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Recent Cases

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LIMITATIONS OF ACTIONS—FRAUDULENT CONCEALMENT, SUSPENSION OF THE ACCRUAL OF THE CAUSE OF ACTION

Kohout v. Adler[1]

Piper, a notary, forged plaintiff's name to a deed of trust on plaintiff's property and six accompanying promissory notes. One note was for $5,000 payable in three years, while the other five were semi-annual principal notes for $250. The notary acknowledged the deed of trust in his capacity as notary public, and then sold the instruments to Mrs. Vandas, to whom he was a trusted business advisor. For the next three years, the notary paid the holder the interest installments and the semi-annual principal notes, claiming to be collecting the money from the alleged makers for remittance. When the $5,000 note became due in 1955, the notary told the holder that the makers wished to extend the due date on the notes another three years, to which the holder agreed. Thereupon, the notary forged a renewal agreement and new semi-annual notes. In 1958 the holder and the alleged makers discovered the fraud. The alleged makers brought an action to set aside the forged deed of trust as a cloud on title, naming the holder and the notary as defendants. The question on appeal resulted from the holder's cross-action against the surety on the notary's bond. The surety's motion to dismiss, on the ground that the special statute of limitations[2] had barred the cause of action, was granted. On appeal, *held,* affirmed.

Piper not only committed a fraud on the holder, but also deliberately concealed his fraud for six years by making interest payments and payment of the semi-annual principal notes. The question is whether such fraudulent concealment suspended the accrual of the cause of action on the notary's bond until the forgery was discovered.

Prior to 1833 there was no statute of limitations in England applicable to proceedings in equity. Though the statutes existing prior to 1833 bound courts of law, they did not bind courts of equity in proceedings solely cognizable therein. Equity adopted an analogous period as a rule to assist it in the exercise of its discretion, but did not apply the statute when, because of fraud, the petitioner did not know he had a cause of action.[3]

It is probable that the English cases formed the basis of the early doctrine

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1. 327 S.W.2d 492 (St. L. Ct. App. 1959).
2. § 486.050, RSMo 1949, first provides for the bond and continues, "but no suit shall be instituted against any such notary or his sureties more than three years after such cause of action accrued."
3. See Rogers v. Brown, 61 Mo. 187 (1875).

in this country that the statute of limitations did not deprive equity courts of their discretion.[4] There was near unanimity among courts of equity that the statute would not bar relief where there was fraud plus concealment, but only a bare majority held that the statute would not bar relief when there was only fraud without active concealment. The theory of this bare majority of courts was that fraud concealed itself.[5] There was a decided conflict in the United States as to whether courts of law would apply either of the equitable rules.[6]

The equitable rules as to fraud and fraud and concealment have been codified in Missouri by Sections 516.120 and 516.280, Revised Statutes of Missouri (1949), in the general sections of the chapter on statutes of limitation. If the principal case had been decided under either of these sections[7] the action against the defrauding notary would not have been barred. The question here was first whether the saving grace of section 516.280, codifying the equitable rule as to fraud plus concealment, was applicable to the special statute of limitations on notaries' bonds, section 486.050,[8] and this turned on the proper interpretation of Section 516.300, Revised Statutes of Missouri (1949), which provides:

> 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.

The equitable rule as to fraud plus concealment had already been codified in 1807, by what is now section 516.280, twenty-eight years before the General Assembly enacted what is now section 516.300 in 1835.[9] By virtue of 516.300, the legislature seems clearly to have exempted special statutes of limitation from all of the general provisions of sections 516.010 to 516.370, including, of course, 516.280. But even if the saving grace of section 516.280 is not applicable to the special statute of limitations on notaries' bonds, was it the intention of the General Assembly in enacting section 516.300 to disable a court from applying the common law equitable doctrine that tolled the running of a statute of limitation where there was fraud and concealment?

The question of interpretation of the statute of limitations on a notary's bond first came before the Kansas City Court of Appeals in *State ex rel. Barringer v.*

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4. 2 WOOD, LIMITATION OF ACTIONS § 275 (1893).
5. Bailey v. Glover, 88 U.S. 342, 347 (1874).
6. 2 WOOD, LIMITATION OF ACTIONS § 274 (1893); ANGELL, LIMITATIONS OF ACTIONS § 185 (1869).
7. § 516.280, RSMo 1949: "If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented."
§ 516.120, RSMo 1949: "Within five years . . . (5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."
8. See note 2 *supra.*
9. The substance of what is now § 516.280, RSMo 1949, was first enacted in 1807, 1 Terr. Laws, C. 42, § 4, at 145. What is now § 516.300 was enacted in 1835, § 10, at 396, RSMo 1835. What is now § 516.120, RSMo 1949, was first enacted in 1849, Mo. Laws 1849, at 74, § 4.

Hawkins,[10] on facts which paralleled those of the principal case. The court decided that the words "after such cause of action accrued,"[11] left an area for judicial interpretation, distinguishing the case from previous decisions construing special statutes of limitation having no such clause. The court further reasoned that since statutes of limitation were for the protection of defendants from the practice of plaintiffs' delaying the bringing of their action until the defendant could no longer prove his defense, it would be unjust to allow the defendant to assert this protection when he himself had concealed knowledge of the fraud from the defrauded party. Accordingly, the court held that the cause of action did not accrue until the defrauded party had, or by reasonable diligence could have, discovered the fraud.

In *State ex rel. O'Malley v. Musick*,[12] which was first appealed to the Springfield Court of Appeals, the court found fraud, but no concealed fraud. Since the court could find no interpretive aid in the statute, it turned to the common law. The court there found two lines of authority, one holding that fraud itself would delay the commencing of the running of the statute, the other requiring concealed fraud. Believing that to hold with the first line of authority would virtually nullify the statute, the court adopted the view that concealed fraud was required. The statement that concealed fraud delayed the accrual of the cause of action was only dictum under the facts, but it represented a clear choice between alternatives.

A single notary perpetrated frauds which brought *State ex rel. Haitz v. American Surety Co.*[13] and *State ex rel. Meinholtz v. American Surety Co.*[14] to the St. Louis Court of Appeals. The notary sold two forged notes to the first holder, who, when they became due, turned them in for collection. The notary then indorsed an extension of time on the forged instruments and sold one of them to Haitz and one to Meinholtz, remitting the proceeds thus obtained to the first purchasers. Haitz learned of the fraud shortly thereafter and brought suit within three years after the notes had been indorsed to him. It does not appear from the reports when the *Meinholtz* case was commenced, but the decision of the St. Louis Court of Appeals was handed down three years after the decision in the *Haitz* case. In both cases the plaintiff prevailed. In the *Meinholtz* case the court stated:

> The cause of action accrued when relator discovered the fraud, or when by proper diligence an ordinarily prudent man could, under the circumstances, have discovered it . . . .[15]

The court in the *Kohout* case distinguished the *Haitz* case on the ground that Haitz's cause of action did not accrue until the notes were indorsed to him.

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10. 103 Mo. App. 251, 77 S.W. 98 (K.C. Ct. App. 1903).
11. § 486.050, RSMo 1949.
12. 145 Mo. App. 33, 130 S.W. 398 (Spr. Ct. App. 1910), *quashed* (for lack of jurisdiction), State *ex rel.* O'Malley v. Nixon, 233 Mo. 345, 138 S.W. 342 (1911) (en banc). The opinion of the Springfield Court of Appeals was adopted by the St. Louis Court of Appeals in State *ex rel.* O'Malley v. Musick, 165 Mo. App. 214, 145 S.W. 1184 (St. L. Ct. App. 1912).
13. 203 Mo. App. 71, 217 S.W. 317 (St. L. Ct. App. 1920).
14. 254 S.W. 561 (St. L. Ct. App. 1923).
15. *Id.* at 564.

The *Meinholtz* case was also distinguished on this point despite the fact that it does not appear from the reports when the action was commenced.

In the only case on this point that has come before the Supreme Court there was only a fraudulent acknowledgment with no subsequent concealment.[16] The court followed the *O'Malley* case and others in holding that the statute had run. They distinguished cases where the facts proved fraudulent concealment, but made no comment thereon.

In earlier cases involving other special statutes of limitation, the Supreme Court was apparently influenced by the equity rule recognizing discretion in the court despite the existence of a definite statutory limitation period. In *Shelby County v. Bragg*[17] it was said by way of dictum:

> . . . [I]t is well settled in this state, whether by force of the statute or independent of it, that fraudulent concealment of a cause of action will delay the operation of the statute of limitation until after discovery of the fraud.[18]

But more recent cases have held that a special statute will run irrespective of concealment.[19] In *State ex rel. Bier v. Bigger*[20] the court said:

> . . . [W]here a statute of limitations is a special one, not included in the general chapter on limitations, the running thereof cannot be tolled because of fraud, concealment or any other reason not provided in the statute itself.[21]

This statement has been repeated in two recent decisions.[22]

Cases from other jurisdictions furnish little authority because of the peculiar interrelation of Missouri statutes. Oklahoma's statute of limitations on a notary's bond is worded the same as that of Missouri, and the supreme court of that state has stated, in dictum, that fraudulent concealment is an implied exception to the statute.[23] An old Kansas decision held that fraud alone would not toll the running of a similar statute.[24]

The *Kohout* case is directly contrary to the *Barringer*[25] case and a wealth of dictum of courts of appeals construing the statute in question. However, the court probably correctly divined the law that the Missouri Supreme Court would apply if the question were to come before it at the present time. The broad

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16. State *ex rel.* State Life Ins. Co. v. Faucett, 163 S.W.2d 592 (Mo. 1942).
17. 135 Mo. 291, 36 S.W. 600 (1896) (failure to report to county amount received in capacity as county clerk).
18. *Id.* at 298, 36 S.W. at 601.
19. Kober v. Kober, 324 Mo. 379, 23 S.W.2d 149 (1929) (statute limiting dower rights).
20. 352 Mo. 502, 178 S.W.2d 347 (1944) (en banc) (limitation on bringing wills to probate).
21. *Id.* at 510, 178 S.W.2d at 350.
22. Gilliam v. Gohn, 303 S.W.2d 101 (Mo. 1957) (limitation for contesting tax deeds); Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958) (wrongful death).
23. Oklahoma Farm Mortgage Co. v. Jordan, 67 Okla. 69, 168 Pac. 1029 (1917).
24. Bartlett v. Bullene, 23 Kan. 606 (1880).
25. State *ex rel.* Barringer v. Hawkins, 103 Mo. App. 251, 77 S.W. 98 (K.C. Ct. App. 1903).

statements of the Supreme Court, made in several recent decisions such as the *Bier* case, furnish strong authority.[26] *Frazee v. Partney*,[27] where the court allowed the statute of limitations to run against one who left the scene of an accident, and who was not discovered until a year later, is representative of the harshness of such decisions. However, the last clause of Section 516.300, Revised Statutes of Missouri (1949),[28] gives credence to the assertion that such an interpretation is the correct one. The situation is one which calls for legislative correction.

FRED D. BOLLOW

PARTNERSHIP—MISSOURI—RECOVERY IN QUANTUM MERUIT AFTER BREACH OF PARTNERSHIP AGREEMENT

White v. Lemley[1]

Plaintiff brought this action to recover for the reasonable value of services rendered to defendant in pursuance of an agreement whereby defendant was to furnish capital, and plaintiff his services, in a business project of erecting electric transmission lines. Plaintiff was to have his expenses and, after such time as defendant would be reimbursed for his capital expenditure, fifty per cent of the profits. After plaintiff had obtained a number of contracts and they were fully performed, disagreements arose which culminated in plaintiff's being relieved of his duties through a court proceeding. Plaintiff alleged that defendant had agreed to pay for the reasonable value of his services but failed to establish this at the trial. The circuit court entered judgment for defendant. On appeal, *held*, affirmed. The Supreme Court held that quantum meruit may not be maintained where no compensation for services, other than a share of the net profits, was agreed upon by the parties.

In an ordinary contract for services when one party prevents the other from fully performing the contract two remedies are available. The injured party may sue for damages for breach of contract, or in quantum meruit for the reasonable value of the services rendered.[2]

However, in a partnership situation the general rule, long adhered to in this country, is that a partner is not entitled to compensation for his services in conducting the partnership business beyond his share of the profits.[3] An exception to

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26. State *ex rel.* Bier v. Bigger, 352 Mo. 502, 178 S.W.2d 347 (1944) (en banc); Gilliam v. Gohn, 303 S.W.2d 101 (Mo. 1957); Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958).

27. 314 S.W.2d 915 (Mo. 1958).

28. ". . . but such action shall be brought within the time limited by such statute."

1. 328 S.W.2d 694 (Mo. 1959).

2. Johnston v. Star Bucket Pump Co., 247 Mo. 414, 202 S.W. 1143 (1918) (en banc); Roll v. Inglish, 220 Mo. App. 1077, 279 S.W. 769 (K.C. Ct. App. 1926); Rodgers v. Levy, 199 S.W.2d 79 (St. L. Ct. App. 1947).

3. Denver v. Roane, 99 U.S. 355 (1878); Humphrey v. McClain, 219 Ky. 180, 292 S.W. 794 (1927).

this rule occurs where there is a stipulation or agreement that he is to receive a fixed amount for his services to the partnership.[4]

Missouri courts recognized the general rule as early as 1864 in the case of *Reily v. Russell*,[5] wherein it was stated that, absent an express agreement, no charge for the value of services could be made by one partner against the other.[6] A frequently cited Missouri case on the rule is *Owsley v. Owsley*[7] where the doctrine was reiterated and referred to as "a settled rule of law." In addition to its case law Missouri has adopted the Uniform Partnership Law, thereby codifying the previously recognized rule.[8] It should also be noted that Missouri courts apply the general rule to the joint venture.[9] For this reason the court in the *Lemley* case contented itself with saying that the parties' relationship was that either of partnership or joint venture, without making any further refinement.

Some courts have recognized that, where there is an express or implied agreement to pay for services rendered, and a defendant partner prevents a plaintiff copartner from performing, the agreement may be treated as rescinded and the plaintiff can sue in quantum meruit for the reasonable value of his services.[10] And in the *Lemley* case the court noted that there was either an express or implied agreement to pay for services rendered the partnership in the cases cited by the plaintiff wherein recovery in quantum meruit was allowed against a partner.[11] However, the court in *Lemley* found no agreement for compensation for services other than an agreement to share in the net profits.

In view of the decision in *Lemley*, where recovery in quantum meruit was not allowed, it may be of value to inquire as to the adequacy of the remedies which are available to plaintiffs in a situation of this type. As *Brannigan v. Schwabe*[12] indicated, an adequate remedy is of special importance in actions between partners. In *Brannigan* the court noted that it is "well settled law" that a partner may exercise his right to dissolve the partnership for any reason he may deem sufficient.[13]

What, then, are the possible theories upon which a plaintiff might recover in a case of this kind? In *Pemberton v. Ladue Realty & Constr. Co.*[14] a substantially similar situation arose where, in a joint enterprise providing for equal division of

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4. Rosenfeld v. Rosenfeld, 390 Pa. 39, 133 A.2d 829 (1957); see Annot., 66 A.L.R.2d 1023 (1957).

5. 34 Mo. 524 (1864).

6. *Accord*, Gaston v. Kellogg, 91 Mo. 104, 3 S.W. 589 (1887).

7. 34 S.W.2d 558, 560 (Spr. Ct. App. 1931).

8. § 358.180, RSMo 1949: "(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs; . . . ."

9. Gales v. Weldon, 282 S.W.2d 522 (Mo. 1955); Hobart-Lee Tie Co. v. Grodsky, 329 Mo. 706, 46 S.W.2d 859 (1931).

10. Rosenfeld v. Rosenfeld, *supra* note 4.

11. Turney v. Baker, 103 Mo. App. 390, 77 S.W. 479 (K.C. Ct. App. 1903); Rodgers v. Levy, *supra* note 2; Joern v. Bang, 200 S.W. 737 (St. L. Ct. App. 1918); Bailey v. Interstate Airmotive, Inc., 358 Mo. 1121, 219 S.W.2d 333 (1949).

12. 133 S.W.2d 1053 (St. L. Ct. App. 1939).

13. See also Schneider v. Newmark, 224 S.W.2d 968 (Mo. 1949).

14. 180 S.W.2d 766 (St. L. Ct. App. 1944).

the profits, the defendant prevented the plaintiff from continuing under the agreement and the plaintiff sued in quantum meruit.[15] The court of appeals of St. Louis held that in no event could the plaintiff sue in quantum meruit, but advanced two other possible theories of recovery—an action at law for breach of the agreement[16] and, in equity, for an accounting for profits.[17]

An accounting is the usual remedy pursued and is a virtual condition precedent to any action by a partner concerning claims on the partnership.[18] But where a partner prevents his co-partner from going ahead with an agreement at a time where large profits are soon to be realized but few, if any, have yet accrued to the partnership, an accounting might reveal that the injured party has little forthcoming for his services.[19] An action at law for damages for breach of contract would likewise result in an inadequate remedy since the damages as to "expected" profits would be difficult, if not impossible, to establish. Thus it appears that the possible theories of recovery advanced by the court in *Pemberton*, in the face of their refusal to allow recovery in quantum meruit, while they may be adequate in many situations, are not adequate in situations like that in the principal case. Because of this inadequacy of alternative remedies, it is submitted that a plaintiff's substantive rights are not protected by strict adherence to the rule disallowing recovery in quantum meruit for services rendered.

In the *Lemley* case the court has approached the problem as being one of remedy, denying an action in quantum meruit and indicating that the proper remedy would be either an action at law for breach of contract or in equity for an accounting. But the substantive law, as regards plaintiff's right to compensation for his services, was not dealt with by the court. Should not the courts limit remedies, as they do here, only with full appreciation of the effect on the parties' substantive rights?

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15. Fitts v. Mission Health & Beauty Shop, 58 Cal. App. 362, 208 Pac. 691 (Dist. Ct. App. 1922).

16. Bagley v. Smith, 10 N.Y. 489, 61 Am. Dec. 756 (1853).

17. Farwell v. Wilcox, 73 Okla. 230, 175 Pac. 936 (1918).

18. Koontz v. Whitaker, 111 S.W.2d 197 (K.C. Ct. App. 1937). However, this case recognizes that a suit for damages for breach of contract may be sustained in certain situations without an accounting where the partnership is limited in scope, where only a few items remain to be settled, and where fraud, accident, or mistake cause the exclusion of specific items from the accounting.

19. Of course, in some situations equity may formulate a decree which will protect the plaintiff by giving him an accounting for profits earned subsequent to dissolution. Bell v. McCoy, 136 Mo. 552, 38 S.W. 329 (1896). A receiver might be appointed or the defendant named as trustee. Brannigan v. Schwabe, *supra* note 12. The reasoning which allows plaintiffs a share of the future profits is based on the retention and use of their capital investment in the firm after dissolution. However, in the situation here, the original contract calls for plaintiff's personal services with little or no capital investment on his part, and an accounting in such a situation would rarely allow a plaintiff any share of future profits. See, *e.g.*, Stearns v. Blevins, 262 Mass. 577, 169 N.E. 417 (1928).

CONTRACTS—BY MUNICIPALITY—CONSIDERATION—"REASONABLE COMPENSATION" SATISFIED MISSOURI STATUTE

Burger v. City of Springfield[1]

O. L. Burger and the City of Springfield entered into a written contract whereby Burger agreed to represent the city in negotiations for purchase of the Springfield City Water Company, a public utility. A resolution passed by the city council pursuant to the agency contract stated in part, ". . . a reasonable compensation for services and expenses to be fixed by the council upon the completion of his services." For three years prior to Burger's employment, the city had tried unsuccessfully to purchase the water company. At the time of Burger's employment, the water company was asking $23,900,000. Burger was authorized to pay up to $19,500,000, but finally negotiated the purchase for $19,000,000. The city purchased the water plant under the contract negotiated by Burger but refused to pay him for his services, claiming that the contract was ultra vires, void and unenforceable under Section 432.070, Revised Statutes of Missouri (1949),[2] which requires municipal contracts to be in writing. The trial court dismissed Burger's amended complaint, in two counts, on the ground that neither count stated facts upon which relief could be granted because of the provision of section 432.070. On appeal, *held,* reversed and remanded. There was a written contract composed of the resolution, the notice of appointment and the formal acceptance, and it complied with the requirements of section 432.070, in that it stated a definite consideration.

Section 432.070 provides in part:

> No county, city, town, village . . . or other municipal corporation shall make any contract . . . unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration shall be in writing . . . .

This section may appear fairly clear and simple in its terms, but as Professor Corbin says, "the term consideration has been used by the courts in so broad and variable a sense that no statute can be clear and easy of application, if it merely requires a memorandum stating the consideration."[3]

The requirements of section 432.070 are mandatory, and not merely directory, and any contract not complying with this section is ultra vires, void and unenforceable.[4] Any contract made with a county,[5] without express statutory authority,

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1. 323 S.W.2d 777 (Mo. 1959).
2. All section references hereafter will be to Revised Statutes of Missouri (1949), unless otherwise noted.
3. 2 CORBIN, CONTRACTS § 503 (1950).
4. Donovan v. Kansas City, 352 Mo. 430, 175 S.W.2d 874 (1943) (en banc), *appeal dismissed,* 322 U.S. 707 (1944).
5. It should be noted that section 432.070 draws no distinction between a county, a city or a municipal corporation.

and not complying with statutory requirements, is void, and the county is not liable on a theory of ratification, estoppel, or implied contract,[6] even though it may have received the benefit of performance by the other party to the contract.[7] One dealing with a municipal corporation or county is bound to know the extent of its authority and the limitations on its power.[8]

Section 432.070 was first enacted in 1874.[9] It was considered by the Missouri Supreme Court for the first time in *Woolfolk v. Randolph County*,[10] the court holding that the section required the consideration to be ascertained in rate or amount and stated in terms of dollars and cents in the contract. However, in the *Woolfolk* case, the parties conceded there was no written contract, and it seems that recovery should have been barred on this basis.[11]

The rule of the *Woolfolk* case interpreting section 432.070 to require that consideration be stated in rate or amount was the avowed basis for the Supreme Court's decision in *Bride v. City of Slater*,[12] which arose 69 years later. In the principal case the court did not overrule the *Bride* case, but rather distinguished it on its facts.[13] The court said that in the *Bride* case the consideration was to be determined by the seller, whereas in the principal case the consideration was to be determined by the city council. By so distinguishing these two cases the court reaffirmed a previously weak and questionable decision, the basis for which the court had earlier destroyed.[14] The court is not inconsistent in distinguishing the cases, but the doctrines of the cases are inconsistent in that the *Bride* case requires the consideration to be stated in dollars and cents, while the principal case requires only "reasonable compensation."

There is some basis in other authorities for the decision in the principal case. Professor Corbin for one draws a distinction between the consideration for the

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6. Bride v. City of Slater, 263 S.W.2d 22 (Mo. 1953); Elkins-Swyers Office Equip. Co. v. Moniteau County, 357 Mo. 448, 209 S.W.2d 127 (1948); Kansas City v. Rathford, 353 Mo. 1130, 186 S.W.2d 570 (1945); Donovan v. Kansas City, *supra* note 4; Likes v. City of Rolla, 184 Mo. App. 296, 167 S.W. 645 (Spr. Ct. App. 1914).

7. Central Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24 (1891); Kansas City v. Rathford, *supra* note 6; Donovan v. Kansas City, *supra* note 4; Riley v. City of Rock Port, 165 S.W.2d 880 (K.C. Ct. App. 1942); Likes v. City of Rolla, *supra* note 6. See also Fleshner v. Kansas City, 348 Mo. 978, 156 S.W.2d 706 (1941), in which the court held that a contract which did not comply with this section was void *ab initio*, and could not be given force by ratification.

8. Thomas v. City of Richmond, 79 U.S. 349 (1870); cases cited note 7 *supra*.

9. Mo. Laws 1874, at 44, § 1.

10. 83 Mo. 501 (1884).

11. Recovery was barred in this case supposedly on the basis that the consideration was not stated in the contract as required by § 5360, RSMo 1879.

12. 263 S.W.2d 22 (Mo. 1953).

13. In Bride v. City of Slater, *supra* note 12, Bride had contracted to supply fuel oil to the city of Slater, the price being stated as the "seller's market price on date of shipment." There was a written contract, but the court refused recovery, stating that the contract did not comply with section 432.070 in that it failed to adequately set out the consideration.

14. See Dahm, *Contracts—By Municipality—Consideration—Seller's Market Price at Time of Delivery*, 20 Mo. L. REV. 316 (1955).

contract, and the price to be paid.[15] He says one can state consideration for a contract without stating the actual price of the goods covered by the contract. This distinction has been recognized by a United States circuit court of appeals in *Reid v. Diamond Plate-Glass Co.*[16]

The English Statute of Frauds prior to 1856 was interpreted as requiring the entire contract of the parties to be in writing, including the consideration.[17] In *Hoadly v. M'Laine,*[18] decided in 1834, it was held that the implication of "reasonable compensation" by law satisfied this requirement. There suit was brought on a written contract for the sale of a landaulet, which contract came within the Statute of Frauds. The contract was silent as to the price to be paid. The English court held that the parties need not state in the writing any terms or conditions implied in law, and that if no other price was agreed upon and stated, it was implied in law that reasonable compensation was agreed to and became a part of the contract as though it were specifically written into the contract, and that therefore the contract met the requirements of the Statute of Frauds. A fortiori, if the courts will imply in law the term "reasonable compensation" to meet the requirement that the consideration must be stated, where the parties specifically agree to, and write "reasonable compensation" into their contract, they have complied with a statute which specifically requires the consideration to be stated.

And in *Burlington Grocery Co. v. Lines,*[19] decided under a statute which required the consideration to be stated in the writing, it was held sufficient that the memorandum stated a price not in excess of a certain sum. The court declared that this was in effect a stipulation for a reasonable price to be determined, but in any event not to be more than the maximum named.

It seems clear that under the Missouri statute, parol evidence cannot be used to prove what consideration was agreed upon where there is no expression relating to the price. Where there is an expression relating to the price which requires defining or explaining, it has been held, under a similar statute, that parol evidence may be received by the court to define or explain such term.[20]

Contracts made by a city, if authorized, are no different from other contracts. A contract is generally held to be sufficiently definite and certain and thus valid and enforceable if a court can give it an exact meaning.[21] Contracts of municipali-

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15. 2 CORBIN, CONTRACTS § 501 (1950).
16. 85 Fed. 193 (6th Cir. 1898).
17. 1 WILLISTON, SALES § 103 (rev. ed. 1948).
18. 10 Bing. 482 (1834).
19. 96 Vt. 405, 120 Atl. 169 (1923).
20. See Flash v. Rossiter, 116 App. Div. 880, 102 N.Y. Supp. 449 (1907).
21. Brown v. Childers, 254 S.W.2d 275 (K.C. Ct. App. 1953); Shofler v. Jordan, 284 S.W.2d 612 (Spr. Ct. App. 1955); 1 WILLISTON, CONTRACTS § 37 (3rd ed. 1957); 12 AM. JUR. *Contracts* § 64 (1938). See also Bay v. Bedwell, 21 S.W.2d 203 (Spr. Ct. App. 1929); Hubbard v. Turner Dep't Store Co., 220 Mo. App. 95, 278 S.W. 1060 (Spr. Ct. App. 1926); RESTATEMENT, CONTRACTS § 32 (1932); 17 C.J.S. *Contracts* § 36 (1939).

ties should be construed in the same manner.[22]

In *Brunner v. Stix, Baer & Fuller Co.*,[23] it was held that "reasonable value" was sufficiently definite consideration to form a binding contract. There appears to be no valid distinction between "reasonable value" and "reasonable compensation." Since "reasonable value" has been held adequate to form a binding contract between individuals, it seems apparent that where a written contract by a municipality calls for "reasonable compensation," it should be held to comply with section 432.070, both in letter and spirit. That is definite in law, and can be made certain by ordinary canons of construction.[24] Section 432.070 was enacted to protect municipalities from extravagant and dishonest officials.[25] To hold "reasonable compensation" satisfies the statute does not defeat this purpose.

The court, in the *Burger* case, destroyed the *Woolfolk* case as authority for the principle which it purported to lay down. The court stated that the construction of the statute given in the *Woolfolk* case is not controlling because that case did not involve a written contract. By so distinguishing these two cases, the court in practical effect overruled the hitherto recognized basis of the *Woolfolk* case.

If the *Bride* case can be distinguished from the principal case on the aspect of certainty, the principal case cannot be distinguished from the *Woolfolk* case on that basis. Since the court has destroyed the *Woolfolk* case as authority, it should also have overruled the *Bride* case insofar as it was based on the *Woolfolk* case.

CARL F. KRAUSS

LEGAL PROFESSION—RESIGNATION FROM THE BAR UNDER CHARGES

In re Sympson[1]

In 1951, while disbarment proceedings were pending against him, petitioner tendered his resignation from the Missouri Bar. It was accepted by the Supreme Court, which concurrently entered an order of disbarment. On motion for reconsideration of a prior motion for reinstatement, filed in the Missouri Supreme Court seven years later, the court overruled the motion, holding that a resignation under such circumstances may be accepted upon such conditions as the courts may deem proper.

That a solicitor may have his name stricken from the roll at his own request

22. Hollerbach v. United States, 233 U.S. 165 (1914); Atlanta Constr. Co. v. State, 103 Misc. 233, 175 N.Y. Supp. 453 (Ct. Cl. 1918); Maney v. Oklahoma City, 150 Okla. 77, 300 Pac. 642 (1931).

23. 352 Mo. 1225, 181 S.W.2d 643 (1944) (en banc).

24. Klaber v. Lahar, 63 S.W.2d 103 (Mo. 1933); Shofler v. Jordan, *supra* note 21.

25. Likes v. City of Rolla, *supra* note 6.

1. 322 S.W.2d 808 (Mo. 1959) (en banc).

has long been recognized in England.[2] However, the name of a solicitor will not be stricken from the rolls at his own request without an affidavit that no proceedings are pending against him, and that he expects none.[3] This rule is considered to be based on the Statute of Westminster I,[4] which gives the English courts the power in disciplinary proceedings to imprison as well as disbar, strike from the rolls, suspend or reprimand. The English courts are seemingly guided by the premise that by allowing a solicitor to resign without the affidavit would deprive the courts of the power to punish by imprisonment.[5]

In this country, as in England, an attorney who is not under charges may resign from the bar and have his name stricken from the roll of attorneys at his own request.[6] The effect of the presence of charges on an attorney's ability to resign, however, is not so clear in this country. But, in general, three approaches to the problem of attorneys resigning from the bar while under charges are apparent in the American decisions: (1) One approach by the courts is to allow resignation from the bar under charges as a matter of course in most cases.[7] (2) Secondly, there is the approach that an attorney should not be allowed to resign from the bar while charges are pending against him.[8] (3) The last approach,[9] and that followed in *In re Sympson,* is to leave with the discretion of the court whether to accept a resignation and the circumstances and conditions to be imposed on such resignation.[10]

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2. *Ex parte* Owen, 6 Ves. Jr. 11, 31 Eng. Rep. 913 (Ch. 1801). It would seem that there is no such thing as a resignation eo nomine from the English Bar. A barrister may be disbarred, either on his own petition or for disciplinary reasons, by the benchers of the Inn of Court to which he belongs, subject to appeal to the Lord Chancellor and the judges of the High Court of Justice. [3 HALSBURY, LAWS OF ENGLAND 5-6 (3rd ed. 1953).] Consequently the term "disbarment" does not have a derogatory connotation in England.

3. *Ex parte* Foley, 8 Ves. Jr. 33, 32 Eng. Rep. 262 (Ch. 1802); *Ex parte* Owen, *supra* note 2; WEEKS, ATTORNEYS AND COUNSELORS AT LAW 189 (2d ed. 1892).

4. 1275, 3 Edw. 1, c. 29; 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND 213 (1681). The statute appears to be applicable to both barristers and solicitors.

5. Application of Harper, 84 So.2d 700 (Fla. 1956).

6. Application of Harper, *supra* note 5; *In re* Lebangood, 308 Ky. 280, 213 S.W.2d 1011 (1948); *In re* Sympson, *supra* note 1; *In re* Quartin, 266 App. Div. 733, 40 N.Y.S.2d 718 (1943); *In re* Haddad, 106 Vt. 322, 173 Atl. 103 (1934); PHILLIPS & MCCOY, CONDUCT OF JUDGES AND LAWYERS 122 (1952); see also Annot., 54 A.L.R.2d 1272 (1957).

7. *In re* May, 239 S.W.2d 95 (Ky. Ct. App. 1951); *In re* Lebangood, *supra* note 6; People *ex rel.* Chicago Bar Ass'n v. Reed, 341 Ill. 573, 173 N.E. 772 (1930); *In re* Quartin, *supra* note 6; In the Matter of McGrath, 255 App. Div. 923, 7 N.Y.S.2d 978 (1938).

8. *In re* Lucas, 230 Ind. 254, 102 N.E.2d 909 (1952); Louisiana State Bar Ass'n v. Pitcher, 238 La. 649, 116 So.2d 281 (1959); *In re* Harrington's Case, 100 N.H. 243, 123 A.2d 396 (1956); *In re* King, 165 Ore. 103, 105 P.2d 870 (1940); *Ex parte* Thompson, 32 Ore. 499, 52 Pac. 570 (1898); *In re* Haddad, *supra* note 6.

9. It should be noted that these are merely the approaches these courts seem to take in the reported decisions. When faced with a particular set of facts the approach might vary.

10. Petersen v. State Bar of Cal., 21 Cal. 2d 866, 136 P.2d 561 (1943); State *ex rel.* Florida Bar v. Englander, 118 So.2d 625 (Fla. 1960); *In re* Application of

If one follows the doctrine set out in many of the decisions on disciplinary proceedings, that the purpose of such proceeding is not to punish an attorney but to guard the administration of justice, preserve the purity of the courts, and to protect the public and the profession,[11] then it might reasonably be inferred that resignation accomplishes all these purposes. It is suggested that this philosophy may well be the basis for the action of the courts of those states which allow resignation from the bar under charges as a matter of course.[12]

The second group of courts[13] seem to follow the theory that any attorney whose conduct justifies disciplinary proceedings should be disbarred or suspended when found guilty and that there should be no consideration of degrees of charged misconduct in determining whether a resignation is possible. The impact of the English rule may still be, to some extent, exerting an influence on these courts.

What then can be said for the rule, which Missouri follows, which leaves with the court the discretion whether or not to accept a resignation under charges and the conditions to be imposed upon such resignation from the bar?[14] It is suggested that because a resignation from the bar does not necessarily connote misconduct in the eyes of the public,[15] many of the courts in this group will allow a resignation when the conduct of the attorney involved is not considered extremely serious. But when there has been extremely serious misconduct, as determined by the court, the courts are unwilling to allow resignation and instead disbar the attorney because they feel that his misconduct justifies the moral condemnation of disbarment,[16] and that if the court should permit an attorney to escape with a light sentence it tends to lessen the respect the public normally has for members of the bar.[17]

Peel, 111 So.2d 452 (Fla. 1959); Application of Harper, *supra* note 5; *In re* Evers, 41 Wash. 2d 942, 247 P.2d 890 (1952); In the Matter of Lonergan, 23 Wash. 2d 767, 162 P.2d 289 (1945).

It may be noted that the rule relating to resignation from the military services is roughly analogous to the rule followed by these courts as to resignation from the bar. That is, the President has discretion as to whether to accept such resignation. An unqualified acceptance of a resignation is an honorable discharge from service, but where the acceptance is for the good of the service the discharge is without honor. [DIG. OPS. JAG 816-817 (1912).]

11. *In re* Williams, 221 Minn. 554, 23 N.W.2d 4 (1946); *In re* Sympson, *supra* note 1; In the Matter of Rich, 161 A.2d 488 (N.J. 1960); In the Matter of Dougherty, 7 App. Div. 2d 163, 180 N.Y.S.2d 971 (1959); *In re* McKechnie, 214 Ore. 531, 330 P.2d 727 (1958).

12. Cases cited note 7 *supra.*

13. Cases cited note 8 *supra.*

14. Cases cited note 10 *supra.*

15. Gresham v. Superior Court, 44 Cal. App. 2d 664, 112 P.2d 965 (Dist. Ct. App. 1941).

16. In State *ex rel.* Florida Bar v. Englander, *supra* note 10, an attorney found guilty in a disciplinary proceeding of obtaining money under false pretenses was not allowed to resign because the purity of the courts would be adversely affected. In Application of Harper, *supra* note 5, an attorney, when serious charges of professional misconduct were pending against him, was allowed to resign when the court found the public interest and the purity of the courts would not be adversely affected.

17. *Ex parte* Thompson, *supra* note 8.

The result reached in *In re Sympson* and in those courts which follow the discretionary approach to resignation from the bar under charges would seem desirable. With this handling of the situation, every case is weighed individually and the court can reach the decision which more fully protects the purity of the courts, the public, and the profession.

EARL S. MACKEY

HUMANITARIAN NEGLIGENCE—APPLICABILITY TO A MOTORIST BLINDED BY APPROACHING HEADLIGHTS

Hampton v. Raines[1]

A nighttime headon collision between two trailer-trucks occurred during a fairly heavy fog on a straight stretch of a two-lane asphalt road. Defendant Ellis testified that when he was five hundred feet from plaintiff Hampton's approaching truck, he was completely blinded by its headlights. He began blinking his lights, reduced his speed from 30 to 35 miles per hour to 20 miles per hour, and tried to hold the wheel straight, but apparently his vehicle "wandered" onto the wrong side of the road. Plaintiff Hampton stated that he was driving at 30 to 35 miles per hour when he saw the lights of the defendant's truck coming into his lane at a distance of about four or five hundred feet ahead. He pulled to the right as far as he could and applied his brakes, leaving skid marks of one hundred and forty-five feet, but did not avert collision.

Undoubtedly if plaintiff failed to dim his headlights, he was guilty of negligence per se.[2] However defendant did not counterclaim on primary negligence, the theory proceeded upon in all previous Missouri cases involving the "blinding" lights situation.[3] Indeed, he could not deny contributory negligence since by the fact of glaring lights he was not absolved of his duty to keep his vehicle on the right side of the road.[4] Instead, the defendant's counterclaim was submitted upon the unique theory that plaintiff's failure to cease blinding constituted humanitarian negligence. The rationale was that defendant entered a position of imminent peril by crossing over into the path of plaintiff's vehicle and that if plaintiff had dimmed his lights in this crisis situation, defendant could have observed his position on the road and returned to his own side in time to have prevented collision. The verdict was in favor of defendant in the trial court. On appeal, *held,* reversed.

Since it is of no consequence that the humanitarian negligence is asserted by

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1. 334 S.W.2d 372 (Spr. Ct. App. 1960).
2. § 304.370, RSMo 1949.
3. Beaver v. Wilhelm, 321 S.W.2d 1 (St. L. Ct. App. 1959); Fullerton v. Kansas City, 236 S.W.2d 364 (K.C. Ct. App. 1950); Bedsaul v. Feeback, 341 Mo. 50, 106 S.W.2d 431 (1937); Powell v. Schofield, 223 Mo. App. 1041, 15 S.W.2d 876 (Spr. Ct. App. 1929); Snyder v. Murray, 223 Mo. App. 671, 17 S.W.2d 639 (K.C. Ct. App. 1929).
4. § 304.020, RSMo 1949. See also Biggs v. Crosswhite, 240 Mo. App. 1171, 225 S.W.2d 514 (K.C. Ct. App. 1949).

defendant in a counterclaim,[5] the parties to this action will be referred to below in terms of plaintiff and defendant in their humanitarian sense so as to permit an analysis corresponding to the outline of the elements of a humanitarian case as set forth in *Banks v. Morris & Co.*[6]

It must first be established that plaintiff was in a position of imminent peril, either from mental obliviousness or physical helplessness. The former is defined in terms of awareness of the danger—a plaintiff, being negligently inattentive, is not conscious of his peril. The latter is descriptive of the situation in which a plaintiff is physically unable to extricate himself from his perilous situation.[7]

The court rejected the contention that plaintiff was oblivious stating: "He may not have known which side of the road he was on, but he knew he was in danger of collision, and he knew *why* he was in danger."[8] But the court did not undertake a discussion of the possibility of physical helplessness in spite of the plaintiff's contention of complete blindness. If a driver were totally blinded (which probably would be the allegation in every case), the situation could be likened to one in which a blind man stands in the path of an approaching vehicle not knowing of those measures that will lead to his safety—a clear case of physical helplessness. However it is the opinion of this writer that a motorist who gets onto the wrong side of the road when confronted by glaring lights is not physically helpless since he can by the exercise of the highest degree of care take steps in the crisis situation to extricate himself from the peril. By glancing down to the right edge of the road,[9] a driver can maintain a continuous check on the position of his car with reference to the center line, angling to the right if necessary, and at the same time obviate the dazzling effect of the lights. Then the effect of the bright lights will not be total blindness, but rather merely a temporary impairment of normal vision, the driver still being able to discern, at least vaguely, the lights of the approaching car and thereby to ascertain the position and direction of the vehicle relative to his own.

With the added factor of fog making the problem a more difficult one, the court chose to dispose of the case on the basis of the second element, that is, there was no showing that defendant had notice, actual or constructive, of plaintiff's danger. Plaintiff's traveling on the wrong side of the road did not give notice, for

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5. Wabash R. Co. v. Dannen Mills, Inc., 288 S.W.2d 926 (Mo. 1956) (en banc). Noted in Becker, *The Missouri Humanitarian Doctrine—1956, 1957,* 23 Mo. L. REV. 420 (1958).

6. 302 Mo. 254, 257 S.W. 482 (1924) (en banc). This case lists the following elements: "(1) Plaintiff was in a position of peril; (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; (4) he failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof plaintiff was injured."

7. The situations are explained in McCleary, *The Bases of the Humanitarian Doctrine Reexamined,* 5 Mo. L. REV. 56 (1940).

8. 334 S.W.2d at 375.

9. This procedure is recommended in Missouri Drivers Guide, at page 30, the pamphlet issued by the licensing bureau to prospective drivers.

defendant was entitled to assume that plaintiff would return to his proper lane.[10] Nor did plaintiff's blinking his lights give defendant reason to suspect the contrary; a rule requiring defendant to act upon a message so frequently emitted in nighttime travel would certainly be a harsh one. Even if there were a finding of notice, the court suggests there would be a problem in finding the third element of humanitarian negligence, namely, whether defendant had the present ability to have averted the impending injury without injury to himself or others. Defendant would have to react to the message and dim his lights in time for the plaintiff to discover his position and turn aside—a time consuming chain of events requiring the cooperative action of both parties.

There should be no doubts as to the propriety of the court's decision. Any other conclusion would not only have permitted a plaintiff blameworthy in the crisis to recover and have imposed an extreme duty of care upon defendant, but also would have given rise to a new source of litigation, where a plaintiff seeks the benefit of the humanitarian doctrine on a theory of being blinded by defendant's headlights in a collision with the latter's automobile, to further hamper efficient administration of justice by the already overcrowded courts.

JAMES J. MOLLENKAMP

CREDITORS' RIGHTS—VALIDITY OF MISSOURI IMMUNITY STATUTE RELATING TO EXAMINATION OF JUDGMENT DEBTOR

State ex rel. North v. Kirtley[1]

Relator, a judgment debtor, was brought before the court by his judgment creditor for a statutory examination[2] pertaining to secretion of assets, and was asked whether or not he owned certain property. A fraudulent conveyance being a crime,[3] the relator refused to answer, claiming the constitutional privilege against self-incrimination.[4] The judge, respondent here, ruled the privilege did not apply, and indicated an intent to commit the relator for contempt. To prevent this the relator obtained issuance of an original writ of prohibition against the respondent from the Missouri Supreme Court, which, after hearing, made the writ absolute.

At the hearing the respondent first contended that the privilege applied only to criminal proceedings. This was rejected by the court, which said: "This state has frequently recognized that the constitutional privilege against self-incrimination

10. Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578 (Mo. 1954); Lemonds v. Holmes, 241 Mo. App. 463, 236 S.W.2d 56 (Spr. Ct. App. 1951).

1. 327 S.W.2d 166 (Mo. 1959) (en banc).

2. § 513.380, RSMo 1949: "Whenever an execution against the property of any judgment debtor . . . shall be returned unsatisfied . . . the judgment creditor in such execution . . . may . . . be entitled to an order by the court . . . requiring the judgment debtor to appear before such court . . . to undergo an examination under oath touching his ability and means to satisfy said judgment . . . . "

3. § 561.550, RSMo 1949.

4. Mo. CONST. art. I, § 19: "That no person shall be compelled to testify against himself in a criminal cause . . . . "

is available to a witness before any tribunal in any proceeding."[5]

Respondent next contended that the relator was given statutory immunity,[6] and therefore the privilege was not applicable. On this point the court held that the statutory immunity granted was inadequate, and therefore the relator had properly claimed the privilege against self-incrimination. In this connection the court said:

> Obviously, section 491.080 is not as broad as the constitutional guaranty. Two shortcomings readily appear. First, the only immunity offered is that 'the testimony of such person shall not be used as evidence to prove any fact in any suit or prosecution against such person.' This falls short of rendering ineffectual the use of the witness' testimony as a means of discovering independent evidence on which a prosecution could be based.
>
> Secondly, the statute restricts the immunity to suits or prosecutions 'for any penalty for violation of any law *in relation to fraudulent conveyance of property.*' (Italics the court's.) There is no limitation upon the use of the testimony of the witness as evidence in some other criminal prosecution. Thus, it does not 'afford absolute immunity' as prescribed by the decisions to which we adhere.[7]

The privilege against self-incrimination, according to historians,[8] resulted from abuses in interrogation by the ecclesiastical courts and the Star Chamber. By 1700 it was considered "fundamental" in the common law that "in all proceedings civil as well as criminal not only parties but witnesses as well are privileged against compulsion to testify to facts subjecting them to punishment or forfeiture."[9] Due to similar abuses in colonial America, it was made a part of the bills of rights of the federal constitution and all state constitutions[10] except Iowa and New Jersey, where, however, the privilege still exists. In Iowa[11] it is part of the state constitutional due process clause, and in New Jersey[12] it is part of the common law.

To ferret out crime, particularly conspiracies, the practice began to grant statutory immunity in exchange for compelled testimony, thus making the occasion for asserting the privilege non-existent.[13] These early statutes, such as the one involved in the *North* case, granted immunity only against use of the testimony as evidence in a subsequent criminal prosecution. This left the state officials free to use the compelled testimony to gain independent evidence with which to convict the person testifying of any crime that he divulged. This trap was closed to

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5. 327 S.W.2d at 167.

6. § 491.080, RSMo 1949: "Whenever any person shall testify, either as a party or as a witness, in any suit or proceedings now or hereafter pending, the testimony of such person shall not be used as evidence to prove any fact in any suit or prosecution against such person for any penalty for violation of any law in relation to fraudulent conveyance of property."

7. 327 S.W.2d at 170.

8. McCormick, Evidence § 120, at 252-57 (1954); 8 Wigmore, Evidence § 2250, at 276-304 (3d ed. 1940).

9. McCormick, *op. cit. supra* at 255.

10. *Id.* at 256.

11. State v. Height, 117 Iowa 650, 91 N.W. 935 (1902).

12. State v. Zdanowicz, 69 N.J.L. 619, 55 Atl. 743 (Ct. Err. & App. 1903).

13. 8 Wigmore, *op. cit. supra* note 8, § 2281, at 468.

state officials, however, in the landmark case of *Counselman v. Hitchcock*.[14] There the United States Supreme Court held inadequate a statute,[15] purporting to grant immunity to a witness before a grand jury, that only protected against use of the testimony as evidence. The Court said it was inadequate because it did not "prevent the use of his testimony to search out other testimony to be used in evidence against him,"[16] and then further said: "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."[17]

Of the *Counselman* case, McCormick says: "Surely this was a wrong turning at a critical point. Perhaps few decisions in history have resulted in freeing more rascals from punishment. Its soundness may be disputed on several grounds."[18] Wigmore, after stating that only three shaky cases could have been used as precedent for the *Counselman* decision, says: "It is unfortunate that the Court in which the latter pronouncement was made should have allied itself with such feeble forces."[19] This, however, is an understandable reaction from quarters that feel the privilege itself should be at least severely restricted, if not abolished.[20] They feel it is long outmoded, an escape route for the guilty, unnecessary for the innocent, and only "fundamental" because of its close association with other parts of the Bill of Rights and with liberal fighters against governmental tyranny.[21]

But courts generally have not agreed with these critics, and after the *Counselman* case in most cases involving state statutes that protected only against the use of the testimony as evidence the courts held the statutes unconstitutional.[22] For instance in *Ex parte Carter*[23] the Missouri Supreme Court held that a witness before a grand jury could not be compelled to give the names of persons other than himself whom he had seen gambling because the immunity granted by the statute[24] was inadequate. In expressly following the *Counselman* case, the Missouri

14. 142 U.S. 547 (1892).

15. REV. STAT. § 860 (1875): "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture . . . ."

16. 142 U.S. 547, 564 (1892).

17. *Id.* at 585.

18. MCCORMICK, *op. cit. supra* note 8, § 135, at 285.

19. 8 WIGMORE, *op. cit. supra* note 8, § 2283, at 527-28.

20. MCCORMICK, *op. cit. supra* note 8, § 136, at 288; 8 WIGMORE, *op. cit. supra* note 8, § 2251, at 304-20.

21. *Ibid.*

22. MCCORMICK, *op. cit. supra* note 8, § 135, at 286; and see Annots., 118 A.L.R. 602 (1939), 53 A.L.R.2d 1030 (1957), for a collection of all the cases, and 8 WIGMORE, *op. cit. supra* note 8, § 2281, note 11, for a collection of all the immunity statutes.

23. 166 Mo. 604, 66 S.W. 540 (1902).

24. § 2206, RSMo 1899: "No person shall be incapacitated or excused from testifying touching any offense committed by another, against any of the provisions relating to gaming, by reason of his having betted or played at any of the prohibited games or gaming devices, but the testimony which may be given by such person shall in no case be used against him."

Supreme Court in *Carter* said: "No statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution."[25] In so holding the Court overruled its own prior case of *Ex parte Buskett*,[26] which had held the very same statute adequate on essentially the same facts.

Because this "no use of the evidence" type statute was generally being held unconstitutional when brought before the courts, the legislatures began passing the "no prosecution" type statute, which requires that the person testify but unconditionally provides that he shall not be prosecuted with respect to any matter, transaction, or thing concerning which he testifies or produces evidence, except perjury in so testifying.[27] In the leading case of *Brown v. Walker*,[28] decided by the United States Supreme Court four years after the *Counselman* case, the constitutionality of such a statute[29] was upheld. In the *Brown* case the witness had been called to appear and testify before a grand jury, and it was held that he was bound to testify, even though it might expose him to personal disgrace[30] or prosecution by some other sovereign.[31] The "no prosecution" type statute has been upheld and the witness compelled to testify in Missouri in *State ex inf. Hadley v. Standard Oil Co.*,[32] and in *State ex rel. Jones v. Mallinckrodt Chemical Works*.[33] Neither of these cases, however, discussed what is required of an immunity statute before it may effectively supplant the self-incrimination privilege.

That the privilege against self-incrimination applies to a judgment debtor being examined as to the location of his hidden assets was not novel to the court in the *North* case. The issue had been before the court earlier in *State ex rel. Strodtman v. Haid*,[34] and the privilege was held to be applicable. However, the particular immunity statute involved[35] was not passed upon because it was not brought to

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25. *Ex parte* Carter, *supra* note 23, at 614, 66 S.W. at 544.
26. 106 Mo. 602, 17 S.W. 753 (1891).
27. See Annot., 53 A.L.R.2d 1030, at 1046 (1957).
28. 161 U.S. 591 (1896).
29. 27 Stat. 443 (1893), 49 U.S.C. § 46 (1952): ". . . no person shall be excused from attending and testifying . . . on the ground or for the reason that the testimony . . . required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify . . . ."
30. Brown v. Walker, *supra* note 28, at 605.
31. *Id.* at 623.
32. 218 Mo. 1, 116 S.W. 902 (1908). Held valid was § 8989, RSMo 1899 [now § 416.400, RSMo 1949] which provides: ". . . no witness shall be permitted to refuse to answer any question material to the matter in controversy . . . upon the ground that to . . . answer such questions might tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be subject to prosecution or to any action for a penalty or a forfeiture on account of any transaction, matter or thing concerning which he may testify or produce books or papers."
33. 249 Mo. 702, 156 S.W. 967 (1913) (en banc). Held valid was § 10322, RSMo 1909 [now § 416.230, RSMo 1949]. The text of this statute is identical in the material parts to the one set out *supra* note 32.
34. 325 Mo. 1137, 30 S.W.2d 466 (1930).
35. § 491.080, RSMo 1949.

the attention of the court. In fact, prior to the *North* case, it had never been before any appellate court since its passage about one hundred years ago. Faced with the *Carter* and *Strodtman* cases the court in the principal case was bound, it would seem, by controlling precedent to hold the statute before it invalid. It would also seem that the only way to get the court to decide otherwise would be to convince the court that the privilege should not apply because it would greatly hamper a judgment creditor in collecting on his judgment, that a judgment debtor was deserving of no such favored treatment, and that it would make virtually useless the examination process provided for by statute. The respondent did in fact make these contentions,[36] but the court did not discuss them. Presumably it did not agree, or else felt that the language of the constitution and prior decisions left it no choice.

The court might very well have felt that the *North* decision would have no appreciable effect on creditors in collecting on their judgments or on their examination of debtors to find assets upon which to levy. This is because the statute had been suspect for fifty-seven years because of the *Carter* case, and the self-incrimination privilege had been deemed applicable to such a situation for twenty-nine years by virtue of the *Strodtman* case; yet, so far as is known, no judgment creditor, other than the one in the *Strodtman* case, had run into the perils held up before the court by the respondent. Nor, presumably, had the Missouri legislature been deluged by unsatisfied judgment creditors demanding a more adequate immunity statute, for it is unlikely that the legislature would turn down such a request if there was evidenced a real need for it. And further, the Missouri legislature has met since the *North* case and has failed to pass a new and broader immunity statute to replace the one held unconstitutional.

One point remains, and that is that the writer feels that the law in Missouri on the exact requirements of an immunity statute is less than crystal clear. This doubt is caused by the language used by the court in the *North* decision, which is set out above. The court therein gave two reasons for holding the statute invalid. It is submitted, however, that the court's language is ambiguous and that there are at least three possible constructions that can be placed upon it.

First, if the reasons given are to be taken as necessary provisions in a constitutional immunity statute, then would not one that merely provided for "no use of the testimony as evidence in any criminal prosecution and no use of the testimony to gain independent evidence" be sufficient? Such a statute, however, would leave the person testifying open to prosecution by any evidence not garnered by the tainted testimony. Such a result is not possible under the requirements laid down by the *Carter* and *Counselman* cases, for those cases require that the witness not be subjected to prosecution for any crime divulged. This amounts to a grant of amnesty or absolute immunity.[37] It is doubtful that the court in the *North* decision meant to leave such a loophole, and depart so far from *Carter* and *Counselman.*

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36. Brief for Respondent, pp. 5-6, State *ex rel.* North v. Kirtley, *supra* note 1.
37. 8 WIGMORE, *op. cit. supra* note 8, § 2281, at 467.

Second, the language utilized by the court could be construed to require that for constitutionality the statute must include both the hypothesized clause above plus a "no prosecution" clause. The former requirement would be based on the *North* case, and the latter would be based on the *Carter* case, upon which the court expressly relied. But if this is the proper construction, then no other jurisdiction has such a requirement,[38] Missouri has no valid immunity statute on the books, and the *Hadley* and *Jones* cases have been overruled. It would clearly seem that the court did not intend such a result, for the court cited the *Hadley* and *Jones* cases (wherein the statutes involved had only a "no prosecution" clause) with approval, and also cited several other similar Missouri immunity statutes in the same manner.[39] Moreover, such a requirement would be demanding a redundancy, for a "no prosecution" clause is generally interpreted to give amnesty[40] and thus covers whatever protection would be given by the writer's hypothesized clause.

Third, and finally, the language of the court could be read as saying that these reasons go to the invalidity of the particular statute before it, but are not to be taken as the only necessary provisions of a valid immunity statute. For the statute did have these two defects—the peril of independent evidence and use in a prosecution other than one for fraudulently conveying one's property. As stated above a "no prosecution" type statute does protect against both of these hazards, and the *Carter* case said a statute to be valid must be of this type. This would leave the law in Missouri unchanged, would be in line with the *Carter, Counselman, Hadley,* and *Jones* cases cited by the court, and would leave the several "no prosecution" type immunity statutes in Missouri unsuspect. It is submitted that this is the proper interpretation of the *North* case, and the one that would be most in conformity with the intention of the court. Such an interpretation is in keeping with the majority view in the United States,[41] and, unless one agrees with the criticisms offered by McCormick and Wigmore, is a sound result. Therefore, while the self-incrimination privilege applies to the judgment debtor being examined as to the location of his assets, it would be very easy for the legislature to supplant the privilege by passing a new immunity statute of the "no prosecution" type.

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38. See Annot., 118 A.L.R. 602 (1939).

39. §§ 136.100, 73.840, 144.340, 288.230, 386.470, RSMo 1949 and § 330.175, RSMo 1957 Supp., all having a no prosecution clause. But, strangely, among those cited with approval was § 129.190, RSMo 1949, which provides: "No person shall be excused from answering any question . . . . But no such answer or answers shall be used or be evidence against such witness in any criminal action, prosecution or proceeding whatever." See Strom, *Witness Immunity and the Missouri Law,* 19 MO. L. REV. 147, at 156 (1954), where the writer says such a statute does not meet the requirement of the Carter and Counselman cases, and for a general discussion of immunity statutes.

40. Brown v. Walker, 161 U.S. 591 (1896); Ullman v. United States, 350 U.S. 422 (1956).

41. See the annotations cited *supra* note 22; see also Strom, *supra* note 39.

JURISDICTION—VENUE—MISSOURI—VENUE OF ACTIONS AGAINST STATE OFFICIALS

State ex rel. Dalton v. Oldham[1]

This was an original proceeding brought at the relation of John M. Dalton, Attorney General, against the Honorable Woodson Oldham, Judge of the Jasper County circuit court, to prohibit the latter from exercising jurisdiction over the person of the relator in an action pending in that court. The action pending in the circuit court arose under section 125.030,[2] which provides for an appeal from the decision and action of the Attorney General in formulating the official ballot title of a proposed constitutional amendment and states that any citizen who is dissatisfied with the title may appeal to "the circuit court," which shall examine the proposal, hear arguments, and make a final decision. The plaintiff in that action filed a petition questioning a proposed ballot title in the Jasper County circuit court, naming the Attorney General as defendant. A copy of the petition was mailed to the Attorney General, who was also served with a summons in Cole County.

The court en banc held that section 125.030 did not fix venue of such an appeal in any county in the state, thereby disposing of respondent's contention that the statutory phrase "the circuit court" had that effect.[3] It was determined that the general venue statute[4] was applicable and that since the Attorney General neither resided in nor was found in Jasper County, there was no proper venue. Further, the court said that if, as respondent contended, the appeal provided by statute is an action in rem to which the general venue statute did not apply, the statutory appeal contemplates the Attorney General's appearance as a party and therefore venue would be governed by the rule that, "unless otherwise provided by statute, the venue of actions against executive heads of departments . . . lies generally in the county in which their offices are located and their principal duties are performed."[5] The court then said that if the appeal is a simple action in rem, the situs of the res, the ballot title, would be in Cole County, outside the territorial limits of respondent's court, precluding that court's jurisdiction.

A. *Does Lack of Venue Preclude Jurisdiction?*

In denying that the Jasper County circuit court had acquired jurisdiction, the court upheld the relator's position that under the general venue statute the appeal did not lie in Jasper County and that there was no service of process

1. 336 S.W.2d 519 (Mo. 1960) (en banc).
2. § 125.030, RSMo 1949.
3. This phrase was interpreted to mean that circuit courts were given general jurisdiction over this class of cases with reference to the granting or denial of relief, and the nature of the action.
4. § 508.010, RSMo 1949: "Suits instituted by summons shall, except as otherwise provided by law, be brought: (1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found; . . . "
5. 336 S.W.2d at 523, quoting from State *ex rel.* Gardner v. Hall, 282 Mo. 425, 221 S.W. 708 (1920) (en banc).

on relator sufficient to confer upon the Jasper County circuit court jurisdiction over his person.[6] This is in conformity with the doctrine that, in actions against single party defendants, service must be made in accord with proper venue. This doctrine is based on the requirement that due and effective notice must be given a defendant that an action has been brought against him, which is the primary purpose of the service of summons.[7] Notice in this connection means more than the mere communication of knowledge. For, while proper service may be waived by the appearance of the parties to the merits,[8] the party against whom the action is directed may insist on service in such a manner as the statute may require.[9] Then, although the court may have jurisdiction over the subject matter of an action, until jurisdiction over the person of the defendant is obtained by proper service, it has no authority to proceed.[10]

Utilizing the rule that requires proper notice before jurisdiction of the person can be obtained, earlier Missouri decisions have held that a court does not obtain jurisdiction of the person of a defendant by service of summons upon him out of the county of venue.[11] Perhaps the court's most concrete statement to this effect was made in *Hankins v. Smarr*,[12] setting aside a judgment on the ground that it was void for lack of jurisdiction. The original suit had been brought in Boone County and service was had on defendants, husband and wife, in Gasconade County. After a discussion of the service statutes, the court said:

> Reading these statutes and the venue statute together, do they not mean that it is essential to jurisdiction, to enter a personal judgment, for service of summons to be had upon a defendant or defendants (except when defendants reside in different counties) in the county (where plaintiff resides and defendant is found or where the defendant resides) in which the suit is begun?[13]

The practical effect of allowing an individual Missouri resident to demand that service upon him be made in accordance with proper venue is to give him a much higher degree of protection than that afforded a non-resident defendant in an action brought in Missouri. Section 508.010(4)[14] provides that a suit against

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6. 336 S.W.2d at 522.
7. Troyer v. Wood, 96 Mo. 478, 10 S.W. 42 (1888).
8. State *ex rel.* Ferrocarriles Nacionales de Mexico v. Rutledge, 331 Mo. 1015, 56 S.W.2d 28 (1932); State *ex rel.* Newell v. Cave, 272 Mo. 653, 199 S.W. 1014 (1917) (en banc); City of St. Louis v. Young, 235 Mo. 63, 138 S.W. 11 (1911); Henneke v. Strack, 101 S.W.2d 743 (K.C. Ct. App. 1937).
9. State *ex rel.* Minihan v. Aronson, 350 Mo. 309, 165 S.W.2d 404 (1942); State *ex rel.* Mueller Baking Co. v. Calvird, 338 Mo. 601, 92 S.W.2d 184 (1936) (en banc); State *ex rel.* Davis v. Ellison, 276 Mo. 642, 208 S.W. 439 (1919) (en banc); State *ex rel.* Mills Automatic Merchandising Corp. v. Hogan, 232 Mo. App. 291, 103 S.W.2d 495 (St. L. Ct. App. 1937).
10. State *ex rel.* Minihan v. Aronson, *supra* note 9.
11. See State *ex rel.* Bartlett v. McQueen, 361 Mo. 1029, 238 S.W.2d 393 (1951) (en banc); State *ex rel.* O'Keefe v. Brown, 361 Mo. 618, 235 S.W.2d 304 (1951) (en banc); Yates v. Casteel, 329 Mo. 1101, 49 S.W.2d 68 (1932).
12. 345 Mo. 973, 137 S.W.2d 499 (1940).
13. *Id.* at 975, 137 S.W.2d at 500.
14. § 508.010(4), RSMo 1949.

a non-resident defendant may be brought in any county in the state. In regard to non-residents using Missouri highways, section 506.210(2)[15] further provides that the non-resident shall be deemed to have appointed the Secretary of State of Missouri his lawful attorney upon whom may be served all process in suits arising from his use of the highways. Thus non-residents are amenable to suit in any county in the state, while residents can be validly served in only two counties.

In order for a court to possess jurisdiction to adjudicate, it must have jurisdiction of the subject matter, jurisdiction of the res or of the parties, and jurisdiction to render a particular judgment in a particular case.[16] The Supreme Court indicated in the principal case that circuit courts, like the one in Jasper County, had jurisdiction over the subject matter and relief to be granted or denied in this statutory appeal.[17] However, because service with improper venue failed to give the Jasper County circuit court jurisdiction over the person of the relator, it lacked the requisite jurisdiction to hear and decide the case.[18]

B. *Venue of Actions Against State Officials*

The principal case represents an extension of the rule requiring suits against state officials having their office in Jefferson City to be brought in the Cole County circuit court. This rule was first announced in *State ex rel. Gardner v. Hall*,[19] which was an action brought in the Circuit Court of the City of St. Louis to quash the records of the State Board of Equalization. The court there gave four reasons for the rule: (1) this board had no entity except at the state capital; (2) it is against public policy to force public officials to neglect their duties in order to travel about the state appearing in court; (3) the board's principal duties were required to be performed at the state capital; and (4) it is less expensive for the state to defend itself in the capital city. The rule has been extended without comment to the Secretary of State,[20] Director of Revenue, Superintendent of the Highway Patrol, and the State Tax Commission.[21]

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15. § 506.210(2), RSMo 1949.

16. Healer v. Kansas City Pub. Serv. Co., 251 S.W.2d 66 (Mo. 1952); State *ex rel.* Lambert v. Flynn, 348 Mo. 525, 154 S.W.2d 52 (1941) (en banc); Charles v. White, 214 Mo. 187, 112 S.W. 545 (1908); State *ex rel.* Industrial Properties Inc. v. Weinstein, 306 S.W.2d 634 (St. L. Ct. App. 1957).

17. *Cf.* Warnecke v. State Tax Comm'n, 340 S.W.2d 615 (Mo. 1960). See note 21 *infra.*

18. See note 3 *supra.*

19. *Supra* note 5.

20. State *ex rel.* Toberman v. Cook, 365 Mo. 274, 281 S.W.2d 777 (1955) (en banc).

21. State *ex rel.* State Tax Comm'n v. Walsh, 315 S.W.2d 830 (Mo. 1958) (en banc). *Cf.* Warnecke v. State Tax Comm'n, *supra* note 17, where it was held the Cole County circuit court had no jurisdiction to review an assessment made by the St. Louis Board of Equalization on downtown St. Louis business property. Section 138.470, RSMo 1949, provides an appeal from tax assessments to be in the manner prescribed by the Administrative Procedure and Review Act except that *venue* of the review proceedings is in the county where the real property is located. Section 536.110, RSMo 1949, of the Administrative Procedure and Review Act states that review proceedings may be instituted in the circuit court

It is submitted that this rule should not be extended to the office of the Attorney General,[22] who has forty-five assistants and special assistants in twenty-eight cities throughout the state.[23] This fact substantially disposes of all the reasons given above for the rule. A more equitable arrangement, which could perhaps be adopted in Missouri, is provided by statute[24] in California. Section 401.1 of the California Code of Civil Procedure provides:

> Wherever it is provided by any law of this State that an action or proceeding against the State or a department, institution, board, commission, bureau, officer or other agency thereof shall or may be commenced in, tried in, or removed to the County of Sacramento, the same may be commenced and tried in any city or city and county of this state in which the Attorney General has an office.[25]

Further, an action to obtain the change of a ballot title,[26] like other actions against state officials, may have political ramifications. This rule then forces the party to bring his action in the city where the opposition is most firmly entrenched. Perhaps this in itself suggests the need for a "change of venue."

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of the county of proper *venue*. Construing these statutes together, the Supreme Court determined that their effect was to confer exclusive jurisdiction of tax assessment review on the circuit court of the county in which the real property is located, which in this case would have been the Circuit Court of the City of St. Louis.

22. The court does not decide whether the general venue statute applies to this action if in rem. Should it decide that the appeal provided for in section 125.030 is an action in rem to which the general venue statute applies, the question arises whether service upon the Attorney General who is found in a county where the suit is instituted, other than Cole County, would give that court jurisdiction over his person? Or would this rule still require the action to be brought in Cole County?

23. STATE OF MISSOURI OFFICIAL MANUAL, page 79.

24. The following standardized statute is found in the civil procedure codes of Idaho, Ind., Iowa, Ky., Mich., Minn., Mont., Nev., N.C., Ohio, Okla., Ore., and Utah: "Actions for the following causes must be brought in the county where the cause, or some part thereof arose: . . . Second, An action against a public officer for an act done by him in virtue, or under color, of his office or for neglect of his official duties."

The following states require by statute that actions against state officials and state agencies, etc., be brought in the county in which the state capital is located: Ariz., Ark., Miss., Neb., N.M., Tex., Va., and Wis.

25. Discussed in 37 CALIF. L. REV. 102, 105 (1949).

26. Because § 125.030 provides that the circuit court's determination shall be final, the ruling requiring all appeals to be brought in Cole County vests in the judge of that circuit court the sole power to determine a ballot title.

AGISTER'S LIEN—SCOPE OF LIEN—REQUIREMENT OF POSSESSION

Crouch v. Brookshire[1]

The plaintiff, pursuant to an oral agreement, pastured the defendant's cattle at a stipulated price per head. A controversy subsequently arose over the amount due the plaintiff, and when the defendant attempted to remove the cattle, the plaintiff demanded payment as a condition precedent to such removal. The defendant insisted that no additional money was owed and refused to pay. The cattle thus remained on the plaintiff's land for several months until, having no suitable pasturage remaining, he delivered them to a third party for pasturage and care on the latter's land, agreeing personally to pay the third party for such care. Upon the return of the cattle to the plaintiff, this action was commenced to recover for the pasturage furnished the cattle under the oral agreement and thereafter while the cattle were being held under lien by the plaintiff and the third party.

The circuit court, relying on a statute according agisters a lien,[2] rendered judgment for the plaintiff for the entire period. On appeal, *held,* affirmed.

Since the existence of a common law artisan's lien depends upon the enhancement of the value of the bailed goods by the bailee,[3] it is clear that the agister has no such lien,[4] inasmuch as he does not confer any additional value on the bailed goods as a result of his labor, which consists simply of turning the animals out to pasture.[5] It is thus pertinent to consider whether the lien herein relied upon, being of statutory creation,[6] should be construed as being more like the lien of the warehouseman, who can charge storage expenses after retaining possession of the bailed goods under lien,[7] or more like that of the artisan, who cannot charge for such storage expenses.[8] The general theory of the cases decided on this point seems to be that the artisan cannot charge for storage on the bailed goods while he is enforcing his lien because the original contract for repairs and the subsequent implied contract for storage are entirely distinct and separate, while the warehouseman may make such additional charges since they are not inconsistent with the purpose of the original agreement.[9] Applying this test to the agistment situation, it would seem that since the pasturage expenses incurred while animals are held

1. 330 S.W.2d 592 (K.C. Ct. App. 1959).
2. § 430.150, RSMo 1949, provides that every person who keeps, boards, or trains any horse, mule, or other animal shall have a lien on such animal for the amount due therefor.
3. Scarfe v. Morgan, 4 Mees. & W. 270, 150 Eng. Rep. 1430 (1838).
4. Tandy v. Elmore-Cooper Live Stock Comm'n Co., 113 Mo. App. 409, 87 S.W. 614 (K.C. Ct. App. 1905); Stone v. Kelley & Son, 59 Mo. App. 214 (K.C. Ct. App. 1894).
5. Jackson v. Cummins, 5 Mees. & W. 342, 151 Eng. Rep. 145 (1839).
6. See note 2 *supra.*
7. Reindenbach v. Tuch, 88 N.Y. Supp. 366 (Sup. Ct. 1904); Devereux v. Fleming, 53 Fed. 401 (C.C.D.S.C. 1892).
8. See Mack Motor Truck Corp. v. Wolfe, 303 S.W.2d 697 (St. L. Ct. App. 1957), wherein numerous authorities sustaining this principle are cited.
9. Devereux v. Fleming, *supra* note 7.

under lien are entirely consistent with the expenses involved in the original contract, their recovery should be allowed. Furthermore, it appears that an analysis of the meaning and theory of agistment[10] will find it to be more analogous to the situation presented in the storage cases than to that involved in the repair cases, inasmuch as the underlying purpose of agistment is the boarding and protection of the bailed animals, and not the improvement or direct enhancement of the value of them. It is true that the pasturage of animals works to enhance their value, but such enhancement does not appear to be synonomous with that involved in the artisan situation,[11] since it is not due directly to labor expended by the bailee. In any event, the enhancement of value would seem to be only a secondary result of the pasturage, which is, in the first instance, required for the mere preservation of the animals. Missouri has apparently followed this reasoning, although it appears that the courts have never before been required to state it in a case identical on facts to the instant one.[12]

Most of the reported cases dealing with the problem of relinquishment of possession by a lienor are concerned with the situation where possession is re-delivered to the bailor, and usually hold that where such re-delivery is for a limited purpose and without the intention to waive the lien, the lien is not lost.[13] These decisions are thus at variance with the general rule that any voluntary relinquishment of possession by the lienor terminates the lien for all time.[14] This conflict seemingly can be resolved under proper factual situations in at least two ways: (1) by holding that the deliveree is an agent of the bailee, thereby making the possession of the deliveree that of the bailee, and consequently permitting the bailee to retain his lien right;[15] or (2) by holding that due to the very nature of the particular bailment, it is within the contemplation of the parties at the time of the original agreement that the bailee might under certain circumstances be forced to

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10. See Bramlette v. Titus, 70 Nev. 305, 267 P.2d 620 (1954), wherein agistment is defined as the particular kind of bailment under which a man, for consideration, takes in cattle to graze and pasture on his land.

11. See State *ex rel.* Pleasant v. City of Ottawa, 84 Kan. 100, 113 Pac. 391 (1911), defining an artisan as one employed in an industrial or mechanical art or trade.

12. *Cf.* Cotton v. Gorrell, 180 Mo. App. 118, 167 S.W. 1187 (K.C. Ct. App. 1914); Powers v. Botts, 63 Mo. App. 285 (K.C. Ct. App. 1895).

13. See, *e.g.*, Storey v. Patton, 61 Mo. App. 12 (St. L. Ct. App. 1895); State *ex rel.* Vette v. Shevlin, 23 Mo. App. 598 (St. L. Ct. App. 1886); Smeed v. Stockmen's Loan Co., 48 Idaho 643, 284 Pac. 559 (1930); Gould v. Hill, 43 Idaho 93, 251 Pac. 167 (1926); Johanns v. Ficke, 224 N.Y. 513, 121 N.E. 358 (1918); Becker v. Brown, 65 Neb. 264, 91 N.W. 178 (1902); Welsh v. Barnes, 5 N.D. 277, 65 N.W. 675 (1895).

14. Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S.W. 445 (1903); Loader v. Bank of Idana, 113 Kan. 718, 216 Pac. 264 (1923); Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271 (1856); Holly v. Huggeford, 25 Mass. (8 Pick.) 73, 19 Am. Dec. 303 (1829).

15. See Pacific Aviation Co. v. Wells, Fargo & Co., 64 Ore. 530, 128 Pac. 438 (1912); Jaquith v. American Express Co., 60 N.H. 61 (1880); Western Transp. Co. v. Barber, 56 N.Y. 544 (1874).

sub-bail the delivered goods in order to protect the bailor's interest.[16] This reasoning has apparently found support in other cases involving agistment,[17] and would appear to be a correct result since the proper pasturage of animals in such situations can in no way be said to be of little importance. The opinion on this point in the instant case is somewhat unsatisfactory, however, because the court apparently assumes that it made no difference whether plaintiff lost possession when he delivered the cattle to a third party. Missouri courts have apparently never directly passed on the question, but it nevertheless can be expected that they will adhere to the result in the principal case in the future inasmuch as it would seem to be compatible with logic and the public interest.

J. KELLY POOL

MALPRACTICE—EXTENDED DUTY OF A PHYSICIAN

Steele v. Woods[1]

Plaintiff sued the defendant for malpractice to recover damages for failure to exercise reasonable skill and judgment during and after an operation for varicose veins. After the operation in question, the inner circulation did not return to the plaintiff's legs. The plaintiff suffered great pain during her 69 days in the hospital, and much of that period was spent under the influence of drugs. As a result of the lack of circulation in plaintiff's legs, gangrene set in. The infection caused ulcers to form on her legs and the skin to fall away from her toes. Later, under the care of another physician, it was necessary to amputate seven of her toes.

Expert testimony submitted by the defendant during the trial explained the plaintiff's condition as resulting from spasms of the blood vessels which caused constriction of the veins and arteries leading to the failure of circulation. There are two remedies for such a condition: a sympathectomy, which is the cutting of the nerves that control the constricting muscles; and second, a paravertebral block, which is the injection of novocain or some other anesthetic agent into the nerves. Such treatment would relieve the spasm and commence circulation. The plaintiff received neither of the treatments.

The defendant alleged the plaintiff was contributorily negligent in refusing to let the defendant perform the paravertebral block when it became apparently necessary after the operation. Plaintiff, on the other hand, alleged that defendant was negligent in failing to advise the plaintiff of the need for such a paravertebral block. Thus the questions were left to the jury as to whether the paravertebral block had been offered, and, if so, whether it had been refused. The jury returned

16. See Willard v. Whinfield, 2 Kan. App. 53, 43 Pac. 314 (1896); Hoover v. Epler, 52 Pa. 522 (1866); Tillotson v. Delfelder, 40 Wyo. 283, 276 Pac. 935 (1929), where the court said that the lienor was certainly under no obligation to let the cattle starve simply because he had no suitable pasturage left.

17. Willard v. Whinfield and Tillotson v. Delfelder, *supra* note 16.

1. 327 S.W.2d 187 (Mo. 1959).

a verdict for the plaintiff. This was set aside by the trial court, which sustained the defendant's motion for judgment after verdict and motion for new trial. On appeal, *held,* reversed concerning the motion for judgment after verdict and affirmed concerning the motion for the new trial.

Defendant's main contention for having his motion for judgment after verdict sustained was that the plaintiff had not brought forth probative evidence to show that the defendant had not offered the paravertebral block. The plaintiff's testimony, in response to the question whether the defendant had discussed the block with her, was to the effect that she could not remember and had no recollection. The defendant submitted that such evidence had no probative force. The court answered the question by going into an aspect of the case overlooked by both attorneys, i.e., whether the condition of the patient created a further duty on the part of the physician to advise someone else of the need for further treatment.

The court recognized the general rule that the physician is required to use that degree of care which is commonly exercised by the ordinarily skillful and prudent physician or surgeon engaged in similar conditions,[2] and that this duty is also extended to post operational care.[3] Even if the physician's personal attention is no longer necessary, he still has a duty to furnish the patient with instructions.[4] It has been generally accepted, however, that if the doctor advises the patient, and the patient, being an adult and in possession of her faculties, refuses, then the doctor has fulfilled the burden of his duty.[5]

In *Fausette v. Grim,*[6] an obvious exception is stated. There the patient was suffering from post operative insanity and the doctor called her relatives and told them she was ready to go home from the hospital. The patient soon thereafter became violently insane. The court held that the jury might find the physician negligent in failing to inform the relatives of the care the patient needed. *Steele v. Woods* seems to extend the duty of the physician to a further degree than *Fausette v. Grim.* In *Fausette* all parties seemed to agree that the patient was suffering from a type of insanity, and because of the insanity the duty of the doctor was extended to inform the relatives. The principal case seems to go even further in saying that if the doctor, under the surrounding circumstances, could reasonably believe that other factors were weighing on the patient's mind (pain and drugs) so that she could not make a competent evaluation of her problem, then the physician has a duty to "advise the husband or other members of the family who are available and competent to advise with or speak for the patient or take other steps to bring understanding of the need home to the plaintiff."

This extension of the duty of the physician does not seem to place an

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2. Williams v. Chamberlain, 316 S.W.2d 505 (Mo. 1958).
3. Nash v. Royster, 189 N.C. 408, 127 S.E. 356 (1925); Sibert v. Boger, 260 S.W.2d 569 (Mo. 1953); Reed v. Laughlin, 332 Mo. 424, 58 S.W.2d 440 (1933).
4. Vann v. Harden, 187 Va. 555, 47 S.E.2d 314 (1948).
5. 70 C.J.S. *Physicians and Surgeons* § 51c (1948).
6. 193 Mo. App. 585, 186 S.W. 1177 (K.C. Ct. App. 1916).

undue burden upon him. The scope of the professional obligation of the highly skilled members of the medical profession to their patients should include this further effort to advise of the need for medical treatment, when it is reasonable to assume that the patient does not understand the seriousness of her problem.

PAUL JACKSON RICE

MILITARY LAW—MINOR'S ENLISTMENT VOID—COURT-MARTIAL JURISDICTION

United States v. Overton[1]

The statutes provide that male persons not less than seventeen years of age may be enlisted in the Regular Army but that persons under eighteen shall not be enlisted without written parental consent.[2] The statutes also provide that soldiers under eighteen who enlisted without written parental consent shall be discharged upon parental application.[3] When the accused was less than seventeen he enlisted in the Army, without parental consent, by using his older brother's name and school record. While he was still under seventeen, the accused requested that the records be changed to reflect his true name. After reaching seventeen, the accused absented himself without leave. Ten months thereafter, while accused was in confinement awaiting trial for the unauthorized absence, his mother applied for his discharge. Two weeks later and a day after he had been found guilty by a special court-martial of the absence without leave and sentenced to six month's confinement, accused refused to obey an order. On his plea of guilty to a charge of willful disobedience, he was found guilty by a general court-martial and sentenced to further confinement. The conviction of willful disobedience was affirmed by a board of review in the Office of The Judge Advocate General but reversed by the Court of Military Appeals, one judge dissenting, on the ground that accused was not subject to military law. The court held that the original enlistment was absolutely void and that the action of the accused in remaining voluntarily in the Army after reaching seventeen did not effect a constructive enlistment because his willingness to serve was conditional upon the approval of his application for change of the record of his name and because his mother's application for his discharge prevented a constructive enlistment.

The federal civil courts, in habeas corpus proceedings, have been in conflict as to the effect of the enlistment of persons below the minimum statutory age for enlistment with parental consent. Some take the view that these enlistments are not

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1. 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958) (Latimer, J., dissenting).
2. 10 U.S.C. § 3256 (1958). Prior to 1947, the governing statutes were REV. STAT. §§ 1116-1118 (1875), providing that recruits shall be between the ages of 18 and 35, that no person under 21 shall be enlisted without written consent of parents or guardian, and that no minor under the age of 16 shall be enlisted.
3. 10 U.S.C. § 3816 (1958).

void but merely voidable.[4] The weight of authority, however, seems to be that these underage enlistments are void.[5] Prior to 1951 the highest tribunals directly reviewing Army court-martial cases, The Judge Advocate General and the boards of review, consistently treated such enlistments as merely voidable.[6] The Court of Military Appeals decided in 1957 that they were absolutely void,[7] and the present decision adheres to that view.

The authorities have been unanimous in holding that an enlistment without parental consent effected after the individual has reached the minimum statutory age for enlistment with such consent is merely voidable at the option of the parents.[8] Parents, however, are not entitled to avoid the enlistment while the individual is being held for trial or under sentence by court-martial.[9] There is some authority to the contrary,[10] but this has been said to be bad law.[11] The Judge Advocate General and the boards of review have always held that until formal discharge

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4. *In re* Cosenow, 37 Fed. 668 (C.C.E.D. Mich. 1889); *Ex parte* Rock, 171 Fed. 240 (C.C.E.D. Ohio 1909); United States *ex rel.* Lazarus v. Brown, 242 Fed. 983 (E.D. Pa. 1917).

5. Commonwealth v. Harrison, 11 Mass. 63 (1814); *In re* Miller, 114 Fed. 838 (5th Cir. 1902), *cert. denied,* 186 U.S. 486 (1902); Hoskins v. Pell, 239 Fed. 279 (5th Cir. 1917); Barrett v. Looney, 158 F. Supp. 224 (D. Kan. 1957), *affirmed per curiam,* 252 F.2d 588 (10th Cir. 1958).

6. C.M. 338668, Charles H. O'Daniel, 6 B.R. & J.C. 243, 255-256 (1949); C.M. 235143, Jack D. McKinney, 21 B.R. 309, 316 (1943); C.M. 187175, Thomas A. Genuso, 1 B.R. 7, 11-12 (1929); WINTHROP, MILITARY LAW AND PRECEDENTS 551 (2d ed. 1920), and cases cited therein; DIG. OPS. JAG *Enlistment* IA (1912), and cases cited therein in note 2; DIG. OPS. JAG § 359(3) (1912-1940).

7. United States v. Blanton, 7 U.S.C.M.A. 664, 23 C.M.R. 128 (1957).

8. *In re* Morrissey, 137 U.S. 157 (1890); *In re* Lessard, 134 Fed. 305 (C.C.D.N.H. 1905); United States *ex rel.* Laikund v. Williford, 220 Fed. 291 (2d Cir. 1915); Allen v. Wilkinson, 129 F. Supp. 73 (M.D. Pa. 1955); *Ex parte* Dostal, 243 Fed. 664 (N.D. Ohio 1917); *Ex parte* Beaver, 271 Fed. 493 (N.D. Ohio 1921); *Ex parte* Lewkowitz, 163 Fed. 646 (C.C.S.D.N.Y. 1908); *Ex parte* Rush, 246 Fed. 172 (M.D. Ala. 1917); Hoskins v. Dickerson, 239 Fed. 275 (5th Cir. 1917); *Ex parte* Dunakin, 202 Fed. 290 (E.D. Ky. 1913); *In re* Scott, 144 Fed. 79 (9th Cir. 1906); United States v. Reaves, 126 Fed. 127 (5th Cir. 1903); *In re* Kaufman, 41 Fed. 876 (C.C.D. Md. 1890); *In re* Dowd, 90 Fed. 718 (N.D. Cal. 1898); Dillingham v. Booker, 163 Fed. 696 (4th Cir. 1908); *Ex parte* Avery, 235 Fed. 248 (E.D.N.C. 1916); *In re* Zimmerman, 30 Fed. 176 (C.C.N.D. Cal. 1887); *In re* Grimley, 137 U.S. 147 (1890).

9. Barrett v. Looney, *supra* note 5; *Ex parte* Hubbard, 182 Fed. 76 (C.C.D. Mass. 1910); *In re* Miller, *supra* note 5; *Ex parte* Foley, 243 Fed. 470 (W.D. Ky. 1917); *In re* Lessard, United States *ex rel.* Laikund v. Williford, Allen v. Wilkinson, *Ex parte* Dostal, *Ex parte* Beaver, *Ex parte* Lewkowitz, *Ex parte* Rush, Hoskins v. Dickerson, *Ex parte* Dunakin, *In re* Scott, United States v. Reaves, *In re* Kaufman, *In re* Dowd, Dillingham v. Booker, *Ex parte* Avery, *In re* Zimmerman, *supra* note 8; *Ex parte* Rock, *In re* Cosenow, *supra* note 4; WINTHROP, *op. cit. supra* note 6. See also Fratcher, *Review by the Civil Courts of Judgments of Federal Military Tribunals,* 10 OHIO ST. L.J. 271, 280 (1949), and cases cited therein.

10. *Ex parte* Lisk, 145 Fed. 860 (E.D. Va. 1906); *In re* Baker, 23 Fed. 30 (C.C.D.R.I. 1885); *In re* Chapman, 37 Fed. 327 (C.C.N.D. Ga. 1889); *Ex parte* Houghton, 129 Fed. 239 (C.C.D. Me. 1904).

11. WINTHROP, *op. cit. supra* note 6.

a minor is subject to court-martial jurisdiction if he commits an offense.[12] Moreover, it has been held that one who enlists while below the minimum statutory age for enlistment with parental consent but remains in the service after attaining that age, accepting the benefits of military status, effects a constructive enlistment, so that his status is the same as if he had enlisted initially after attaining that age,[13] and the fact that his original enlistment was faulty is not fatal to military jurisdiction over him.[14]

The present decision throws grave doubt upon the continued application of these well-established rules. It appears to permit a person eligible for enlistment to remain in the service, accepting food, lodging, clothing and pay for an extended period, without effecting a constructive enlistment, merely because he has made an application for an unimportant change in the record of his enlistment. It also appears to permit a parent to wait until his son is in confinement for a serious offense and then prevent his punishment for that offense by applying for his discharge.

The 1957 decision of the Court of Military Appeals[15] and the present decision create a class of persons who are actually in uniform, serving as soldiers, but who are legally civilians because their age is less than that shown on the records. In time of war this is likely to be a large class and its existence is seriously disadvantageous both to the military service and to the members of the class themselves. The disadvantage to the service of having men who appear to be soldiers but who, unknown to their superiors, are not punishable for refusal to fight, is obvious. The individuals themselves, especially those who behave well, are also injured. They cannot count service in this status for purposes of retirement and veteran's benefits.[16] They would not be entitled to hospitalization and medical care for service-incurred wounds and disease. They may be liable to repay the pay and allowances which they receive and, probably, to reimburse the government for their food, lodging, clothing and transportation. It may even be that, if captured by the enemy, they are not entitled to the status of prisoners of war, i.e., they may be "civilians." And civilians who conduct hostilities may be shot by their captors.[17]

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12. C.M. 235143, Jack D. McKinney, *supra* note 6, at 316; DIG. OPS. JAG *Enlistment* IA (1912), and cases cited therein.

13. *Ex parte* Hubbard, *supra* note 9; *Ex parte* Dunakin, *In re* Kaufman, Dillingham v. Booker, *supra* note 8; Hoskins v. Pell, *supra* note 5.

14. C.M. 338668, Charles H. O'Daniel, *supra* note 6; Barrett v. Looney, *supra* note 5.

15. United States v. Blanton, *supra* note 7.

16. Op. Comp. Gen., B-142704, 39 DECS. COMP. GEN. — (1960).

17. See 2 OPPENHEIM, INTERNATIONAL LAW § 80 (6th ed. 1944), referring to Art. I of the Hague Convention of 1907.