case of *Campbell Glass & Paint Co. v. Davis-Page Planing Mill.*[10] The *Campbell* case was not decisive of the question involved in the *Herrman* case since it did not concern notice or knowledge, although it involved substantially the same fact situation. In the *Campbell* case the owner, *O*, contracted with *P* and *T* to errect a building for him. *P* and *T* in turn, sub-contracted the millwork and glass work to *S*. *S* got his materials from *M* whom he also owed for previous jobs. While the work was being performed, *S* paid *M* various sums of money but made no direction as to how he wished it applied to the debts. Subsequently, *S* went into bankruptcy while still owing *M* on the various contracts. *M* sued to enforce a mechanic's lien on *O*'s building. *O* contended that because *M* did not keep a separate account of the balance due on each project they could not now assert a mechanic's lien against *O*'s property. *O* contended that *M* did not know from which job the debt resulted. It was held that if the dealings of *M* had been with different contractors that the accounts of each should have been kept separate.

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5. 36 AM. JUR. *Mechanic's Liens* § 228 (1941); 57 C.J.S. *Mechanic's Liens* § 249 (1948).

6. T. Dan Kolker, Inc. v. Shure, 209 Md. 290, 121 A.2d 223 (1956).

7. Andrew v. Bishop, 132 Me. 447, 172 Atl. 752 (1934).

8. 36 AM. JUR. *Mechanic's Liens* § 228 (1941); 57 C.J.S. *Mechanic's Liens* § 249 (1948).

9. See PHILLIPS, MECHANIC'S LIENS § 287 (3d ed. 1893); Annot., 41 A.L.R. 1297 (1926), 130 A.L.R. 198 (1941), 166 A.L.R. 643 (1947).

10. 130 Mo. App. 474, 110 S.W. 24 (K.C. Ct. App. 1908). Note that this case is referred to, erroneously apparently, in 57 C.J.S. *Mechanic's Liens* § 249, at 827 (1948) as a case where knowledge or lack of knowledge was controlling.

> We do not think, however, where the dealings were with a single contractor, who had different contracts going on at the same time, that he was bound to ascertain from what particular contract the contractor realized the money with which he made payments. No such burden is imposed by the statute. He was not required to keep an account of the money transactions of his contractor and the original contractor or owner of the building. He had no lien on any particular fund.[11]

The *Campbell* case is representative of the general tenor of the Missouri cases on this problem. There has been a definite tendency to decide according to the best interests of the materialman. The other Missouri cases on this problem prior to the *Herrman* case were not decided on the question of knowledge or notice of the source of the payment made to the materialman. There are a few general concepts which seem to be uniformly accepted. For example, the debtor can, where there is more than one account due, direct that his payment be applied to a certain account.[12] If the debtor does so direct, then the creditor cannot make any change in such application without the debtor's assent.[13] These are merely general rules appliable to the ordinary debtor-creditor relationship. On the other hand the creditor may, where the debtor did not appropriate a payment, apply it as he wishes.[14] Accordingly, the owner may designate a payment as one to be applied to a specific account for materials used on his project. Where the owner fails to designate, then the contractor or the materialman may apply it as he pleases.[15] If some items were lienable and others were not, the materialman is free to apply a payment to the nonlienable items and retain his lien on the more secure items.[16] The materialman may also apply a payment to the oldest items, as opposed to the most recent.[17] In the situation where neither the owner nor the materialman has indicated any application to a particular account, the law will act. Here the materialman has enjoyed a definite advantage. The courts have tended to place themselves in the materialman's position and have tried to apply payments as the materialman himself would do.[18] The application has been to the nonlienable or unsecured items rather than to the items against which the materialman may assert his lien.[19] If the owner failed to specify to the contractor or materialman how he wanted a payment to be applied, then he stood a good chance

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11. 130 Mo. App. at 478, 110 S.W. at 25.
12. Starr v. Mitchell, 361 Mo. 908, 237 S.W.2d 123 (1951); Short v. White, 234 Mo. App. 499, 133 S.W.2d 1039 (K.C. Ct. App. 1939).
13. Bopp v. Wittich, 88 Mo. App. 129 (St. L. Ct. App. 1901).
14. Reis v. Taylor, 103 S.W.2d 892 (St. L. Ct. App. 1937); Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co., 184 S.W. 952 (St. L. Ct. App. 1916).
15. Waterman v. Younger, 49 Mo. 413 (1872); Reis v. Taylor, *supra* note 14; Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co., *supra* note 14.
16. Hanenkamp v. Hagedorn, 110 S.W.2d 826 (St. L. Ct. App. 1937); Reis v. Taylor, *supra* note 14; Glencoe Lime & Cement Co. v. Polar Wave Ice & Fuel Co., *supra* note 14.
17. St. Louis Sash & Door Works v. Tonkins, 188 Mo. App. 1, 173 S.W. 47 (St. L. Ct. App. 1915); Wilson-Reheis-Rolfes Lumber Co. v. Ware, 158 Mo. App. 179, 138 S.W. 690 (St. L. Ct. App. 1911).
18. PHILLIPS, MECHANIC'S LIENS § 287 (3d ed. 1893).
19. Hanenkamp v. Hagedorn, *supra* note 16.

of having it applied to another account, rather than to his own, leaving his own property subject to the lien.

Of course, it can not be forgotten that the mechanic's lien is a statutory creation enacted for the protection of the materialman.[20] This explains the tendency to favor the materialman. However, it may be asked if this protection is really necessary or desirable under current conditions. The *Herrman* decision recognizes the rights of both the materialman and of the owner. Prior cases have placed upon the owner the entire burden of assuring that his property is protected from mechanic's liens. They have however, given their assistance to the materialman to assure him the added security of the owner's property. This does not appear to be realistic in view of the present day large scale operations of both contractor and materialman. In most instances, the materialman is much better equipped to handle credit problems than the home owner. The *Herrman* case does not relieve the owner of all of the responsibility and transfer it to the materialman. It merely requires the materialman to take notice of facts which should reasonably cause him to know the source of a payment or to make some sort of inquiry under circumstances where inquiry would be a normal response. In the absence of facts sufficient to put the materialman on notice, he is protected. The aim seems to be the prevention of conscious disregard of information which should call attention to the source of a payment.

It may be wondered where this leaves the owner. What can he now do in order to feel safe from the foreclosure of a mechanic's lien which he has thought was discharged after he paid the contractor? Obviously, the *Herrman* case does not provide adequate protection. Not being a supreme court decision it may not be followed in the other courts of appeal. The owner, therefore, cannot be sure he is safe even under circumstances similar to these. The *Herrman* decision is a step toward the balancing of rights between owner and materialman, but litigation was necessary to obtain that recognition. The owner can require that the contractor give a bond to indemnify against mechanic's liens.[21] This would prevent the litigation which was necessary in the *Herrman* case and would seem to be one of the more effective means of protection. Receipted bills for all materials purchased and used on the project also afford some measure of security. The owner may also draw his check to the order of both the contractor and the materialman. It is also possible to obtain a waiver by the materialman of the benefits of the mechanic's lien law.[22] It is clear that the mere payment to the principal contractor and nothing more is what leads to litigation. Perhaps the best protection is in the careful selection of a reliable contractor. The cases on this problem indicate that controversies have developed more frequently where the contractor had a history of difficulty in meeting financial obligations. With an established reputable firm, the possibility of the assertion of a mechanic's lien by the materialman after the contractor has been paid is certainly reduced.

WILLIAM J. ESELY

20. Roy F. Stamm Elec. Co. v. Hamilton-Brown Shoe Co., 350 Mo. 1178, 171 S.W.2d 580 (1943) (en banc).
21. 36 AM. JUR. *Mechanic's Leins* § 212 (1941).
22. *Id.* § 200.

NAVIGABLE WATERS—ARTIFICIAL LAKE CONNECTED TO RIVER

Sneed v. Weber[1]

Prior to 1903 the Mississippi River at flood stage overflowed its southerly bank into a marsh on defendant's land. In 1903 a drainage ditch was constructed from the south side of the marsh through plaintiff's land to a lower point on the river. In 1908 defendant's predecessor in title constructed a dam across the drainage ditch, thus creating Weber Lake, which was wholly on defendant's land. The lake was some eight feet above the normal level of the river, and did not connect with the river except during the flood stage. Defendant enlarged Weber Lake by excavation in 1920 and used it for a fishing resort. In 1942 the United States constructed a dam across the river below Weber Lake. This raised the normal level of the river and the lake to a common level which was higher than the former level of Weber Lake and higher than the 1908 dam. After this it was possible to navigate a boat from Weber Lake to the river by forcing it through intervening shallow water studded with trees and stumps. Plaintiff, who sought to establish a boat harbor in the old drainage ditch on his land from which his patrons could navigate across Weber Lake to the river, sued defendant in equity to compel him to remove a pontoon bridge which obstructed such navigation. Defendant and his predecessor in title had been maintaining this or a similar obstruction across the lake since 1908. The trial court gave a decree for the defendant. On appeal, *held,* affirmed. The St. Louis Court of Appeals held that Weber Lake is not navigable and not subject to a public easement of navigation. The court based this conclusion on two premises: (1) that Weber Lake is not navigable in fact in view of its limited and obstructed connection with the river; (2) that even if presently navigable in fact, Weber Lake is not navigable in law because it would not be navigable in fact in its natural state, unaided by artificial excavation and construction.

There has been some confusion as to the English common law test for determining whether a body of water is navigable in the sense of being subject to a public right of navigation.[2] In this country, the test is whether it is usable for commerce in its natural state, although there are minor differences as to what constitutes commerce for this purpose.[3] Whether a body of water is usable for commerce, as

1. 307 S.W.2d 681 (St. L. Ct. App. 1957).

2. American courts have rejected the English common law tide-water test as unsuited to the conditions of this country. Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 233, 238 (1851). However, the true common law test is that ebb and flow of tide water establishes a presumption of Crown ownership of the beds thereunder. Malcomson v. O'Dea, 10 H.L. Cas. 593, 11 Eng. Rep. 1155 (1863). Navigability in the sense of a public highway or passage over the waters is determined by the body of water's utility to the ordinary modes of public commerce and travel. Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, (1900); King v. Montague, 4 B. & C. 598, 107 Eng. Rep. 1183 (K.B. 1825); Grant v. Gordon, 15 Mor. Dic. 12,820 (Ct. Sess. 1781); HALE, DE JURE MARIS, in MOORE, HISTORY AND LAW OF THE FORESHORE 374, 376 (1888).

3. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405 (1940); The Montello, 87 U.S. (20 Wall.) 430, 439 (1874); Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17, 22 (1954) (en banc); Smith v. State, 184 Wash. 58, 50 P.2d 32 (1935).

that term is locally defined, is a question of fact.[4] Its being a marsh and containing vegetation does not necessarily preclude a determination of navigability.[5] Except in some arid states,[6] however, intermittent bodies of water existing only during periods of flood are not ordinarily deemed navigable.[7] Therefore the court's determination that the site of Weber Lake was not navigable before the construction of the dam in 1908 would seem to be sound. Its conclusion that the lake is not, as a matter of fact, commercially usable at the present time is more questionable.

At least for purposes of congressional regulation under the commerce clause, a stream may be navigable although some artificial improvements, such as dredging the channel deeper at shallow spots, are needed to make it commercially usable.[8] Subject to the qualification imposed by the commerce clause, if a basin or channel is artificially constructed by a private person on a site owned by him and not previously occupied by a body of navigable water, the resulting artificial body of water, even though in fact usable for commerce, is not subject to rights of navigation by persons other than the owner of the site unless (1) the public acquires a right of navigation by dedication, which may be inferred from acquiescence in public use,[9] or (2) particular persons acquire an easement of navigation by prescription.[10] As the defendant and his predecessor in title had been careful to exclude all but their licensees from Weber Lake at all times after its construction, it was clear that the public had not acquired a right of navigation by dedication or by prescription. Consequently, even if Weber Lake is in fact commercially usable at the present time, the decision would appear to be sound.

DONALD EUGENE CHANEY

TORTS—MISSOURI—DUTY TO INVITEES—INJURY BY THIRD PERSON WHEN INVITEE HAS KNOWLEDGE OF DANGER

Gregorc v. Londoff Cocktail Lounge[1]

The plaintiff was shot while a patron in defendant's cocktail lounge. *A* entered the lounge after the plaintiff and stood on the other side of the bar, thirty-five feet

4. Elder v. Delcour, *supra* note 3; Slovensky v. O'Reilly, 233 S.W. 478 (Mo. 1921); Hobart-Lee Tie Co. v. Grabner, 206 Mo. App. 96, 219 S.W. 975 (Spr. Ct. App. 1920).

5. Attorney Gen. v. Bay Boom Wild Rice & Fur Co., 172 Wis. 363, 178 N.W. 569 (1920); Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N.W. 661 (1897).

6. Town of Refugio v. Heard, 95 S.W.2d 1008 (Tex. Civ. App. 1936); Orange Lumber Co. v. Thompson, 59 Tex. Civ. App. 562, 126 S.W. 604 (1910).

7. Frazie v. Orleans Dredging Co., 182 Miss. 193, 180 So. 816 (1938); Munson v. Hungerford, 6 Barb. 265 (Sup. Ct. N.Y. 1849); Lebanon Lumber Co. v. Leonard, 68 Ore. 147, 136 Pac. 891 (1913).

8. United States v. Appalachian Elec. Power Co., *supra* note 3.

9. Stump v. McNairy, 5 Humph. 363 (Tenn. 1844).

10. Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E.2d 479 (1956); Kray v. Muggli, 84 Minn. 90, 86 N.W. 882 (1901); Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 Atl. 646 (1938).

1. 314 S.W. 2d 704 (Mo. 1958).

away, holding a gun against *B*. *A* and *B* quarrelled in this position for fifteen to twenty minutes, in plain view of the plaintiff, and the plaintiff saw *A* and *B* in this position. The proprietor, defendant, tried to take the gun from *A* but, being unsuccessful, he then went into the kitchen and lay down on the floor until the shooting was over. The defendant did not warn the plaintiff of any danger. A policeman entered the lounge and stood behind the plaintiff's table. The policeman commanded *A* to drop the gun; instead, *A* fired a shot which injured the plaintiff. The policeman then subdued *A*. The trial court instructed the jury that if the defendant had not warned the plaintiff, the defendant was negligent. The defendant's motion for a new trial was sustained. On appeal, *held*, affirmed. The duty owed to an invitee is to warn him of danger on the premises or to make the premises safe, but there is no duty to warn an invitee of a danger which is obvious or as well known to the invitee as to the operator of the premises.

It is well settled that the owner of premises, upon which an invitee comes, is liable only for his negligence. The duty owed is usually more specifically stated as a duty to make the premises safe or to warn the invitee of any danger.[2] This same duty exists when the danger threatened arises from a third person's acts.[3]

However, there is no duty to warn an invite of dangerous conditions on the premises which are "obvious, or as well known"[4] to the invitee as to the occupier of the premises.[5] This has been the law in Missouri since *Welch v. McAllister*,[6] where the court suggested that there is a duty to warn only of *unusual* danger or danger unknown to the invitee.[7] In Missouri the "basis of the defendant-proprietor's liability is defendant's superior knowledge."[8]

2. 65 C.J.S. *Negligence* § 45(b) (1950); RESTATEMENT, TORTS § 343 (1934).

3. *E.g.*, Sinn v. Farmers' Deposit Sav. Bank, 300 Pa. 85, 150 Atl. 163 (1930); RESTATEMENT, TORTS § 348 (1934).

4. Ostresh v. Illinois Terminal R.R., 313 S.W.2d 19, 22 (Mo. 1958).

5. Great Atl. & Pac. Tea Co. v. Keltner, 29 Ala. App. 5, 191 So. 633 (1939); Kessler v. Cudahy Packing Co., 38 Cal. App. 2d 607, 102 P.2d 363 (1st Dist. 1940); Gordon v. Maryland State Fair, Inc., 174 Md. 466, 199 Atl. 519 (1938); Hoyt v. Woodbury, 200 Mass. 343, 86 N.E. 772 (1909); Caniff v. Blanchard Nav. Co., 66 Mich. 638, 33 N.E. 744 (1887); Vogt v. Wurmb, 318 Mo. 471, 300 S.W. 278 (1927); Dabelstein v. City of Omaha, 132 Neb. 710, 273 N.W. 43 (1937); Kalinowski v. Young Women's Christian Ass'n, 17 Wash. 2d 380, 135 P.2d 852 (1943); London Graving Dock Co. v. Horton, [1951] A.C. 737, 755; *cf.* Great Atl. & Pac. Tea Co. v. Cox, 51 Ga. App. 880, 181 S.E. 788 (1935); Indermaur v. Dames, [1866] L.R. 1 C.P. 274.

6. 15 Mo. App. 492 (St. L. Ct. App. 1884). The court relied on Carleton v. Franconia Iron & Steel Co., 99 Mass. 216 (1868) and Indermaur v. Dames, *supra* note 5.

7. *But see* Stein v. Battenfield Oil & Grease Co., 327 Mo. 804, 39 S.W.2d 345 (1931) and O'Donnell v. Patton, 117 Mo. 13, 22 S.W. 903 (1893). These two cases speak of this theory of the occupier's duty to invitees, but decide the case on contributory negligence or assumption of risk. Therefore, they must have found the occupier negligent despite the fact that the danger was obvious or known to the invitee. Compare with the above cases Bartling v. Firestone Tire & Rubber Co., 275 S.W.2d 618 (K.C. Ct. App. 1955) where the court says in effect that there is *a duty* to warn but that duty is satisfied by the obvious danger being itself the necessary warning.

8. Ostresh v. Illinois Terminal RR., *supra* note 4, at 22; *accord*, Wattels v. Marre, 303 S.W.2d 9 (Mo. 1957); Dixon v. General Grocery Co., 293 S.W.2d 415 (Mo. 1956); 20 R.C.L. § 52 (1918).

Some courts have decided this type of case on a contributory negligence or assumption of risk doctrine.[9] These courts may find the invitor negligent but deny liability because of the invitee's contributory negligence or his assumption of the risk. One Australian court held that the invitation is qualified to the extent of inviting the invitee to use premises as they appear or are known to the invitee.[10]

As concerns dangerous to patrons created by third persons, there are few cases where the invitor is held to be negligent. These dangers usually arise and produce injury so rapidly that the invitor does not have notice of these dangers until it is too late to remedy them.[11] However, in the cases where the invitor knows of the danger created by third persons, or should have known, and where such danger was obvious or known to the invitee, there is no duty to warn the invitee.[12] The majority opinion in *Great Atl. & Pac. Tea Co. v. Keltner* states, 'if such invitee was *unaware* of his impending peril, he [invitor] should warn the invitee of the danger, so that the latter might take steps to avoid injury."[13] (Emphasis added.)

A Missouri case, where the invitee saw one of the defendant's servants chip off a hot piece of steel which fell into a box of dynamite and caused an explosion, held that there was no duty placed on the invitor to warn the invitee of dangers that were obvious or known to the invitee.[14]

There seems to be no valid reason for treating dangers created by third persons differently from other dangers on the premises. That an invitor "is not an insurer of the safety of his business invitees" and that "there is no duty to warn a business visitor of a danger or defect which is as obvious and well known to the patron as to the operator of the business"[15] are sound principles which rightfully govern the case where the danger is one created by a third person.

BERNARD N. FRANK

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9. *E.g.*, Texas Co. v. Washington, B. & A. Elec. R.R., 147 Md. 167, 174, 127 Atl. 752, 755 (1925). The court here states, "There is a confusion of language in some of the cases . . . but a closer examination shows that, whatever language may be used, the real underlying principal of the decisions is the contributory negligence of the plaintiff."

10. South Australian Co. v. Richardson, 20 Commw. L.R. 181, 186, 9 B.R.C. 52, 58 (Austl. 1915).

11. See, *e.g.*, Great Atl. & Pac. Tea Co. v. Cox, *supra* note 5; Hughes v. Coniglio, 147 Neb. 829, 25 N.W.2d 405 (1946).

12. Great Atl. & Pac. Tea Co. v. Keltner, *supra* note 5 (plaintiff was grocery store patron who stood next to manager and saw third person throw rocks at door).

13. *Id.* at 8, 191 So. at 635. *But cf.* Moone v. Smith, 6 Ga. App. 649, 65 S.E. 712 (1909) where the court, in upholding the petition against a demurrer, speaks of a duty placed on the invitor to protect the invitee, hinting at the idea that even if the patron had been warned, he may not have been required to leave the premises and forsake that enjoyment impliedly promised by the invitation.

14. Goetz v. Hydraulic Press Brick Co., 320 Mo. 586, 9 S.W.2d 606 (1928). If the fact that the third person here was defendant's servant has *any* effect, as compared to the *Gregorc* case, it would seem to increase the duty of the defendant. Yet the court held that there was no duty to warn.

15. 314 S.W.2d at 707.

TORTS—MISSOURI—EXTENSION OF THE MACPHERSON v. BUICK MOTOR CO. DOCTRINE

Central & So. Truck Lines, Inc. v. Westfall GMC Truck, Inc.[1]

Harry Lasater had his tractor unit repaired at defendant's garage. Subsequently, Lasater rented the tractor unit to plaintiff truck line. While plaintiff's driver was using the tractor to pull plaintiff's trailer, the tractor-trailer unit went out of control and was wrecked because of a defect in the steering mechanism. Alleging that this defect was caused by defendant's negligent repair, plaintiff recovered a judgment for the damage to his trailer. On appeal, *held*, affirmed.

Thus, the question before the court was whether the doctrine of *MacPherson v. Buick Motor Co.*[2] should be extended to include a defendant whose negligent repair of an automobile results in the injury of a third person who was not in privity of contract with the defendant. In the *MacPherson* case, Mr. Justice Cardozo held that a defendant automobile manufacturer was liable to the plaintiff automobile owner who had suffered personal injuries from the collapse of a negligiently constructed wheel despite the fact that there was no privity of contract between plaintiff and defendant. Liability of the manufacturer was said to be predicated upon a breach of duty owned by the manufacturer to the automobile owner:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.[3]

The *MacPherson* doctrine is widely accepted in this country[4] and is also the rule in Missouri.[5]

The *MacPherson* doctrine has been steadily broadened since its inception. In *Kalinowski v. Truck Equipment Co.*[6] defendant repairer rebuilt a truck supplying a new body, rear axle, and wheels. While the truck, thereafter, was being driven by its owner, the rear axle broke; a wheel came off and ran upon the sidewalk injuring plaintiff. The court held for the plaintiff relying upon the *MacPherson* case. This is an intermediate case between the *MacPherson* case and the principal case. In *MacPherson*, defendant was clearly a manufacturer; in *Kalinowski* the defendant was a rebuilder; in the principal case the defendant is merely a repairer. By a com-

1. 317 S.W.2d 841 (K.C. Ct. App. 1958).
2. 217 N.Y. 382, 111 N.E. 1050 (1916).
3. *Id.* at 389, 111 N.E. at 1053.
4. For an excellent discussion of this entire subject, see Annot., 164 A.L.R. 569 (1946).
5. Parker v. Ford Motor Co., 296 S.W.2d 35 (Mo. 1956).
6. 237 App. Div. 472, 261 N.Y.S. 657 (4th Dep't 1933).

parison of the three cases one can trace the development of liability in this area of the law.

In determining liability in the principal case, the court noted that almost all of the jurisdictions that follow the *MacPherson* doctrine have, when the case presented itself, extended the doctrine to include automobile repairers as well as manufacturers.[7]

The court concluded that "we should follow the rule announced in these decisions which represent the weight of all the current authority. . . . [P]laintiff made a submissible jury case under tort law principles, and . . . privity of contract between plaintiff and defendant is not a requisite to recovery."[8]

TED M. HENSON, JR.

TORTS—WRONGFUL DEATH STATUTE IN MISSOURI—APPLICATION OF GENERAL STATUTES OF LIMITATION

Frazee v. Partney[1]

This was an action for wrongful death resulting from an automobile accident which occurred on Missouri Highway Eight about ten miles west of Potosi on October 10, 1954. The plaintiff was driving west with his wife and five children. As the plaintiff approached a curve, a pick-up truck driven by the defendant, traveling east, came around the curve and into the path of the plaintiff's automobile. To avoid a head-on collision, the plaintiff, applying his brakes, swerved to the right, but in doing so caused his car to go down an embankment and turn over several times killing the plaintiff's wife almost immediately and one of his daughters later the same day. The defendant saw the plaintiff's automobile pass on his left side heading for the ditch. He did not stop, however, until he had reached the top of the hill and seeing nothing he proceeded on. A mile or so further he stopped once more and he and his wife discussed the possibility of the accident and decided to continue their trip to St. Louis. The plaintiff, afterward, tried unsuccessfully to locate the defendant. It was not until 1956 that the defendant was located by the highway patrol and he readily admitted being at the scene at the stated time. The plaintiff then instituted the suit for wrongful death contending that the causes of action did not accrue until suits could be validly commenced and maintained against the actual defendant and the defendant's violation of § 564.450[2] prevented plaintiffs from filing

7. Vrooman v. Beech Aircraft Corp., 183 F.2d 479 (10th Cir. 1950); Moody v. Martin Motor Co., 76 Ga. App. 456, 46 S.E.2d 197 (1948); Burkett v. Globe Indem. Co., 182 Miss. 423, 181 So. 316 (1938); Zierer v. Daniels, 40 N.J. Super. 130, 122 A.2d 377 (App. Div. 1956).

8. 317 S.W.2d at 846.

1. 314 S.W.2d 915 (Mo. 1958).

2. § 564.450, RSMo 1949:
No person operating or driving a vehicle on the highway knowing that an injury has been caused to a person or damage has been caused to property, due to the culpability of said operator or driver, or to accident, shall leave

their suits earlier and excused their delay. The trial court gave judgment for the defendant. On appeal, *held*, affirmed. The court held that the wrongful death act created a new and different cause of action not known to the common law; that the time limit is an inherent part of the cause of action; and, even if the one-year provision is considered a statute of limitation affecting only the remedy, it is nevertheless a special statute of limitation and must carry its own exception.

Actions for wrongful death have been a comparatively recent development in the law. The first wrongful death act was enacted by England's Parliament in 1846.[3] In 1855 Missouri enacted our wrongful death statute which was similar to that of England. In 1905, the Missouri legislature adopted the non-suit section to the death act.[4] Again in 1909, the tolling provision in the general statutes as pertaining to absence from the state was added to the death act.[5] Since then, however, no additional tolling provisions have been added. The court in the instant case reasoned that, from the addition of these provisions, the legislature did not intend that the general tolling provisions or exceptions would apply to the death acts that carried their own limitations.

From the inception of the wrongful death acts, there has been much discussion in Missouri cases as to whether the one-year limitation is merely a statute of limitation or a condition imposed on the right itself and part of the cause of action.[6] As early as 1886 the court stated that the latter interpretation should be given.[7] Although there

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the place of said injury, damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer.

3. Wrongful Death Act, 1846, 9 & 10 Vict. c. 93.

4. Mo. Laws 1905, § 2868, at 137:
Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of such action shall accrue: Provided, that if any action shall have been commenced within the time prescribed in this section, and the plaintiff therein suffer a non-suit, or, after a verdict for him, the judgment be arrested, or after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action, from time to time, within one year after such non-suit suffered or such judgment arrested or reversed.

5. Mo. Laws 1909, § 2868, at 464:
Every action instituted by virtue of the preceeding sections of this chapter shall be commenced within one year after the cause of action shall accrue: *Provided*, that if any defendant, whether a resident or non-resident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him. . . .

6. Baysinger v. Hanser, 355 Mo. 1042, 199 S.W.2d 644 (1947); Chandler v. Chicago & A.R.R., 251 Mo. 592, 158 S.W. 35 (1913); Packard v. Hannibal & St. J.R.R., 181 Mo. 421, 80 S.W. 951 (1904). *Contra*, Wentz v. Price Candy Co., 352 Mo. 1, 175 S.W.2d 852 (1943); Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 S.W. 109 (1907).

7. Barker v. Hannibal & St. J.R.R., 91 Mo. 86, 14 S.W. 280 (1886).

have been decisions to the contrary, it seems to have been established in *Baysinger v. Hanser*[8] that the limitation is a condition imposed upon the right itself and this view was accepted by the court in the present case.

This interpretation is followed by the majority of the states which have considered the problem.[9] A contrary view has been taken by a few states which hold that it is merely a statute of limitation and not merely a limitation upon the right itself.[10]

The court in deciding this case, also discussed the fact that even if it were a statute of limitation, it was none the less a special statute of limitation incorporated in the wrongful death acts, hence § 516.300[11] would apply and thus limit the use of the tolling provisions in the general statute of limitations section.

The effect of this interpretation is to defeat the basic purpose of the wrongful death act and, by unlawful concealment, a wrongdoer is able to defeat the cause of action which otherwise the representatives were intended to have. In other areas of the law, unlawful concealment is recognized as tolling the statutory period.[12] However, since no such tolling provision seems to be applicable to the death act, the wrongdoer escapes civil liability. This may be a possible interpretation of the statute but it is shocking to the conscience.

However, recent decisions have introduced a new approach to the problem. In cases where the statute of limitation was considered to be a condition imposed on the right itself, the court has allowed the plaintiff to plead that the defendant was estopped from pleading the statutory bar because of misleading conduct on the part

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8. 355 Mo. 1042, 1045, 199 S.W.2d 644, 646 (1947). In the decision it was held that the Missouri's wrongful death statute created a new right and different cause of action. The time limit in the statute was an inherent part of the cause of action.

9. Gulf States Steel Co. v. Jones, 204 Ala. 48, 85 So. 264 (1920); Earnest v. St. Louis, M. & S.E.R.R., 87 Ark. 65, 112 S.W. 141 (1908); Korb v. Bridgeport Gas Light Co., 91 Conn. 395, 99 Atl. 1048 (1917); Harwood v. Chicago R.I. & P.R.R., 101 Kan. 215, 171 Pac. 354 (1917); Stasciewicz v. Parks, 148 Md. 477, 129 Atl. 793 (1925); Crosby v. Boston Elevated Ry., 238 Mass. 564, 131 N.E. 206 (1921); Eldridge v. Philadelphia R.R., 83 N.J.L. 463, 85 Atl. 179 (Ct. Err. & App. 1912); Martin v. Pitt. Ry., 227 Pa. 18, 75 Atl. 837 (1910).

10. Chiles v. Drake, 2 Ky. (Met.) 146 (Ct. App. 1859); Sharrow v. Inland Lines, 214 N.Y. 101, 108 N.E. 217 (1915); Hass v. New York Graduate Medical School & Hosp., 131 Misc. 395, 226 N.Y. Supp. 617 (Supt. Ct. 1928). An important decision with respect to the minority is that of Brookshire v. Burkhart, 141 Okla. 1, 283 Pac. 571 (1929). The court decided in overruling a previous decision that the limitations of the death acts being in the same chapter of the Code of Civil Procedure and each of the sections being created by the same legislature at the same time are in "parti materia" and the limitation provided for in the former is applicable to actions provided for in the latter.

11. § 516.300, RSMo 1949:
The provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.

12. §§ 516.170-.310, RSMo 1949.

of the defendant.[13] In jurisdictions where this argument has not yet been introduced, it would seem to be to the plaintiff's advantage to do so as the argument seems quite plausible.

It is otherwise difficult to understand how the unconscionable result in the instant case and in other jurisdictions could have continued in the law for the length of time that it has. However, only a few courts have attempted to remedy this harsh situation. If the courts cannot, within the statute, put an end to the defendant's circumvention of the social purpose of the statute, it is high time for the legislature to amend the wrongful death act so that it will achieve its purpose.[14]

JOHN D. RAHOY

TRADE REGULATION—TRADING STAMPS—EFFECTS OF FAIR TRADE LAWS

Colgate-Palmolive Co. v. Elm Farm Foods Co.[1]

Defendants here operated retail markets in Massachusetts and issued trading stamps or redeemable cash register receipts with purchases made in their markets. These stamps and receipts were issued on all items purchasd. Colgate-Palmolive Company had minimum price agreements with some retailers in the state on various items in accord with the fair trade law,[2] and while no such agreement was made with defendants the defendants had knowledge of these other agreements. Colgate sought to enjoin the defendants from issuing trading stamps or redeemable register receipts on fair-traded products. The case was reported to the supreme judicial court by the trial judge without opinion and the supreme judicial court enjoined the defendants from issuing trading stamps or redeemable register receipts on fair-traded products. The court felt the theory of the fair trade law was to protect the manufacturer's goodwill and restricting trading stamps on fair-traded items were reasonably necessary to protect such goodwill. The court moreover emphasized that

13. McLaughlin v. Blake, 136 A.2d 492 (Vt. 1957). Here the court held that the defendant was estopped in pleading the statute of limitation. Although this was applied where the defendant made false representations to the plaintiff, the same reasoning should apply where the defendant's conduct was in unlawfully concealing himself. Both types of conduct led the plaintiff to believe that suit could not be brought. *Accord,* MacKeen v. Kasinskas, 333 Mass. 695, 132 N.E.2d 732 (1956); Frabutt v. New York, Chi. & St. L.R.R., 84 F. Supp. 460 (W.D. Pa. 1949).

14. Until the legislature makes provision for this situation, it may be worth a try, in situations similar to the instant case, to file a "John Doe" suit against a fictitious defendant. This was argued but not discussed as no such suit was in fact filed.

1. 148 N.E.2d 861 (Mass. 1958). Five companion cases are included in this decision. The same plaintiff brought actions against Stop and Shop, Inc., Star Market Co.. Food Center, Inc., Tedeschi's Super Markets, Inc., and Supreme Markets, Inc.

2. MASS. ANN. LAW ch. 93, §§ 14A-D (1958).

the issuance of the stamps or redeemable register receipts constituted price cutting, a practice prohibited by the fair trade law.

The problem presented in this case is one of importance in jurisdictions having fair trade laws. Missouri is one of three states which has no fair trade law, and so the problem here presented would not arise in Missouri. The technical wording of the various fair trade laws varies somewhat, but the basic effect of these laws is the same. They provide that by agreement between manufacturer and retailer the manufacturer's products will not be sold at retail for less than the agreed price. Nonsigning retailers with knowledge of such an agreement are bound also. Sale below this price is deemed an unfair trade practice. With the widespread use of trading stamps and redeemable register receipts the question presented in the case under discussion was bound to arise. The Massachusetts holding is a strict application of these statutes. The reasoning seems to be that trading stamps or redeemable register receipts issued with fair-trade goods have a definite and ascertainable value; this value reduces the agreed upon fair trade price and amounts to an unfair trade practice.[3] The *de minimis* principles was considered in a leading case sustaining the validity of trading stamps,[4] but this contention has been rejected in the jurisdictions prohibiting them. The fair trade law was enacted to prevent price cutting and does not distinguish between large or small amounts thereof. An argument that a cash discount was an implied exception to the law was refused. If such exception was to be made it was felt to be within the province of the legislature, and as they had made no such exception the court would not imply one.[5] It has been argued that trading stamps or redeemable register receipts are no different from free customer services such as free parking and delivery. The monetary benefit to the customers from such services is not denied, but it is distinguished from trading stamps as being remote from the article purchased while the benefit from trading stamps and redeemable register receipts is directly and proportionately related to the article purchased and its price.[6]

Under a less strict application of the fair trade law the issuance of trading stamps or redeemable register receipts on fair-traded merchandise has been held not to be an unfair trade practice. The main reason given is that the issuance of such stamps or redeemable register receipts is a discount for cash payment which was felt not to be precluded by the fair trade laws.[7] Other reasons include comparing the stamps and register receipts to the benefit of free parking and free delivery,[8] and the *de minimus* principle.[9] Where the fact that a retailer operated on a strictly cash basis was advanced to refute the validity of the cash discount argument it was held

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3. Bristol-Myers v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950).
4. Bristol-Myers v. Lit Bros., 336 Pa. 81, 6 A.2d 843 (1939).
5. Bristol-Myers v. Picker, *supra* note 3.
6. *Ibid.*
7. Safeway Stores v. Oklahoma Retail Grocers Ass'n., 322 P.2d 179 (Okla. 1958); Gever v. American Stores, 387 Pa. 206, 127 A.2d 694 (1956).
8. *Ibid.*
9. Bristol-Myers v. Lit Bros., *supra* note 4.

that a cash discount was of greater value to a cash only retailer as his success was dependent on his ability to attract cash trade.[10]

That the validity of the fair trade acts themselves has been questioned in many states creates further uncertainty. While a majority of the states which have tested the fair trade laws have held the valid, a respectable number have held the non-signer provision unconstitutional.[11] Various reasons have been given by the courts in holding this provision invalid: unlawful delegation of legislative power;[12] violation of due process;[13] and the need for a reasonable relation to the public need and welfare which was here not felt to exist.[14] The fair trade law itself is still enforceable against parties to the agreement. In these jurisdictions a special stamp problem will arise, for where the non-signer provision was held valid an injunction against issuance of trading stamps or redeemable register receipts on fair-traded items will prohibit their issuance on all sales of fair-traded merchandise. Logically, however, where the non-signer provision is void an injunction against the issuance of trading stamps or redeemable register receipts on fair-trade items would be effective only against parties to the fair trade agreement and trading stamps or redeemable register receipts could be issued on large quantities of fair-traded merchandise sold by non-signers. Thus it would seem that the existence of a fair trade law in such jurisdictions would be a detriment rather than a benefit to retailers, as parties to fair trade agreements would be unable to meet competition either on price or the inducement to sales achieved by the issuance of trading stamps.

Trading stamps have also been subjected to attempts by legislatures to regulate, tax, or prohibit their issuance without regard to fair trade laws. The few jurisdictions

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10. Food & Grocery Bureau of So. Cal., Inc. v. Garfield, 20 Cal. 2d 228, 125 P.2d 3 (1942); *cf.* Weco Prods. Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1942).

11. Annot., 60 A.L.R.2d 420 (1958). The following cases have held the non-signer provision unconstitutional. Union Carbide & Carbon Corp. v. White River Distribs., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Sterling Drug, Inc. v. Eckerd's of Tampa, Inc., 71 So. 2d 156 (Fla. 1954); Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 209 Ga. 613, 75 S.E.2d 161 (1953), *cert. denied*, 346 U.S. 823 (1953); Bissell Carpet Sweeper Co. v. Shane Co., 143 N.E.2d 415 (Ind. 1957); Quality Oil Co. v. E.I. Du Pont de Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., 231 La. 51, 90 So. 2d 343 (1956); Argus Cameras, Inc. v. Hall of Distribs., Inc., 343 Mich. 54, 72 N.W.2d 152 (1955); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957); Union Carbide & Carbon Corp. v. Bargain Fair., Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); General Elec. Co. v. Whale, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957); General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956).

12. Quality Oil Co. v. E.I. Du Pont de Nemours & Co., *supra* note 11; Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., *supra* note 11.

13. Union Carbide & Carbon Corp. v. White River Distribs., Inc., *supra* note 11; Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); McGraw Elec. Co., v. Lewis & Smith Drug Co., *supra* note 11.

14. Union Carbid & Carbon Corp. v. Bargain Fair, *supra* note 11; General Elec. Co. v. Whale, *supra* note 11.

facing this problem have sustained such legislation. Constitutional problems, both federal and state, are involved in the reasoning for either view and an exposition of the views is beyond the scope of this Case Note.[15] However, in *Ed Schuster & Co. v. Steffes*[16] it was held that a legislative prohibition on trading stamps issued in connection with fair-traded merchandise specifically was within the police power of the state and not void as being discriminatory. This indicates another method of dealing with the issuance of trading stamps on fair-traded merchandise and a valid method of limiting their use.

Of important consideration now is the possibility of a federal fair trade law. Such legislation has been proposed[17] and if enacted one wonders what effect it would have on the issuance of trading stamps. Reasonable argument exists for treating trading stamps as price cutting; treating them as cash discounts is just as reasonable. How specific the legislation will be[18] and what view the federal courts would take in the matter are conjectural. Trading stamp companies have made great investments[19] and are becoming more and more a part of the American scene. They should not be faced with the uncertainty that would arise should a federal fair trade law be enacted. Such legislation should be reserved to the states as they are in a superior position to determine whether their economy is in the need of trade regulation and whether the issuance of trading stamps or redeemable register receipts should or should not be allowed.

GUSTAV J. LEHR

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15. For an exhaustive study of this problem see Annot., 26 A.L.R. 707 (1923), 124 A.L.R. 341 (1940), 133 A.L.R. 1071 (1940).

16. 237 Wis. 41, 295 N.W. 737 (1941).

17. Senators Humphrey and Proxmire on May 19, 1958, introduced S. 3850. This bill in effect makes it lawful for one to establish and control the resale price of merchandise in interstate commerce identified by trademark or trade name when such merchandise is in free and open competition with other articles of the same general class. This bill also contains a non-signer provision making it unlawful for one with notice of an established resale price to sell below this price. Suits for injunction may be brought in the federal courts without regard to the amount in dispute. This bill apparently would apply without regard to local law.

In the House of Representatives bills very similar to this bill have been introduced by Representatives Friedel and Macdonald. Friedel's bill, H.R. 11216, was introduced on March 6, 1958 and Macdonald's H.R. 11264, on March 10, 1958.

For further legislation in this area see H.R. 10527 introduced by Representative Harris in February, 1958.

18. As indicated above in Ed Schuster & Co. v. Steffes, 237 Wis. 41, 295 N.W. 737 (1941) legislation specifically aimed at prohibiting the issuance of trading stamps on fair-traded merchandise was sustained.

19. The amount of business done by a trading stamp company is pointed out in State v. Sperry & Hutchison Co., 49 N.J. Super. 165, 139 A.2d 463 (Ch. 1958).