Recent Cases

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CIVIL PROCEDURE—RESPONDEAT SUPERIOR—EFFECT OF SERVANT'S SETTLEMENT ON MASTER'S LIABILITY—ESTOPPEL

Max v. Spaeth[1]

While driving his employer's truck, Wyatt, an employee of Leota Hauling Company, collided with a car driven by Max, injuring both drivers. Wyatt brought suit against Max, alleging the latter's negligence. Max filed an answer, but did not counterclaim. Instead, Max filed a separate action against Wyatt's employer, seeking to recover upon the theory of respondeat superior, that the employer is secondarily liable for the negligence of his employee. Thereafter, the employee, Wyatt, dismissed his suit with prejudice, upon a stipulation which read:

> All of the matters and things in controversy in the above entitled cause having been adjusted, compromised, and finally settled, it is hereby stipulated that this cause shall be dismissed with prejudice to any future action on account of the matters and things contained and set forth in plaintiff's petition, and the court costs shall be paid by the defendant.[2]

After this dismissal of the action between Wyatt and Max, the employer defended Max's separate action on the basis of the stipulation, claiming that Max was seeking to hold him secondarily liable under respondeat superior, even though Max had not filed a counterclaim in the suit brought by Wyatt and further that by the stipulation for dismissal of Wyatt's suit, Max had released Wyatt from all claims and could not assert the same cause of action against the employer. Summary judgment was entered in favor of the employer and Max appealed. The Missouri Supreme Court affirmed, holding that when Max compromised and settled the servant's case by agreeing, without any qualification, that all the matters in controversy were settled, he released the servant, and that a valid release of a servant from liability for tort operates to release the master.

In determining the applicability of the defense of estoppel, the courts apparently make a distinction as to whether the party, who is primarily liable, actively participated in the settlement. When the term "primarily liable party" is used, it is meant to be the first, chief or principal party responsible or answerable in a series of liable parties. If the one primarily liable has actively participated in the settlement, then the principle of estoppel is held to be applicable. If the primarily liable party has not actively participated in the settlement, then the defense of estoppel is not a valid defense. When the primarily liable party actively partic-

1. 349 S.W.2d 1 (Mo. En Banc 1961).
2. *Id.* at 2.

ipated in the settlement, the courts tend to find that a settlement under these circumstances could reasonably lead the primarily liable party to rely on the belief that the entire controversy was settled. The courts in Missouri have followed this distinction in three different types of factual situations.

The first situation is where the primarily liable party has settled with the third party and the secondarily liable party wants to use the settlement to estop action against it by the third party.

In *Max v. Spaeth*,[3] the servant, the one primarily liable, had actively participated in the dismissal of the prior suit. The court held that Max, the third party, was estopped from asserting his claim against the master.

The servant in *Simpson v. Townsley*[4] paid $10,000 to the third party for a covenant not to sue. In that case, based upon Kansas substantive law, no complaint was filed before the covenant was made. The covenant contained a provision that if the third party should get a judgment against the master, then the master would get a $15,000 credit on the amount of the judgment obtained against him by the third party. The court felt that the provision, "we hereby agree to hold Smith [the servant, the one primarily liable] harmless from any damages resulting from said accident," clearly indicated that the parties did directly intend to relieve the one primarily liable. The right of indemnification in the master would nullify the intent of the covenant not to sue. Here again the party primarily liable actively participated in the settlement of the prior case, and therefore the third party was estopped from asserting his claim against the secondarily liable party.[5]

If the suit is allowed against the master, after a release of the servant, an injustice will occur. If the master is allowed to assert his common law right of indemnification against the servant, the servant in effect pays the claim although the third party could not proceed against him directly. Likewise, if the servant accepted a similar consideration in reliance on his own release from liability, the subsequent recovery by the master against the servant for indemnification would subject the servant to double payment. Therefore, the courts say that the third party who has released the servant cannot recover from the master on respondeat superior. The only alternative would be to deny the master's common law right of indemnification.

The estoppel principle would apply even if there were an express reservation of right to proceed against the master. This result was reached in *Bacon v. United States*,[6] where Bacon released the employee of the United States government. The

3. *Id.* at 1.
4. Simpson v. Townsley, 283 F.2d 743 (10th Cir. 1960).
5. This situation must be distinguished from those cases where the third party executes a settlement with the master for a consideration and then subsequently proceeds against the servant. A minority of the courts say that the master and servant can be considered joint tort-feasors. Therefore, the release of master releases the servant. Wilson v. City of New York, 131 N.Y.S.2d 47 (Sup. Ct. Kings Cty. 1954). Most courts allow the party primarily liable to be sued in a subsequent suit by the third party, although the party secondarily liable has been released. Hamm v. Thompson, 143 Cal. 298, 353 P.2d 73 (1960).
6. Bacon v. United States, 209 F. Supp. 811 (E.D.Mo. 1962).

covenant not to sue contained the statement that "this agreement is not intended as, nor shall it be construed as a release of the United States of America." The court felt that where an action against the employer is based exclusively on the employee's alleged negligence, release of the employee effectively bars a claim against the employer.[7]

The second situation is where the primarily liable party, the insured, turns over the case to an insurance company or is jointly litigating the case with the insurance company, and the insurance company settles with the third party. If such be the case, is the claim or counterclaim of the primarily liable party estopped?

The court held in *Rudloff v. Johnson*[8] that it was not. In this case Rudloff brought suit against Johnson and an answer was filed by the attorneys representing the defendant's insurance carrier. Later, attorneys, other than those who filed the answer, filed a counterclaim seeking damage for Johnson's personal injuries. The lawyer who represented the insurance company entered into a stipulation, similar to the one in *Max v. Spaeth,* on behalf of the defendants. Neither the insured nor the insured's attorney were aware of the dismissal of the main cause of action until it was filed. The court did not allow the stipulation to prevent prosecution of the counterclaim which had been asserted by the insured in the original action. The settlement was effected without the insured's knowledge or consent, and was not thereafter ratified or adopted by the insured. As can be seen from these facts the party primarily liable did not actively participate in the settlement and was therefore not estopped on his counterclaim.

A similar result was reached in *Burnham v. Williams*[9] where the facts indicated that the plaintiff had not seen the release; nor was he told of the settlement between the defendant and the plaintiff's insurance adjuster until after the claim by the defendant had been filed. As a result he was not prevented from thereafter suing.

In *Faught v. Washam,*[10] the insured brought suit against the third party, alleging the latter's negligence. The third party filed an answer and counterclaim, alleging primary negligence. In the reply the plaintiff pleaded a release which an adjuster for the insurance company had received in connection with a settlement payment to the defendant immediately prior to the commencement of the suit. The release had been obtained without the prior knowledge, authorization or consent of the plaintiff. The defendant filed a motion to dismiss the plaintiff's claim on the ground that the pleading of the release had constituted a ratification and

7. The express reservation of the right to proceed against the master must be distinguished from those cases involving joint tort-feasors. A plaintiff may compromise, release or covenant not to sue one of several joint tort-feasors and at the same time reserve his right to sue others of the joint tort-feasors. However, the entering of a judgment approving the compromise operates as complete satisfaction of the causes of action as to all joint tort-feasors; therefore the court is powerless to reserve the right in the plaintiff to prosecute another suit on the same causes of action. Eberle v. Sinclair, Prairie Oil Co., 120 F.2d 746 (10th Cir. 1941).

8. Rudloff v. Johnson, 267 F.2d 708 (8th Cir. 1959).

9. Burnham v. Williams, 198 Mo. App. 18, 194 S.W. 751 (Spr. Ct. App. 1917).

10. Faught v. Washam, 329 S.W.2d 588 (Mo. 1959).

adoption of the settlement. The court found insured was not estopped from asserting the claim since the release was pleaded for the benefit of the insurer, not the plaintiff personally.[11]

In *Keller v. Keklikian*,[12] the primarily liable party was estopped. Keklikian brought an action against Keller in the first suit for damages. Keller turned the petition and summons over to his insurance carrier in accordance with the terms of the policy. A stipulation of dismissal with prejudice was filed by the insurance company without notice or consent from Keller. Keller then brought suit against Keklikian for damages arising out of the same collision. Keklikian defended on the basis of the compulsory counterclaim statute.[13] The question was whether the compulsory counterclaim statute barred the insured, even though he had not participated in and was totally unaware of the settlement by his liability insurer. The court held: "[H]e could not turn over to his insurer the whole management of the subject of settlements and accept the benefits of the insurer's efforts when they are successful, but repudiate the consequences when they affect his cause adversely." The lack of knowledge by the insured of the insurance company's activities in effecting a settlement did not excuse the failure to assert a compulsory counterclaim. The decision seems to indicate that not only must the primarily liable party not participate actively in the settlement, but he must not be a passive party in the litigation.

The third situation is where settlement is made between the immediate parties.

In *England v. Yellow Transit Company*,[14] England brought suit against both servant and master. The defendant master had pleaded a counterclaim for $6,500 for damages to its property, alleging the plaintiff's negligence. A stipulation to dismiss with prejudice was filed, with the defendant master paying the plaintiff $500 and court costs. The counterclaim of the master was not mentioned in the stipulation and the attorney for the master admitted that he never thought of it, and had forgotten that one had been filed. There was an express reservation in the stipulation, leaving open the servant's counterclaim for personal injuries. The plaintiff set up the stipulation as a defense to the master's counterclaim. The court applied the principle that making a settlement estops any immediate party to the settlement from subsequently prosecuting a claim arising out of the same accident. The court felt the circumstances of the settlement could reasonably lead the third party, England, to rely on the belief that the payment and release settled the controversy between the third party and the master.

A similar result was reached in *Eberting v. Skinner*[15] where the facts indi-

11. See also, Graves Truck Line v. Home Oil Co., 181 Kan. 507, 312 P.2d 1079 (1957); Fikes v. Johnson, 220 Ark. 448, 248 S.W.2d 362 (1952); Klotz v. Lee, 36 N.J. Super. 6, 114 A.2d 746 (1955); Foremost Dairies v. Campbell Coal Co., 57 Ga. App. 500, 196 S.E. 297 (1938); U.S.A.C. Transport v. Corley, 202 F.2d 8 (5th Cir. 1953).
12. Keller v. Keklikian, 362 Mo. 919, 244 S.W.2d 1001 (1951).
13. § 509.420, RSMo 1959.
14. England v. Yellow Transit Co., 240 Mo. App. 968, 969, 225 S.W.2d 366, 369 (Spr. Ct. App. 1949).
15. Eberting v. Skinner, 364 S.W.2d 829 (Spr. Mo. App. 1963).

cated that the plaintiff had personally sought and received a Safety Responsibility Law Release from the defendant, in order to prevent his license from expiring. The release states that the defendant has released the plaintiff from all claims and causes of action arising from the above described accident. The court felt that the plaintiff had, for his own benefit, induced the respondent to change her position to her detriment.[16]

As set forth above, when a person becomes involved in a dispute and expects to assert a claim, this claim may be accidentally lost in one of three manners:

1. By failing to assert a compulsory counterclaim in prior suit.
2. By permitting a counterclaim in the same suit to be dismissed with prejudice, based upon a settlement thereof.
3. By actively participating in a settlement with one primarily liable, thereby losing a claim against a party secondarily liable.

DAVID P. ROSS

CORPORATIONS—INTERESTED DIRECTORS DEALING WITH THE CORPORATION

Yax v. Dit-Mco, Inc.[1]

Heller, one of five directors of Dit-Mco, offered to sell about 52,000 shares of his stock in the corporation to six individuals, two of whom were also directors. Heller attached a condition precedent to his offer to the individuals: acceptance by the corporation of his offer to sell it about 14,000 shares at market value. At a meeting of the board of directors, Heller abstained from voting on the resolution to accept his offer to sell the shares to the corporation. The two purchaser-directors and two disinterested directors voted in favor of the resolution.

Yax, a minority shareholder, brought this action to impose a constructive trust on the profits which resulted to the six individual purchasers from the increase in market value of the shares after the sale. He did not seek to have the sale to the corporation set aside, but he alleged that the profits made by the individuals should be held in trust for the corporation because the two purchaser-directors used their positions as directors to bring about the condition precedent attached to Heller's offer to themselves as individuals. Yax claimed that the purchaser-directors had obtained a personal profit from their office as directors.

Affirming the trial court judgment for the individual purchasers, the Supreme Court of Missouri refused to impose a trust in favor of the corporation. The court

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16. See also Mensing v. Sturgeon, 97 N.W.2d 145 (1959); Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951); Wm. H. Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., 270 Wis. 443, 71 N.W.2d 395 (1955); Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949); Tompkins Motor Lines v. Georgia Broilers, Inc., 260 F.2d 830 (5th Cir. 1958).

1. 366 S.W.2d 363 (Mo. 1963).

made a specific finding that the transaction was fair to the corporation, and observed that the two purchaser-directors did not constitute a majority of the board of five which passed the resolution to purchase the shares offered to the corporation. However, the court made no mention of the obvious fact that without counting the two purchaser-directors, neither a quorum of directors nor a majority vote to approve the resolution of purchase would have been available. The supreme court ruled that in the absence of a charter provision to the contrary, a corporation has no interest in offers from one shareholder to another to sell stock of the corporation, apparently holding that the purchaser-directors did not take a corporate opportunity for themselves.

Previous Missouri cases have held that directors may take advantage of opportunities themselves where the corporation is unable to do so for financial reasons[2] or where the opportunity cannot be secured for the corporation.[3] The *Yax* case indicates that Missouri is not moving toward the West Virginia position that before directors can accept an offer which their corporation could not take, they must exert a reasonable effort to impart their information to the other shareholders to give them an equal chance to take the opportunity as individuals.[4]

The court's decision in *Yax* also indicates that Missouri may be moving toward the position of allowing corporations to avoid contracts with interested directors only where the contracts are unfair to the corporation, without considering the issue of whether a disinterested quorum was present and a disinterested majority of directors represented the corporation. Previous Missouri cases have held that where a disinterested quorum and majority represent the corporation in dealings with interested directors, the corporation may avoid the transaction only by showing unfairness to the corporation. But where there is no disinterested quorum and majority, a line of Missouri cases has held that the corporation may avoid transactions with interested directors without regard to fairness to the corporation.

Despite the sometimes inexact wording of early decisions, contracts between interested directors and their corporations have been treated as voidable by the corporation rather than void ab initio, a proposition adopted in *Kitchen et al. v. St. Louis, K. C. & No. Ry.*[5] Quoting language from a decision of the United States Supreme Court,[6] the *Kitchen* case held: "the general doctrine in regard to contracts of this class is not that they are absolutely void, but that they are voidable on the election of the party whose interest has been so represented by the party claiming under it."

The *Kitchen* case demonstrates the effect of a disinterested quorum and majority of directors approving a transaction with interested directors. A railroad corporation was represented by seven disinterested directors (from a board of 12)

2. Hannerty v. Standard Theater Co., 109 Mo. 297, 19 S.W. 82 (1891).
3. Keokuk Northern Line Packet Co. v. Davidson, 95 Mo. 467, 8 S.W. 545 (1888).
4. Young v. Columbia Oil Co., 110 W.Va. 364, 158 S.E. 678 (1931).
5. 69 Mo. 224, 254 (1878).
6. Twin-Lick Oil Co. v. Marbury, 91 U.S. 587 (1875).

when the board approved a second mortgage on the railroad property in favor of a group of persons lending funds to complete the line. Five of the railroad directors were among the group advancing the money. The Missouri supreme court stated that while acts of directors who contract with their corporations would be viewed with jealousy and set aside on slight grounds, the mortgage and surrounding circumstances could not be considered so unfair to the corporation as to make the mortgage voidable. According to Fletcher, this position is in line with "the great weight of authority."[7]

Conversely, where the corporation is not represented by a disinterested quorum and majority of directors when it contracts with a director, Missouri decisions have held that such contracts are voidable by the corporation without considering fairness, simply because of the interests of the contracting directors. Thus, a corporation was allowed to avoid payment of salary to a director when the director's own vote was necessary for the majority approving the resolution to create the salaried position. "If his own vote was essential to give life to the contract of employment and compensation, then the contract cannot be upheld against the corporation."[8] Likewise, salaries paid to a director were recovered by a corporation after a showing that the director's own vote was necessary to make the majority which approved payment of salary.[9] No consideration was given to the fairness of the contract. Another variation illustrating the necessity of an independent quorum and majority in order to keep the corporation from avoiding a transaction was presented when a corporation president credited funds to his own account in excess of his salary. The corporation was allowed to recover the excess because the president's own vote was necessary to make a majority of directors voting to approve a resolution which purported to ratify the president's act. "The attempted ratification brought about by his own vote was of no validity."[10] For the same reason, interested directors seeking specific performance of a contract to sell land to their corporation were refused relief when the corporation showed that the interested directors' votes were necessary to make the majority approving the contract and that the presence of the interested directors was necessary to make the quorum. The Missouri supreme court ruled that since there was no disinterested majority, the interested directors were representing both sides of the contract. Once the absence of a disinterested majority was disclosed, the court announced: "It does not stop to inquire whether the transaction was fair or unfair. It stops the inquiry . . . and sets aside the transaction . . . at the instance of the party for whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case."[11] Another case which applied the requirement for a disinterested quorum and majority of directors arose when one of six directors claimed that salary was due him and challenged the validity of a resolution abolishing his salaried post. That resolu-

7. 3 FLETCHER, PRIVATE CORPORATIONS § 931 (perm. ed. 1947).
8. Bennet v. St. Louis Car Roofing Co., 19 Mo. App. 349, 353 (St. L. Ct. App. 1885).
9. R. T. Davis Mill Co. v. Bennett, 39 Mo. App. 460 (K.C. Ct. App. 1889).
10. Ward v. Davidson, 89 Mo. 445, 454, 1 S.W. 846, 848 (1886).
11. Hill v. Rich Hill Coal Mining Co., 119 Mo. 9, 24, 24 S.W. 223, 226 (1893).

tion was approved by three directors. Plaintiff claimed that the resolution did not carry by a majority because he and one other director voted against the resolution and a third director abstained. The St. Louis Court of Appeals ruled that the interested director was not entitled to vote, and that a majority of the five directors eligible to vote on the matter did approve the resolution.[12]

According to Fletcher,[13] the Missouri position on dealings between interested directors and their corporations is stated in *Frankford Exchange Bank v. McCune.*[14] In that case, the court ruled that where all the directors of a corporation were parties to a contract with their corporation, their own approval of the contract on behalf of the corporation did not bind the corporation because the directors did not deal openly with other disinterested agents of the corporation who had full power to act on behalf of the corporation. "This is undoubtedly true if it merely means that such a contract is voidable as distinguished from being void."[15] The doctrine of the *Frankford* case was approved by the Missouri supreme court in *People's Bank v. Allen.*[16]

In only one instance before the *Yax* case has the Missouri court deviated from the position that transactions between an interested director and his corporation may be set aside without regard to fairness where the corporation is not represented by a disinterested quorum and majority of directors. Missouri allows insolvent corporations to prefer some creditors over others while it is still a going concern. Unlike most other jurisdictions, Missouri allows preferences to director-creditors.[17] In one case the Missouri supreme court took the position that a corporation could prefer its director-creditors even when those preferred creditors were necessary to make the quorum and majority of the board granting the preference, so long as they acted "for the interest of the corporation" and in good faith.[18]

While it should be remembered that the plaintiff in *Yax* did not seek to have the sale of shares to the corporation set aside,[19] the facts and holding might be a

12. Christy v. Laclede-Christy Clay Products Co., 253 S.W. 106 (St. L. Mo. App. 1923).
13. 3 FLETCHER, PRIVATE CORPORATIONS § 937 (perm. ed. 1947).
14. 72 S.W.2d 155 (St. L. Mo. App. 1934).
15. 3 FLETCHER, *op. cit. supra* note 13, at § 937.
16. 344 Mo. 207, 212, 125 S.W.2d 829, 832 (1939).
17. See Annot., 19 A.L.R. 320 (1922).
18. State v. Manhattan Rubber Mfg. Co., 149 Mo. 181, 198, 50 S.W. 321, 325 (1899). *But see* Pitman v. Chicago Land Co., 93 Mo. App. 592, 67 S.W. 946 (K.C. Ct. App. 1902). The Kansas City Court of Appeals ruled that a director should be required to show not only the fairness to the corporation and other shareholders of the preference voted to himself, but also that the preference was obtained without the necessity of his own vote.
19. The supreme court observed that plaintiff testified in a deposition taken April 14, 1961, that he brought the action to secure a court order that the corporation be made purchaser of all the stock or that all the shareholders be given an opportunity to buy the Heller stock on a pro-rata basis. The court also noted that Heller's price to the corporation was $10.50 a share; his price to the individual purchasers was $11 a share. When the sale was made in March, 1961, the stock had a market price of about $11 a share. On May 18, 1961, the stock had a market price of about $17 a share. When this case was argued before the Missouri supreme court in January, 1963, market value was about $6 a share.

departure from the traditional Missouri view of dealings between interested directors and their corporations. If this traditional position were abandoned, the only question to be determined when a corporation sought to avoid a transaction with an interested director would be "Was the transaction fair to the corporation?"

ALLEN F. BRAUNINGER

CORPORATIONS—THE BOOKS OF A CORPORATION—SHAREHOLDER'S RIGHT OF INSPECTION

State ex rel. Jones v. Ralston Purina Co.[1]

Relator Jones had accumulated a substantial number of shares of the Ralston Purina Company, a Missouri corporation. By virtue of his shareholder's status he sought to inspect the books and records of the corporation, more specifically "The Preliminary," "The Profit Analysis" and "The Balance Sheet." Briefly these documents are comprised as follows. "The Preliminary" is a compilation of current profit and loss figures, computed monthly, as well as cumulatively for the year leading up to the annual report. In addition it contains estimates of future profit and loss, the figures being computed for each plant, facility and division of the corporation. The document is prepared from some materials which are reflected in the books of account of the corporation and others which are not. "The Profit Analysis" contains monthly figures on costs, production and expenses and indicates whether a given month yielded a profit or a loss. As with "The Preliminary" some of its sources and figures are reflected in the books of account, others are not. "The Balance Sheet" differs from the regular company balance sheet, being more detailed and including items not in the regular balance sheet. It is prepared monthly and reflects preliminary profit figures obtained by the use of "The Preliminary" and "The Profit Analysis" and is basically a compilation of these two documents in balance sheet form.[2] It is important to note that all three of these documents are unaudited, "subject to check, verification, adjustment and analysis, and are frequently changed from month to month." These were considered very confidential by the company and although relator Jones had inspected these documents while employed by the Purina organization,[3] after his retirement he was denied access to them three times and these occasions were the basis of his petition for mandamus to compel the company to allow him access for inspection purposes and seeking statutory penalties of $750, $250 for each refusal. The peti-

1. 358 S.W.2d 772 (Mo. 1962) *reversing* 343 S.W.2d 631 (St. L. Mo. App. 1961).
2. For a more detailed description see 358 S.W.2d at 774.
3. There is testimony to the effect that relator was not on the access list to inspect these documents when employed by the company, but saw copies sent to his superior. 343 S.W.2d at 635.

tion was brought under § 351.215, RSMo 1959[4] which pertains to shareholders' rights of inspection.

The trial court found that the three mentioned documents were not within the meaning of the term "books" as found in § 351.215 and denied the writ.

The St. Louis Court of Appeals reversed this decision and ordered the writ of mandamus to issue. For purposes of interpretation the court divided subsection 1 of § 351.215 into three subdivisions; first, the "books and records" all corporations were required to keep; second, those which it must keep at its registered office or principal place of business in this state; and third, that the "books" of the corporation should be available for the inspection of the stockholders.[5] The court then relied heavily on a case previously decided by that court, *State ex rel. Watkins v. Cassel*,[6] in reaching its result and construed "books" to include "all books, records, papers, contracts or other instruments which will enable the stockholder better to protect his interest and perform his duties as a stockholder. . . ."[7] In this respect the court found the statutory right and the common law right to be substantially coextensive.

The court of appeals was in turn reversed by the Supreme Court of Missouri. The supreme court agreed with the court of appeals in the three part subdivision of subsection 1 of § 351.215. It then found that the "books" the shareholder was entitled to inspect under subdivision three would be those the corporation was required to keep under the first two subdivisions. However it reversed the decision, holding that the paper writings here in dispute were not "books" in the statutory sense and that relator was restricted to his statutory right since that was the theory on which he had proceeded in the trial court.[8]

There were several approaches the court could have taken in arriving at the decision. One possible approach is that the statute is a declaration of the common

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4. § 351.215, RSMo 1959:
(1) Each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its shareholders and board of directors; and shall keep at its registered office or principal place of business in this state books in which shall be recorded the number of shares subscribed, the names of the owners of the shares, the numbers owned by them respectively, the amount of shares paid, and by whom, the transfer of said shares with the date of transfer, the amount of its assets and liabilities, and the names and places of residence of its officers, which books shall be kept open for the inspection of all persons interested. Each shareholder may at all proper times have access to the books of the company, to examine the same, and under such regulations as may be prescribed by the by-laws.
(2) If any officer of a corporation having charge of the books of the corporation shall, upon the demand of a shareholder, refuse or neglect to exhibit and submit them to examination, he shall, for each offense, forfeit the sum of two hundred and fifty dollars.
5. 343 S.W.2d at 638.
6. 294 S.W.2d 647 (St. L. Mo. App. 1956).
7. 343 S.W.2d at 640.
8. Although proper time, place and purpose are to be considered in determining access under the common law right, they are not a basis for the holding here and so are beyond the scope of this note.

law right with respect to what may be inspected, and therefore would provide access to the same documents.[9]

Concerning the scope of the common law right, Fletcher states that the "right of the stockholder at common law extends to all the books, papers and records generally, including correspondence between the controlling officers relating to the internal affairs of the corporation."[10] Some courts have carried this common law right to the extent of providing access to the physical property of the corporation, but this seems to be an older view.[11] The scope of the common law right could vary in accordance to the application of a balancing test. If the inspection by the shareholder would be detrimental to the corporation and the other shareholders, the court could refuse to order the inspection.[12] A New Jersey case even required the shareholder's inspection to be conducted under a "bona fide desire to safeguard the interests of all the stockholders" and a probability of that result.[13]

In a case heavily relied on by relator, the Wisconsin court was more favorable to the shareholder under both his common law and statutory right and held that either one would extend to "all papers, contracts, minute books, or other instruments from which he can derive any information which will enable him to better protect his interests. . . ."[14] the Missouri Supreme Court was unwilling to accept what it called the Wisconsin "liberal" view in construing the Missouri statute[15] and emphasized the point that the wording of the Missouri statute differed from those considered in the cases which the relator offered as authority for his position.

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9. *Cf.* Durnin v. Allentown Federal Savings and Loan Ass'n, 218 F. Supp. 716 (E.D. Pa. 1963); 5 FLETCHER, PRIVATE CORPORATIONS § 2220 (perm. ed. rev. repl. 1952). Closely related to this is an approach that the statute is a codification of the common law right. This is the approach taken by the following cases though they are primarily concerned with proper purpose for inspection: Hagy Premier Mfg. Corp., 404 Pa. 330, 172 A.2d 283 (1962); Goldman v. Trans-United Industries, Inc., 404 Pa. 288, 171 A.2d 788 (1961).

10. 5 FLETCHER, *op. cit. supra* note 9, § 2239. Though rejected as authority for construing the Missouri statute, Otis-Hidden Co. v. Scheirich, 187 Ky. 423, 219 S.W. 191 (1920), extended the common law right to "the documents, contracts and papers of the corporation." State *ex rel.* Johnson v. St. Louis Transit Co., 124 Mo. App. 111, 100 S.W. 1126 (St. L. Ct. App. 1907) contains a statement of the right as expressed by a Missouri court of appeals.

11. See Hobbs v. Tom Reed Gold Mining Co., 164 Cal. 497, 129 Pac. 781 (1913); Otis-Hidden Co. v. Scheirich, *supra* note 10; 2 HORNSTEIN, CORPORATION LAW AND PRACTICE 125, 129 (1959).

12. See State v. Loft, Inc., 34 Del. 538, 156 Atl. 170 (1931); State *ex rel.* Cochran v. Penn-Beaver Oil Co., 34 Del. 81, 143 Atl. 257 (1926); 5 FLETCHER, *op. cit. supra* note 9, § 2249; 3 OLECK, MODERN CORPORATION LAW 607 (1959); *but see* 5 FLETCHER, *op. cit. supra* note 9, § 2218. Bernert v. Multnomah Lumber & Box Co., 119 Ore. 44, 247 Pac. 155 (1926), states that the same test would apply to issuing a writ of mandamus under the statutory right.

13. Fulle v. White Metal Mfg. Co., 13 N. J. Misc. 591, 180 Atl. 231 (1935).

14. State *ex rel.* McClure v. Malleable Iron Range Co., 177 Wis. 582, 187 N.W. 646 (1922). See State v. Loft Inc., 34 Del. 538, 156 Atl. 170 (1931); 3 OLECK, *op. cit. supra* note 12, § 1556 (1959).

15. 358 S.W.2d at 777.

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It does seem from the foregoing investigation of the common law right, that had the Missouri Supreme Court chosen to treat our statute as a declaration or codification of the common law right, it could have affirmed the court of appeals in holding these documents to be within its purview. But whether the court would have found that relator's interest would outweigh that of the corporation in keeping these documents withdrawn from inspection by all but a limited number of high company officers is another question which the court did not decide. So, under this approach it is possible the court would have reached the same result.[16]

Another approach very closely related to the declaration and codification approaches just discussed would be the use of the common law as a guide in determining the scope of the statutory coverage with respect to what a shareholder may inspect.[17]

An Illinois case states that the right under the Illinois statute, which includes the terms "books and records of account" as found in the first subdivision of subsection 1 of § 351.215,[18] was "apparently identical" with the common law right. It then construed the common law right to be that "every stockholder of a corporation has a right by reason of his interest therein to inspect and examine its books and papers. . . ."[19] Another Illinois case states that although statutes of this sort vary, they are generally a confirmation or enlargement of the common law right.[20] A Virginia case involving a statute requiring corporations to keep "correct and complete books and records of account" found it was not materially different from the common law right, but was "merely in affirmance of the common law" which included "books, records and papers."[21]

Using this approach the Missouri Supreme Court could have extended the statutory right to the documents under consideration here, but whether it would have would be subject to the same limitations discussed in regard to the declaration approach.

A Pennsylvania case involving statutory terms "books or records of account" drew a distinction between "commercial records and books of account," i.e., as used in the accounting sense, and the more inclusive statutory terms.[22] It will be

16. For further restrictions on inspection under the common law right see note 8 *supra.*

17. See State *ex rel.* Grismer, 3 Wash.2d 417, 101 P.2d 308 (1940); 5 FLETCHER, *op. cit. supra* note 9, §2215.1. *But see* Daurelle v. Traders Federal Savings & Loan Ass'n, 143 W.Va. 674, 104 S.E.2d 320 (1958).

18. *Supra* note 4.

19. Wise v. Byllesby & Co., 285 Ill. App. 40, 1 N.E.2d 536 (1936).

20. Babcock v. Harsch, 310 Ill. 413, 141 N.E. 701 (1923). An Illinois appellate court has construed the Illinois statutory right to give the shareholder "a right to know what its management is doing, what its practices and policies are, what expenditures are being made, what his stock is worth, the reasons for a dividend policy that depresses the value of his stock and decreases its marketability, whether the salaries of those who are in control—and their income tax brackets—may be the reason for the small dividends, who the other stockholders are and where." Winger v. Richards-Wilcox Mfg. Co., 33 Ill. App.2d 115, 123, 178 N.E.2d 659, 664 (1961).

21. Bank of Giles v. Mason, 199 Va. 176, 98 S.E.2d 905 (1957).

22. Ruby v. Penn Fibre Board Corp., 326 Pa. 582, 192 Atl. 914 (1937).

noted that these statutory terms are substantially the same as those found in the Missouri statute describing the documents a corporation has to keep and hence the "books" a shareholder has a statutory right to inspect. A later Pennsylvania case extended the shareholder's statutory right to "records, books and documents."[23] A 1960 Pennsylvania case[24] established that the statutory inspection right was satisfied by access to the "share register, records of proceedings of the shareholders and directors and books or records of account in five respects, with the offer (by the corporation) to consider additional requests, if any, after such inspection."[25]

The Missouri Supreme Court, as noted, restricted the relator to his statutory right since that was the theory of his case in the trial court. Although it is not clear whether the relator would have been granted access to these documents even under the common law right,[26] there is some authority for allowing him its benefits even though he proceeded under the statutory right.[27]

The principal case did to some extent indicate what were and what were not "books." By dictum the court indicated many items which would be "books." In the St. Louis office the "private ledger,[28] general ledger,[29] accounts receivable ledgers, stock ledgers, cash receipts books, the prorate ledger[30] and a series of private ledgers for each of the subsidiary companies and plants would be within that term. Also included were sets of books at each separate branch which "paralleled" the principal books kept in St. Louis. Then construing the statute in the light of the documents here in dispute, the court held that "under the evi-

23. Kahn v. American Cone & Pretzel Co., 365 Pa. 161, 74 A.2d 160 (1950).

24. Donna v. Abbotts Dairies, Inc., 399 Pa. 497, 161 A.2d 13 (1960), *affirming* 20 Pa. D. & C.2d 463 (1960).

25. The five categories of books and records were those pertaining to: "a. Compensation to officers and counsel; b. payment of taxes; c. Acquisitions; d. purchases or sales by the company of any of its stock; e. Disbursements by the company." For an interesting "rule of reason" approach see Self v. Langley Mills, 123 S.C. 179, 115 S.E. 754 (1923).

26. *Supra* note 8.

27. See Dogget v. North American Life Ins. Co., 396 Ill. 354, 71 N.E.2d 690 (1947); Foster v. White, 86 Ala. 467, 2 So. 88 (1888).

28. The private ledger in the "St. Louis office contains the principal property accounts and represents reserves, contains the surplus accounts, the controlling accounts for the capital stock records, the debenture records, providing for income taxes and certain types of special receivables." 358 S.W.2d at 775.

29.

> The general ledger contains the current additions or retirements to the property accounts; it contains the control accounts for the cash accounts which control the cash receipts and disbursement books; it contains certain inventory accounts (such as prepaid insurance and debenture expense); also control accounts for the regular receivables; various accrual accounts —wages, interest, etc; it also contains the profit and loss accounts, that is the control accounts for certain sales and items of that nature, miscellaneous income such as from investments; the general ledger also contains a control account for each of the fifty-five or sixty branch or subsidiary operations. 358 S.W.2d at 775.

30. *Ibid.*, the prorate ledger records administrative and selling expenses and cash disbursements for them.

dence, the trial court was warranted in regarding them [as] . . . not comprehended within the meaning of 'books' as that term is used in the statute."[31] Conversely the court of appeals was not warranted in its finding that these were books. The court then set forth a negative standard precluding "analyses or tenative studies[32] prepared purely for the information of the management, and being in the nature of confidential[33] inter-office communications" from the scope of the statute.[34]

This holding seems based on the same philosophy expressed in a Pennsylvania case that shareholders can't be given a "carte blanche" to go rummaging through the corporation's records[35] as this would put an undue burden on the corporation and could hinder its operations to the injury of other shareholders.

ROBERT M. LINDHOLM

DOMESTIC RELATIONS—CONDITIONED CUSTODY DECREES

Levitsky v. Levitsky[1]

In this Maryland case the Plaintiff (father) and the Defendant (mother) had been divorced one year prior to this action. Incorporated within the original custody decree, *inter alia,* was the agreement that:

> [I]f either of the parties shall have knowledge of any illness, accident or other matter seriously affecting the well-being of any of the children, he or she, as the case may be, shall promptly notify the other and, except in emergencies, shall not take any action without consulting the other.[2]

Both parties had been members of the Roman Catholic Church, but prior to the divorce the mother joined the Jehovah's Witnesses and continued her membership therein. The parties' only son, seven year old Nicholas, became ill, was hospitalized and was in need of a blood transfusion. The mother, who was awarded custody of all three of the children, refused to grant authorization for the administration of the transfusion because it was not in accordance with her present religious beliefs. When the boy's condition became critical, the mother signed a document absolving the hospital from any responsibility in the almost certain event that the child

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31. 358 S.W.2d at 778.
32. See Boderick v. Adamson, 159 Misc. 634, 288 N.Y.S. 688 (1936); Perkins v. Cummings, 66 Vt. 485, 29 Atl. 675 (1894).
33. But see Nationwide Corp. v. Northwestern National Life Ins. Co., 251 Minn. 255, 87 N.W.2d 671 (1958).
34. 358 S.W.2d at 778.
35. Donna v. Abbotts Dairies, Inc., 399 Pa. 497, 161 A.2d 13 (1960). *But see* Dines v. Harris, 88 Colo. 22, 291 Pac. 1024 (1930) which asserts that these "statutes should be liberally construed in favor of the shareholders"; Cooper v. Nutt, 254 Ill. App. 445 (1929).

1. 231 Md. 388, 190 A.2d 621 (1963).
2. *Id.* at 622.

would die. The doctors, however, were able to contact the plaintiff, who gave authorization for the transfusion. The transfusion was administered and the boy recovered.

The plaintiff brought this action seeking the modification of the custody decree and the transfer of the children's custody from the mother to himself. The trial court held that the best interests of the children would be served by allowing custody to remain with the mother. The trial judge sought to minimize the risk of harm to the children by requiring the mother to give immediate written notice to the court in the event any of the children were admitted to the hospital for any purpose.

On appeal, the Court of Appeals remanded the case for the inclusion of adequate safeguards by:

> [A]mending the decree in such a manner as to provide that the mother's consent to the use of blood transfusions or plasma for any of the children shall not be required and specifying conditions upon which any licensed physician or surgeon in this State may administer blood or plasma when, in his judgment, the administration of blood or plasma shall be necessary to protect the life or health of any of these children.[3]

At common law the view as to the right to custody of children gave the father an almost unlimited right, paying little regard to the natural right of the mother or the interests or welfare of the child.[4] Furthermore, even the authorization to modify a decree is considered to be statutory and not according to the common law.[5]

The fitness of the parent, attention and care that the parent is willing to devote to the children, opportunities for uninterrupted schooling, religious education to be provided, and the like, are factors to be considered in determining custody of the children.[6] This court sets forth, as many jurisdictions provide by statute, that the paramount concern in deciding who should be awarded the custody of the children is to determine with which person the children's best interests would be served.[7]

It is generally held today, although not at common law,[8] that the custody decree may be modified when: (1) such modifications would serve the best in-

3. *Id.* at 627.
4. Rex v. Greenhill, 4 Ad. & El. 624, 111 Eng. Rep. 922 (1836); *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936 (Mo. En Banc 1920); Wells v. Wells, 117 S.W.2d 700 (St. L. Mo. App. 1938).
5. *In re* Krauthoff, 191 Mo. App. 149, 177 S.W. 1112 (K.C. Ct. App. 1915); Nichols v. Nichols, 239 Iowa 1173, 34 N.W.2d 187 (1948); Liggett v. Liggett, 165 Kan. 527, 195 P.2d 577 (1948); Breton v. Breton, 332 Mass. 364, 125 N.E.2d 121 (1955); Matter of De Saulles, 101 Misc. 447, 167 N.Y.S. 445 (Surr. Ct. N.Y. County Ct. 1917); *Ex parte* Quinn, 192 Ore. 254, 233 P.2d 767 (1951); 2 VERNIER, AMERICAN FAMILY LAWS, § 95 (1932).
6. People v. Cachelin, 18 App. Div.2d 1057, 238 N.Y.S.2d 869 (1963).
7. Levitsky v. Levitsky, *supra* note 1, at 624; *Accord,* Commonwealth v. Bell, 189 A.2d 908 (Pa. Super. 1963); Commonwealth v. Derr, 148 Pa. Super. 511, 25 A.2d 769 (1942).
8. *Ex parte* Quinn, *supra* note 5.

terests of the children; and (2) there has been a change in the circumstances that did not exist at the time of the issuance of the original decree.[9] Courts have been reluctant, however, to modify the decree when there has been no "material" change in the circumstances.[10] It is to be noted that a material change in the circumstances alone will not necessarily warrant a modification and none will be made unless required for the children's welfare.[11]

It is not subject to question that the courts have the authority and power to set forth conditions that are such as might reasonably be deemed necessary and appropriate to insure or enforce compliance with a judgment or other order of the court.[12] Most child custody decrees contain directions in regard to visitation rights and support payments, but the courts have much less frequently required certain conditions, express as such, to be fulfilled by the one who is awarded custody.

There is no doubt that the court has the inherent power to enforce its orders by holding the violator in contempt,[13] or by relieving the father of the obligation to contribute to the support until there is compliance with the order,[14] or by other methods.[15] This author is of the opinion that such methods of enforcement are inadequate for the situation presented in the instant case. It is conceivable, if not probable, in view of the mother's declaration in court,[16] that the mother would refuse medical treatment in the event of future illnesses although she would be charged with contempt. It is not believed that a contempt charge, with possible punishment therefor, would sway her religious convictions when the probability of death to her child, coupled with the possibility of punishment for such neglect upon the violation of the duty placed upon her by the statute[17] did not result in any deviation from this belief.

The Maryland Statutes provide that the father and mother are jointly and severally charged with the "support, care, nurture, welfare and education" of their

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9. *In re Wines'* Adoption, 241 Mo. App. 628, 239 S.W.2d 101 (Spr. Ct. App. 1951); Smith v. Smith, 90 Ariz. 190, 367 P.2d 230 (1961); Poitevent v. Poitevent, 152 So.2d 256 (La. App. 1963); Pitts v. Pitts, 181 Md. 182, 29 A.2d 300 (1942).

10. Ernst v. Ernst, 214 Cal. App.2d 386, 29 Cal. Rptr. 478 (1963); Pangle v. Pangle, 134 Md. 166, 106 Atl. 337 (1919).

11. Hensley v. Lake, 274 S.W.2d 493 (Spr. Mo. App. 1955); Connolly v. Connolly, 214 Cal. App.2d 461, 29 Cal. Rptr. 616 (1963); Mumma v. Aguirre, 364 S.W.2d 220 (Tex. 1963).

12. Saltonstall v. Saltonstall, 148 Cal. App.2d 109, 306 P.2d 492 (1957); DeVille v. DeVille, 87 Ohio App. 220, 94 N.E.2d 474 (1949).

13. White v. Held, 269 S.W.2d 125 (St. L. Mo. App. 1954); Newman v. Newman, 145 Kan. 1, 63 P.2d 927 (1937); Benson v. Benson, 121 Mont. 230, 193 P.2d 827 (1948).

14. White v. White, 71 Cal. App.2d 390, 163 P.2d 89 (1945).

15. State *ex rel.* Couplin v. Hostetter, 344 Mo. 770, 129 S.W.2d 1 (En Banc 1939) (enforcement of condition only after payment of back alimony); Williams v. Williams, 103 Cal. App.2d 276, 229 P.2d 830 (1951) (reduction of amount of alimony); Budlong v. Budlong, 51 R. I. 113, 152 Atl. 256 (1930) (enjoining mother from interfering with father's custody of the children).

16. Levitsky v. Levitsky, *supra* note 1, at 623.

17. MD. ANN. CODE art. 72A, § 1 (1957); Palmer v. State, 223 Md. 341, 164 A.2d 467 (1960).

minor children.[18] While the statute does not mention "medical care" in specific terms, this court has held that medical care is embraced within the scope of the broad language used.[19] By a close observation of the interpretation of the statute, and a comparison of it with the condition included within the decree, one readily ascertains that compliance with the condition will be no more than compliance with the statute. As a practical matter the court is only instructing the mother to comply with the already existing laws.

The expressed goal of his court was to take the necessary precautions to eliminate the recurrence of a similar situation wherein the children's well-being would be endangered due to the want of medical treatment.[20] *Quaere,* in view of the mother's declaration in court that should the situation arise again she would deny her children a blood transfusion, even if the result of her action would result in swift and sudden death, whether the inclusion of this condition within this decree will accomplish the desired goal.[21]

Although the present case does not determine whether the plaintiff is a fit and proper person for the custody of the children, it is this writer's opinion that the conditioned custody decree is frightfully inadequate and that the custody should be transferred from the mother to one who will insure that the children's best interests, which includes medical care, will be served.[22]

In Missouri, as in the majority of jurisdictions, the basic principle underlying all decisions where the custody and care of a child is involved is the welfare of the child.[23] Furthermore, all else being equal, the law prefers the custody to be with the mother.[24] Our legislature has further provided the courts with a statute which declares that the failure to furnish medical aid to one's children is a misdemeanor.[25]

Apparently recognizing the fact that the inclusion of a condition within a decree would be futile in some situations, Missouri courts, even though having the benefit of the misdemeanor action as did the court in the instant case, have wisely modified decrees to transfer custody in instances where there was a far less serious threat to the well-being of the children[26] than is presented in the instant case.

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18. MD. ANN. CODE art. 72A, § 1 (1957).
19. Craig v. State, 220 Md. 590, 155 A.2d 684 (1959).
20. Levitsky v. Levitsky, *supra* note 3.
21. *Id.* at 623.
22. Parks v. Cook, 355 Mo. 1236, 180 S.W.2d 64 (1944); Johnson v. Fish, 197 S.W.2d 990 (Spr. Mo. App. 1946).
23. *In re* Barger, 365 S.W.2d 89 (St. L. Mo. App. 1963); Le Claire v. Le Claire, 352 S.W.2d 379 (St. L. Mo. App. 1961).
24. R——— v. E———, 364 S.W.2d 821 (Spr. Mo. App. 1963).
25. § 559.350, RSMo 1959: ". . . or if any man or woman shall, without good cause, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child . . . then such person shall be guilty of a misdemeanor."
26. Garvey v. Garvey, 233 S.W.2d 48 (K.C. Mo. App. 1950) (attempt to remove child from one parent's influence); Krueger v. Krueger, 107 S.W.2d 967 (Spr. Mo. App. 1937) (concealment of child from other parent was a ground for

Although no Missouri case was found that presented such a serious situation as the instant case there is no question but what our courts are authorized to use the conditioned decree. The language in the Missouri statutes is sufficiently broad to include this type of enforcement.[27] Further, the conditioned decree has been used to enforce various rights in the decree.[28]

It is the opinion of this author that if a similar case were to come before a Missouri court it would decree the obvious and adequate remedy by transferring the custody of the children to one who is capable and willing to serve the children's best interests.

DAVID P. MACOUBRIE

DOMESTIC RELATIONS—ALIMONY PROVISIONS—DEFINITENESS

Taylor v. Taylor[1]

Plaintiff brought a suit to enforce the alimony provisions of a divorce decree. The decree provided, *inter alia,* that the divorced husband was to pay plaintiff 25% of his net income for the preceding year and send plaintiff each year a verified copy of his federal income tax return. The court, noting the precise problem had not been decided in Missouri, declared the provision void "because it lacked the certainty, definiteness and exactness necessary to a good judgment that can be enforced in a manner provided by law."[2] Further, the divorce decree must satisfy the common-law judgment requirements as to form and amount, viz., "the judgment must be sufficiently certain in its terms to be susceptible of

modification); Weniger v. Weniger, 32 S.W.2d 773 (St. L. Mo. App. 1930) (showing of interference with operation of original decree established grounds for modification).

27. § 452.070, RSMo 1959: ". . . or enforce the performance of the judgment . . . , or by such other lawful ways and means as is according to the practice of the court."

28. Pope v. Pope, 267 S.W.2d 340 (St. L. Mo. App. 1954) (decree modified to prevent father from creating religious conflict in child's mind and fostering religious barriers between child and mother); Link v. Link, 262 S.W.2d 318 (St. L. Mo. App. 1953) (father required to pay all arrearages due under support provision of decree as a condition to the maintenance of his motion to modify custody); Wilson v. Wilson, 260 S.W.2d 770 (St. L. Mo. App. 1953) (express provision that child not be removed from state); Hensley v. Hensley, 233 S.W.2d 42 (K.C. Mo. App. 1950) (general statement regarding court's power to insure carrying out of its orders regarding custody); Drew v. Drew, 186 S.W.2d 858 (K.C. Mo. App. 1945) (requiring nonresident grandparents to whom custody was awarded to execute a formal "submission to jurisdiction" with regard to future modifications of the decree); Olson v. Olson, 184 S.W.2d 768 (St. L. Mo. App. 1945) (prevent removal from state); Wells v. Wells, *supra* note 5 (visitation rights); Shine v. Shine, 189 S.W. 403 (K.C. Mo. App. 1916) (custody to mother on condition that she live where the child may conveniently attend his father's church, be reared in the Catholic Church, and see his father regularly at proper times and occasions).

1. 367 S.W.2d 58 (St. L. Mo. App. 1963).
2. *Id.* at 65.

enforcement and must be in such form that the clerk is able to issue an execution upon it which an officer will be able to execute."[3] The court concluded the provision providing for a percentage of income was incapable of enforcement in this manner.[4]

The opinion cited broad language in several Missouri cases[5] which provides that a judgment, or order or decree, for alimony or maintenance in a divorce suit is treated the same and is subject to the same incidents as other judgments rendered in actions at law. Particularly pertinent, the court felt, were *Bishop v. Bishop*,[6] a Missouri case, and *Ives v. Ives*,[7] an Alabama case. In *Bishop*, the court was called upon to decide whether a property settlement stipulation was intended to be incorporated in the divorce decree (thus allowing the court to enter an amended judgment nunc pro tunc). One provision in the stipulation provided defendant should pay plaintiff one-third of his total gross income not to exceed one-hundred dollars per week. The court doubted this provision could be enforced by execution, and held that it and several others were more indicative of a contractual obligation than a judgment. In *Ives v. Ives*, the Alabama court refused to enforce a percentage-of-income provision in a Florida divorce decree until the Florida court had ascertained the amount and removed the contingency.[8]

The reasoning the court advanced for declaring the percentage-of-income provision void is somewhat tenuous. Similar provisions have been upheld in several other states,[9] and this decision gives Missouri law a unique look. The widespread use of such provisions generally,[10] and in separation agreements in Mis-

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3. *Id.* at 64.
4. *Id.* at 65.
5. Pflanz v. Pflanz, 237 Mo. App. 660, 177 S.W.2d 631 (St. L. Ct. App. 1944), appeal of an order overruling a motion of defendant husband to quash and stay an execution theretofore issued on a divorce decree; Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920), a proceeding to revive alimony judgment scire facias; Mayes v. Mayes, 342 Mo. 401, 116 S.W.2d 1 (1938), involving an execution on an alimony decree; Dreyer v. Dickman *et al.*, 131 Mo. App. 660, 111 S.W. 616 (St. L. Ct. App. 1908), alimony decree cannot be enforced after statutory ten-year period barring actions on judgments has run.
6. 151 S.W.2d 553 (St. L. Mo. App. 1941).
7. 247 Ala. 689, 26 So.2d 92 (1940).
8. This was the only case involving alimony from a foreign jurisdiction cited by the court. The Alabama courts have upheld their own decrees which have been just as uncertain, *e.g.*, Adams v. Adams, 231 Ala. 298, 164 So. 749 (1935), where a wife was permitted to audit the books of husband's partnership to determine the amount of profits to which she was entitled under a provision.
9. Sturtevant v. Sturtevant, 146 Conn. 644, 153 A.2d 828 (1959), a provision for payment of one-sixth of net income for previous year; Hafstad v. Hafstad, 20 Misc.2d 979, 191 N.Y.S.2d 88 (1959), the sum payable to be increased or decreased in direct proportion to the increase or decrease in the earnings after taxes; Prescott v. Prescott, 52 Wash.2d 769, 329 P.2d 200 (1959), providing for $600 a month payments plus 25% of net income in excess of $24,000 per annum; Berry v. Berry, 50 Wash.2d 194, 310 P.2d 223 (1957), providing for a payment of 12% of net income in excess of $5,000.
10. 79 A.L.R.2d 611. Annot: Construction and Effect of Provision in Separation Agreements that wife is to have portion of "income," "total income," and the like. This annotation is not limited to cases involving separation agreements, but to cases involving decrees and separation agreements incorporated in the decrees. See particularly sections 1 and 2 for this.

souri,[11] is evidence of the desirability and utility of the provision as a device to solve the complexities inherent in providing alimony. Such a unique view in Missouri thus is not desirable if any other result can be reached.

Section 452.070, RSMo 1959, requires "the court make such *order* touching alimony and maintenance of the wife . . . as, from the circumstances of the parties and the nature of the case, shall be reasonable."[12] (Emphasis added.) The section further provides that the "judgment or order" may be enforced by an execution for the collection thereof or by such "other lawful ways and means as is according to the practice of the court." This statute ostensibly gives the court wide descretion in making the order and enforcing it. There is no requirement of a fixed sum. The use of the term "order" would seem to retain the shrouds of ecclesiastical court and equity proceedings,[13] and an order or decree, as set out in similar divorce and alimony statutes, is and has been held to be conceptually different from a traditional judgment at law.[14] Furthermore, the order is not limited to enforcement by execution and the test for validity should not be confined to this single manner of enforcement. In short, statutory alimony may be in the nature of a judgment with fixed sums or it may be in the nature of an order or decree enforceable by other lawful ways and means.[15]

Prior Missouri cases, declaring that the order is subject to the same incidents as traditional judgments, were not concerned with the problem of validity.[16] Upon close analysis, they stated that a decree for a fixed sum will be treated as a judgment at law for remedial purposes. They found no requirement that a valid

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11. See Goodwin v. Goodwin, 277 S.W.2d 850 (K.C. Mo. App. 1955); Bishop v. Bishop, *supra* note 6; Beckett, *Separation Agreements,* 21 Mo. L. Rev. 280 (1956); Peterson and Eckhardt, Missouri Legal Forms, § 581, 6 Mo. Prac. (1959).

12. This statute is virtually unchanged since § 4505, RSMo 1889, and was denominated § 1519, RSMo 1939, when the Taylor decree was issued. Also, see § 452.080, RSMo 1959.

13. See Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920) which cites Chapman v. Chapman, 269 Mo. 663, 668, 192 S.W. 448, 449 (1917) which points out that the statute must be read with the English background in mind. *Accord*: Joseph Harris & Sons, Inc., v. Van Loan, 23 N.J. 466, 129 A.2d 571 (1957).

14. Some courts have said because of the statute's use of the term "order" and its further provisions as to enforcement, the decree awarding alimony does partake of the nature of the ordinary judgment, but an ordinary judgment does not order defendant to pay anything as it merely adjudicates the amount owing, whereas the award of alimony goes further and constitutes a direct command to defendant to pay the sum therein. See: Long v. Stratton, 50 Ariz. 427, 72 P.2d 939 (1937); Miller v. Superior Courts, 9 Cal.2d 733, 72 P.2d 868 (1937); Condy v. Condy, 328 Ill. App. 8, 65 N.E.2d 219 (1946); Bogert v. Watts, 32 N.Y.S.2d 750 (1942); Franklin v. Franklin, 176 Misc. 612, 28 N.Y.S.2d 195 (1941); Peters v. Peters, 115 Ohio App. 443, 183 N.E.2d 431 (1962); Commons *et al.* v. Bragg, 183 Okla. 122, 80 P.2d 287 (1938). The Illinois courts and the New York courts have declared that the decree is sui generis (see Condy case and Bogert case).

15. Other jurisdictions have allowed contempt proceedings to enforce such a decree (see note 14). In Missouri, at least one case has declared the amount in the decree a debt of record and this would bar contempt proceedings to enforce such a debt on constitutional grounds. See Nelson v. Nelson, *supra* note 13.

16. See cases *supra* note 5.

decree or order must be of the nature of a traditional judgment in regard to form and amount.

Luedde v. Luedde,[17] a Missouri case, announced a broader test than the instant case. Both parties, subsequent to the decree, moved to have it corrected nunc pro tunc and include a stipulation. The stipulation stated that sums be paid only "so long as defendant is a member of the United States Army with the rank of Major or above and thereafter *plaintiff and defendant shall agree on a sum or amount for such purposes or in event of their failure to agree thereon, such sum or amount shall be determined by this court*."[18] Plaintiff, in effect, contended that if the italicized portions were included, the decree would be indefinite, uncertain, conditional and, therefore, void.[19] The court held that there was nothing indefinite or uncertain about the provision because it provided for definite events as well as a definite method for determining defendant's obligation to pay.[20] Upon separation from the United State Army, defendant's obligation would not meet the standard of the instant case, but that narrow standard was not applied. On the other hand, the husband in the instant case did have a definite method of determining his obligation to pay requiring only grocery store arithmetic.

An example of the attitude of foreign courts to this type provision under similar modern alimony statutes is found in *Condy v. Condy*,[21] an Illinois case. There a provision in a divorce decree directing the divorced husband to pay the divorced wife as alimony one-half of his salary earned and received as a teacher or employee of the City of Chicago, so long as he was so employed, was held not so indefinite and uncertain as to be unenforceable. Defendant asserted that the amount to be paid must be specified so that at any given time the clerk could compute the amount due from the decree and issue an execution, as in the case of any other judgment or decree for money. The court however concluded, "the fact that the clerk cannot at any given time compute the amount due from the decree and enter judgment is not a proper test as to whether a decree for alimony is reasonably certain in its terms."[22] The court applied a test similar to the one found in the *Luedde* case.

Although a large number of jurisdictions have not considered the question, courts doing so have generally upheld this kind of provision. Arguments to the effect that the amount is contingent upon future earnings, salary, or income, that this uncertainty is inconsistent with modern statutes, or that it is an illegal assignment of future wages, have not impressed the courts.[23]

The provision in the instant case was not contested as being unjust or unreasonable. Similar use of income tax returns prompted one judge to remark

17. 240 Mo. App. 69, 211 S.W.2d 513 (St. L. Ct. App. 1948), followed in State *ex rel.* Whatley v. Mueller, 288 S.W.2d 405 (St. L. Mo. App. 1956).
18. 211 S.W.2d 513, 518 (St. L. Mo. App. 1948).
19. *Ibid.*
20. *Ibid.*
21. 328 Ill. App. 8, 65 N.E.2d 219 (1946). Applicable statutes: ILL. REV. STAT. ch. 40, § 19, ch. 22 § 42 (1961).
22. 65 N.E.2d 219, 222 (Ill. 1946).
23. See note 10, *supra.*

that a provision based on federal income tax returns is a convenient and uniform method for determining the exact amount of one's net income from year to year and is an assurance of the correctness of such computation.[24]

Finally, the ruling that since the provision was unenforceable it must be void, was not necessary under authority cited by the court. In *Goldstein v. Goldstein*,[25] a Missouri case, the court modified a provision, clearly unenforceable because of uncertainty, substituting instead a provision for a fixed sum. The Missouri statute[26] allows for alteration from time to time as may be necessary. The harsh step denying even a modification compounded the first scrivener's error, if it must be called that.

Until the issue is reconsidered, which this writer heartily recommends, the only safe device to provide for a percentage-of-income payment is a contractual agreement. The *Bishop* case recognized the validity of such a provision in a contract.[27]

JACK LEE WHITACRE

LABOR LAW—THE COLLECTIVE BARGAINING AGREEMENT AND NLRB PRE-EMPTION

A recent United States Supreme Court case involved a suit brought against the Evening News Ass'n., a publisher engaged in interstate commerce, by an employee, Smith, in his own behalf and in behalf of forty-nine other similarly situated employees, members of the Newspaper Guild of Detroit,[1] for damages arising out of a breach of the no-discrimination clause[2] of the collective bargaining agreement between the Guild and the respondent-employer.

Petitioner, Smith, alleged that a strike was being conducted by members of a union, other than the Guild, who were in the employ of the respondent. During the strike, respondent refused to allow Smith to report for work although he was willing and able. Notwithstanding, respondent allowed non-union employees to report for work and did pay them their full wages.

Respondent's motion to dismiss for lack of jurisdiction over the subject matter was sustained by the Wayne County Circuit Court. The Michigan Supreme Court affirmed,[3] relying primarily on *San Diego Bldg. Trades Council v. Garmon*,[4] and the United States Supreme Court granted certiorari.[5]

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24. Dillon v. Dillon, 34 Wash.2d 12, 21, 207 P.2d 752, 756 (1949).
25. 237 Mo. App. 214, 165 S.W.2d 876 (K.C. Ct. App. 1942).
26. § 452.070, RSMo 1959.
27. See material note 11, *supra*. Some of the drafting problems arise from the use of terms; see annotation, note 10, *supra*.

1. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).
2. *Id.* at 196. "There shall be no discrimination against any employee because of his membership or activity in the Guild."
3. *Smith v. Evening News Ass'n*, 362 Mich. 350, 106 N.W.2d 785 (1961).
4. 359 U.S. 236 (1959).
5. 369 U.S. 827 (1962).

The question presented to the Court was whether a state court could take jurisdiction over a common law breach of contract action alleging facts which, if found to be true, would constitute an unfair labor practice under the provisions of § 8(a) of the Labor Management Relations Act.[6] This question presented what, at first sight, appeared to be a head-on conflict between the primary jurisdiction of the National Labor Relations Board to prevent unfair labor practices and the jurisdiction of the courts under § 301 of the Labor Act to enforce collective bargaining agreements.[7] The decision of the Michigan Supreme Court was reversed, it being held that the state court was *not* precluded from taking jurisdiction to decide the controversy on its merits, notwithstanding the fact that "the alleged conduct of the employer, not only arguably, but concededly, . . . [was] an unfair labor practice within the jurisdiction of the National Labor Relations Board."[8]

The Court presents no reasoned support for its holding, and on its face the decision appears to strike a crippling blow at *Garmon* and the pre-emption doctrine.[9] However, it will be seen after an investigation of these decisions underlying pre-emption and of those decisions supporting the jurisdiction of the courts under § 301, that the *Smith* case can be reconciled with *Garmon*.

The pre-emption doctrine finds its basis in the National Labor Relations Act,[10] wherein Congress empowered the NLRB exclusively to prevent any person from engaging in any unfair labor practice affecting commerce.[11] The first of the pre-emption cases was *Bethlehem Steel Co. v. New York State Labor Relations Board*.[12]

In *Bethlehem* certain foremen, having been refused certification by the national board as a collective bargaining unit, sought certification from the state labor board. The question of jurisdiction was presented in a challenge to the validity of the state labor act which purported to regulate that same area which was

6. Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 49 Stat. 452 (1947), 29 U.S.C. § 158(a)(3) (1958): "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization."

7. § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

8. Smith v. Evening News Ass'n, *supra* note 1, at 197.

9. *Ibid.* The Court rejected both the doctrine and *Garmon* "here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board."

10. 49 Stat. 449 (1935).

11. § 10(a), 49 Stat. 453 (1935), 29 U.S.C. § 160(a) (1958): "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive,* and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise" (Emphasis added).

12. 330 U.S. 767 (1947).

held to be occupied by Congress.[13] The Court reasoned that if both laws were upheld, two administrative bodies would be allowed to assert discretionary control over the same area. The result could be conflicting determinations. "[A]ction by one necessarily denies the discretion of the other."[14] The Court felt that the assertion of control over this area by the federal board left no room for the states.

Prompted by the *Bethlehem* decision, Congress, in the 1947 amendments to the Act,[15] changed the wording of § 10(a) and added a proviso allowing cession of jurisdiction to the state courts by the Board in certain instances.[16] The Court subsequently pointed out that the legislative history of the 1947 amendments shows that Congress was well aware of the fact that the 1935 Act had pre-empted the field insofar as commerce within the meaning of the act was concerned.[17]

In 1953 came the classic expression of the doctrine of pre-emption in *Garner v. Teamsters Union*.[18] The Supreme Court of Pennsylvania reversed the lower equity court, which had granted petitioner an injunction prohibiting picketing by the respondent union, holding that such conduct was prohibited by § 8(a)(3) and § 8(b)(2) of the Taft-Hartley Act and that the state court was thereby pre-empted from considering the merits of the controversy.[19] The Supreme Court granted certiorari.[20] Speaking through Mr. Justice Jackson, the Court affirmed.

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.[21]

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13. Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945); NLRB v. Fainblatt, 306 U.S. 601 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
14. Bethlehem Steel Co. v. New York State Labor Relations Board, *supra* note 12, at 775-76.
15. *Supra* note 6.
16. § 10(a) 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958): "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, that the Board is empowered by agreement with any agency of any State or territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this sub-chapter or has received a construction inconsistent therewith." Compare with statute quoted note 11 *supra*.
17. Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Board, 340 U.S. 383, 397-98 (1950).
18. 346 U.S. 485 (1953).
19. 373 Pa. 19, 22-23, 94 A.2d 893, 896 (1953).
20. 345 U.S. 991 (1953).
21. Garner v. Teamsters Union, *supra* note 18, at 490.

Petitioner argued, however, that the Board's function is to enforce and protect only public rights and that it is left to the state courts to enforce and protect a private right. But the Court answered that "the conflict lies in remedies, not rights."[22]

In *Guss v. Utah Labor Relations Board*[23] came determination of the question of whether Congress, by vesting in the Labor Board jurisdiction over labor relations matters affecting interstate commerce, had completely displaced state agencies where the Board had declined to exercise its jurisdiction but had not ceded jurisdiction as provided for in the proviso to § 10(a) of the Act. Speaking through Chief Justice Warren, the Court held that the state agency was preempted notwithstanding the National Board's refusal and the resulting creation of a "vast no-man's-land, subject to regulation by no agency or court."[24] The state agency could take jurisdiction *only* by the proviso to § 10(a).[25]

Decided along with *Guss* were *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*[26] and *San Diego Bldg. Trades Council v. Garmon.*[27] In the *Fairlawn* case the Court held that failure by the NLRB to comply with the terms of the proviso to § 10(a) excludes state courts the same as it excludes the state labor board as held in *Guss*. Further, it is for the NLRB "in the first instance"[28] to determine how consistent state law must be with federal policy to warrant the cession of jurisdiction to the state agency under § 10(a). *Garmon* is distinguished from both *Guss* and *Fairlawn* by the fact that, in addition to seeking injunctive relief, respondent sought damages. *Garmon* was remanded to the state court for determination in the light of *United Construction Workers v. Laburnum Construction Corp.*[29] which, respondent argued, was controlling in this instance.

On remand,[30] the California court set aside the injunction in accordance with the decisions in *Guss* and *Fairlawn*. The court decided that it had jurisdiction to award damages and held that the activities of the union constituted a tort based

22. *Id.* at 498.
23. 353 U.S. 1 (1956). The union filed an unfair labor practices charge with the National Board. On July 15, 1954, the Board issued its revised jurisdictional standards, 34 L.R.R.M. 75, and thereafter refused to issue a complaint. The union thereupon turned to the state labor board which took jurisdiction and concluded the action on the merits. Its decision was upheld by the Utah Supreme Court on a writ of review. 5 Utah2d 68, 296 P.2d 733 (1956).
24. *Id.*, at 10. Congress subsequently placed this "no-man's land" within the jurisdiction of the state or territorial agency or court. Labor-Mangement Reporting & Disclosure Act (Landrum-Griffin Act) § 701(a)(2), 73 Stat. 542 (1959), 29 U.S.C. 164 (1958).
25. Guss v. Utah Labor Relations Board, *supra* note 23, at 9. *Accord,* Amalgamated Ass'n of Employees v. Wisconsin Employment Relations Board, 340 U.S. 383, 397-98 (1951).
26. 353 U.S. 20 (1956).
27. 353 U.S. 26 (1956).
28. Amalgamated Meat Cutters v. Fairlawn Meats, Inc., *supra* note 26, at 24.
29. 347 U.S. 656 (1954). In *Laburnum* the Court affirmed an award of damages under state tort law for violent conduct. The facts did constitute an unfair labor practice; however, there was a compelling state interest that sustained the jurisdiction of the courts.
30. 49 Cal.2d 595, 320 P.2d 473 (1958).

on an unfair labor practice under *state law*. Certiorari was granted,[31] and *Garmon* came to the Court a second time.[32] The issue presented was whether the state court was precluded by the Labor Act from granting damages arising out of a peaceful union activity which it could not enjoin. Mr. Justice Frankfurter speaking for the majority set out the problem involved in the question of pre-emption and the guidelines by which the Court should attempt a solution.

> We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. . . .[33]

With this in mind the Court held that when activities are arguably subject to the protection of § 7 of the Act, or constitute an unfair labor practice under § 8, the courts must yield to the primary jurisdiction of the NLRB. The Court did not stop with this; it proceeded to elaborate:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.[34]

The Court reiterated what it had said in *Garner*.[35] To allow two lawmaking sources to govern would cause conflict notwithstanding the absence of conflict with federal policy by a state court award of damages or injunction in a particular situation.[36]

While *Garmon*, which was to become the landmark case in pre-emption, was going through the state courts a second time, the case which was to become the landmark in promoting the enforcement of collective bargaining agreements under § 301 of the Labor Act was being argued before and decided by the Supreme Court.[37] It was in *Textile Workers of America v. Lincoln Mills*, over the vigorous dissent of Mr. Justice Frankfurter, that the Court read substantive content into § 301.

Section 301 of the Labor Management Relations Act is entitled "Suits by and against labor organizations—Venue, amount, and citizenship."[38] Subsection (a) thereof provides that "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting com-

31. 357 U.S. 925 (1958).
32. 359 U.S. 236 (1959).
33. *Id.* at 242. See also Weber v. Anheuser Busch, Inc., 348 U.S. 468 (1955).
34. 359 U.S. 236, 244-45 (1959).
35. Garner v. Teamsters Union, *supra* note 18.
36. San Diego Bldg. Trades Council v. Garmon, *supra* note 34, at 247.
37. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
38. Labor Management Relations Act, *supra* note 7.

merce . . . may be brought in any federal district court without respect to the amount in controversy or without regard to the citizenship of the parties."[39] For the purposes herein subsection (b) provides that "any such labor organization may sue or be sued as an entity and in behalf of the employees it represents in the courts of the United States."[40] Predicated upon this section is the jurisdiction of the federal courts, concurrent with existing jurisdiction of the state courts, to enforce collective bargaining agreements between employers and labor organizations in industries affecting commerce as defined in the Act.[41]

In the *Lincoln Mills* case,[42] after an examination of the Senate Report and the House Report on provisions which were the substantial equivalent of the present § 301, the Court stated that Congress intended collective bargaining agreements should be binding on both parties and held that they are enforceable in the federal courts under § 301.[43] The Court further concluded "that the substantive law to apply in suits under § 301 is federal law, which the courts must fashion from the policy of our national labor laws."[44] A third issue determined by the Court was that jurisdiction to compel arbitration of grievance disputes was not withdrawn from the federal courts by the Norris-LaGuardia Act.[45]

Lincoln Mills raised the question whether the conferring of jurisdiction upon the federal courts by § 301 to enforce collective bargaining contracts deprives the state court of its jurisdiction both at law and in equity to enforce collective bargaining contracts. The Court held in *Charles Dowd Box Co. v. Courtney*[46] that it did not. Petitioner in the *Dowd Box* case argued that to allow the state courts to assert jurisdiction would be to defeat the rationale of *Lincoln Mills, i.e.,* the formulation of a federal common law in this area of labor management relations. In support of this argument petitioner drew an analogy to the *Garner* decision,[47] which was an early case in the fashioning of the pre-emption doctrine of *Garmon.* The Court answered that "the legislative history of the enactment nowhere suggests that, contrary to the clear import of the statutory language, Congress intended in enacting § 301(a) to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal."[48] Further, "Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices."[49]

39. § 301(a), 61 Stat. 156 (1947).
40. § 301(b), 61 Stat. 156 (1947).
41. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).
42. *Ibid.*
43. A summary of the legislative history of § 301 can be found in the appendix to the dissenting opinion of Mr. Justice Frankfurter in Textile Workers v. Lincoln Mills, *supra* note 41, at 485.
44. Textile Workers v. Lincoln Mills, *supra* note 41, at 456.
45. Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958).
46. 368 U.S. 502 (1962).
47. Garner v. Teamsters Union, 346 U.S. 485 (1953).
48. *Supra* note 46, at 507.
49. *Id.* at 513.

In *Local 174, Teamsters v. Lucas Flour Co.*[50] the respondent-employer brought suit against the petitioner-union for damages arising out of a strike called allegedly in violation of a contract clause providing that differences in interpretation of the agreement be submitted to arbitration and that during the arbitration there be no work stoppage.[51] Four issues were presented for determination.[52] However, interest lies primarily in a footnote to the Court's brief determination that the state court, in which this action arose, properly took jurisdiction under § 301 of the Act, citing its decision in *Dowd Box*.[53]

In the footnote the Court speaks of the pre-emptive doctrine of *Garmon* as being not relevant "since this was a suit for violation of a collective bargaining contract within the purview of § 301(a)."[54]

> It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the NLRB to remedy unfair labor practices, as such.[55]

The Court clearly anticipated what was subsequently to arise in *Smith v. Evening News Ass'n.*[56]

Approximately six months before the *Smith* decision was handed down, the Court decided *Atkinson v. Sinclair Refining Co.*[57] *Atkinson* presents a situation similar to that found in *Lucas Flour.* The employer sought to enjoin the union from work stoppages in violation of the collective bargaining agreement providing for arbitration of grievances and including therein a no-strike provision. The employer also sought damages arising out of past work stoppages in violation of the agreement. The Court held that the District Court was acting within its jurisdiction when it took this suit under § 301 of the Act. The Court again relegated to a footnote its comment on pre-emption.

> The union also argues that the preemptive doctrine of cases such as *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, is applicable and prevents the courts from asserting jurisdiction. Since this is a § 301 suit, that doctrine is inapplicable. *Local 174 v. Lucas Flour Co.,* 369 U.S. 95, 101 n.9.[58]

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50. 369 U.S. 95 (1962).
51. *Id.* at 96-97.
52. The issues presented were (1) whether the judgment below was of the state's highest court; (2) whether § 301 deprived the state courts of jurisdiction; (3) whether the state court was free to decide this controversy within its local law; and if not, (4) whether federal law requires a result different from that reached by the state court.
53. *Supra* note 50.
54. *Ibid.*
55. *Id.* at 101.
56. 371 U.S. 195 (1962).
57. 370 U.S. 238 (1962).
58. *Id.* at 245. In both *Lucas Flour* and *Atkinson* the Supreme Court dealt with the problem of pre-emption summarily but the state court in Lucas Flour Co. v. Local 174, Teamsters, 57 Wash.2d 95, 356 P.2d 1 (1960), and the United States District Court in Sinclair Refining Co. v. Atkinson 187 F.Supp. 225 (N.D. Ind. 1960), dealt with the problem at length.

It is, then, the intent of Congress that collective bargaining agreements be enforceable in the courts, both federal and state.[59] A uniform construction of national policy should result due to the requirement that federal law govern.[60]

But, it is also the intent of Congress that the NLRB be empowered to prevent unfair labor practices.[61] The underlying intent was to facilitate a uniform application of the substantive rules of the Labor Act. The doctrine of pre-emption gives effect to this intent by excluding all other agencies, both state and federal, from this area. However, "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds."[62] It is well recognized that the states have been allowed to take jurisdiction where the conduct involved constituted an unfair labor practice, and in addition thereto, was marked by violence and imminent threats to the public welfare.[63]

It seems, then, that the jurisdiction of the NLRB and of the courts will not be determined by "the label affixed to the cause of action."[64] As the Court said in *Garmon*, "our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered."[65] This would apply equally whether the conduct be described in tort or in contract. On the one hand national policy will be weighed against the compelling state interest; on the other hand national policy with its object the prevention of unfair labor practices will be weighed against national policy with its object the enforcement of the collective bargaining agreement.

The decision of the Court in *Smith* appears to fit this pattern. While it was held that the state courts were not pre-empted by the NLRB, it was also held that:

> [T]he authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301. . . . If as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise.[66]

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59. See cases cited in note 41, *supra.*
60. Textile Workers v. Lincoln Mills, *supra* note 41.
61. Labor Management Relations Act, § 10(a) 61 Stat. 146 (1947).
62. Weber v. Anheuser Busch, Inc., 348 U.S. 468, 480 (1954).
63. International Union, UAW v. Russell, 356 U.S. 634 (1958); International Ass'n. of Machinists v. Gonzales, 356 U.S. 617 (1958); United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954).
64. Local 100, United Assn. of Journeymen v. Borden, 373 U.S. 690, 698 (1963).
65. San Diego Bldg. Trades Council v. Garmon, *supra* note 34, at 246.
66. Smith v. Evening News Ass'n., *supra* note 1, at 196. The Court did not determine whether the individual had standing to sue under § 301. In note 9, at 201 the Court expressly rejects any different view: "Respondent does not argue here and we need not consider the question of Federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts." The Court did discuss the jurisdiction of the federal courts over a suit brought by a union to vindicate individual employee rights arising from

The view of the NLRB, made known to the court in an *amicus curiae* brief, was to the effect that to oust the court of jurisdiction in this case "would not only fail to promote, but would actually obstruct, the purposes of the Labor-Management Relations Act."[67] This, viewed in connection with the fact that petitioner would be without a remedy should the court be pre-empted,[68] was compelling reason for the court to take jurisdiction.

It appears, then, that determination of that area of overlap which will be allowed to the courts and of that area to remain with the Board is to "be translated into concreteness by the process of litigating elucidation."[69]

LARRY H. PELOFSKY

TORTS—PUBLIC SWIMMING POOL—CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

Boll v. Spring Lake Park, Inc.[1]

Plaintiff, twenty-one years of age, entered the defendant's recreation area, Spring Lake Park, paying an admission price of sixty cents. After playing tennis, the young man decided to go swimming. He had not been to this pool previously that year, or perhaps ever before, though the evidence was not clear on the latter point.[2] The pool was oval in shape and 200 feet long. The sides were of cement, but the bottom was "natural earth" with three or four inches of sand on top. A rope was stretched across one portion of the pool, roughly one fourth of the total length, separating it from the rest. Within this area, at the end of the pool, was a diving board. The depth of the water in front of the board was nine to ten feet. Plaintiff walked to a spot beside the pool ten to fifteen feet from the board. He could not see the bottom. The water was "like a muddy lake," "at least as dark as coffee."[3] He testified that he looked for depth markings, but saw none. He threw an inner tube into the water two or three feet from the edge of the pool

a collective bargaining contract. This has, however, resulted in varying interpretations of what the Court did determine in *Smith*. See also, General Drivers Union v. Riss & Co., 372 U.S. 517 (1963); Alexander v. Pacific Maritime Ass'n., 314 F.2d 690 (9th Cir. 1963); International Union, UAW v. Textron, Inc., 312 F.2d 688 (6th Cir. 1963); Burris v. Teamsters Union, 216 F.Supp. 38 (W.D. N.C. 1963); Local 641, Amalgamated Butcher Workmen v. Capitol Packing Co., 32 F.R.D. 4 (D.Colo. 1963).

67. Smith v. Evening News Ass'n, *supra* note 1, at 198, n.6.

68. Prior to filing in the state court petitioner had allowed the six-month period of limitations for bringing a grievance to the Board to expire. § 10(a) 61 Stat. 146 (1947).

69. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

1. 358 S.W.2d 859 (Mo. 1962).
2. *Id.* at 862.
3. A photograph showed that even when the pool was empty of swimmers the water was muddy.

and then dived "straight down"—into three feet of water. Plaintiff suffered a broken neck and was permanently paralyzed from his shoulders down. Defendant appealed from a judgment of seventy-five thousand dollars contending that the plaintiff was contributorily negligent as a matter of law. *Held*, affirmed.

In its opinion, the Supreme Court of Missouri gives a full summary of the reciprocal rights and duties of both the proprietor and patron of a public recreation area, and more specifically of a public bathing area. The plaintiff in this case had paid an admission price and was accordingly an invitee or business visitor.[4] Although the defendant was not held to be an insurer,[5] it was held to the standard of reasonable care in furnishing and maintaining its facilities for the purposes for which they were apparently designed and to which they were adapted.[6] What constitutes the exercise of reasonable care varies according to the circumstances,[7] but as far as the maintenance of a diving pool is concerned, the proprietor must provide a pool of sufficient depth to make diving safe, or else he must give warning.[8] This is especially true if a dangerous condition is hidden.[9] A patron paying an admission price has the right to expect that the proprietor has prepared a safe place for the use for which he was invited,[10] and need not make an inspection of the premises to make sure of their safety.[11] However, the patron does have a duty of using ordinary care: first, to avoid dangers once they are known or appreciated; and secondly, to observe dangerous conditions which a prudent person exercising ordinary care under the same circumstances would discover.[12] It is on the basis of this twofold duty of reasonable care that the principal case is decided.

In the present set of facts, the plaintiff knew that it was dangerous to dive into three feet of water. However, he did not know that the water into which he dived was only three feet deep. Therefore he did not know of or appreciate the

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4. RESTATEMENT, TORTS § 332 (1934); PROSSER, TORTS § 78, at 453 (2d ed. 1955).

5. Perkins v. Byrnes, 364 Mo. 849, 269 S.W.2d 52 (1954); Vukas v. Quivira, Inc., 166 Kan. 439, 201 P.2d 685 (1949); 52 AM. JUR. *Theaters, Shows, Exhibitions, and Public Resorts* § 47 (1944).

6. Hughes v. St. Louis Nat. League Baseball Club, Inc., 359 Mo. 993, 224 S.W.2d 989 (En Banc 1949); Vukas v. Quivira, Inc., *supra* note 5; Waddel's Adm'r v. Brashear, 257 Ky. 390, 78 S.W.2d 31 (1935); Blanchette v. Union St. Ry. Co., 248 Mass. 407, 143 N.E. 310 (1924); Lake Brady Co. v. Krutel, 123 Ohio St. 570, 176 N.E. 226 (1931). Additional cases are cited in Boll v. Spring Lake Park, Inc., *supra* note 1, at 862. See Annot., 48 A.L.R.2d 104 (1956).

7. Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W.2d 1025 (1928).

8 Waddel's Adm'r v. Brashear, 257 Ky. 290, at 392, 78 S.W.2d 31, at 32 (1935).

9. *Ibid.*, see Perkins v. Byrnes, *supra* note 5.

10. Waddel's Adm'r v. Brashear, *supra* note 6; Johnson v. Hot Springs Land & Improvement Co., 76 Ore. 333, 148 Pac. 1137 (1915).

11. Waddel's Adm'r v. Brashear, *supra* note 6; Gates v. Gautier, 29 Cal. App.2d 524, 85 P.2d 141 (1938); Louisville Water Co. v. Bowers, 251 Ky. 71, 64 S.W.2d 444 (1933).

12. Waddel's Adm'r v. Brashear, *supra* note 6; RESTATEMENT, TORTS § 466 (1934) lists two main types of contributory negligence and these correspond substantially with violations of the two duties enumerated by the court (see comments *c* and *g*); PROSSER, TORTS § 78, at 459 (2d ed. 1955).

dangerous condition. The court narrowed the issue to whether the plaintiff was contributorily negligent as a matter of law in the second way, in not discovering the dangerous condition, the shallowness of the muddy water.[13] The court felt that a patron could reasonably believe that the entire roped-off area which contained the diving board was sufficiently deep for diving. And the plaintiff was entitled to rely to a certain extent on the assumption that the defendant would not invite him to use a dangerous pool. On the other hand, the court believed that there was sufficient evidence for the jury to have found the plaintiff contributorily negligent, but that the evidence was not such that this was the only conclusion reasonable men could draw. Thus the question of contributory negligence was for the jury, and the trial court properly refused to rule that the plaintiff was contributorily negligent as a matter of law.

The court distinguished the facts of the present case from those of earlier decisions of the Missouri courts in which recovery was barred because of contributory negligence found as a matter of law. These cases are not limited to situations involving public swimming pools or invitees. In all of them, however, it was determined that the victim had violated his duty in one of the two ways described earlier, either by subjecting himself to a known hazard, or by failing to use ordinary care to discover the hazard.[14] As examples to illustrate clear breaches of this duty in a swimming pool context, the court cites four cases from foreign jurisdictions.[15]

In *Johnson v. Hot Springs Land & Improvement Co.*,[16] according to the Missouri Supreme Court, the "plaintiff voluntarily exposed himself to the risk of injury from a known dangerous condition."[17] The plaintiff had been told by an attendant that the water was shallow and he waited for the pool to fill. Later, before diving in, he could hardly have failed to see his companion standing in only three and a half feet of water. In addition, the plaintiff tried to make a long shallow dive from the board, but slipped or lost his balance, and went straight in. The Oregon court found that he had "knowledge of the existing conditions and a realization of the hazard."[18]

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13. Other decisions in which the question of the clearness of the water has been noted by the court are Ferguson v. Marrow, 210 F.2d 520, 522 (8th Cir. 1954); Vukas v. Quivira, 166 Kan. 439, 444, 201 P.2d 685, 689 (1949); Louisville Water Co. v. Bowers, 251 Ky. 71, 74, 64 S.W.2d 444, 446 (1933).

14. McFarland v. Grau, 305 S.W.2d 91 (St. L. Mo. App. 1957); Turner v. City of Moberly, 224 Mo. App. 683, 26 S.W.2d 997 (K.C. Ct. App. 1930); McGee v. Wabash R. Co., 214 Mo. 530, 114 S.W. 33 (1908); Van Alst v. Kansas City, 239 Mo. App. 346, 186 S.W.2d 762 (1945).

15. In the present case the court cited or referred to decisions from twelve jurisdictions. In the 1954 Missouri Supreme Court decision, Perkins v. Byrnes, *supra* note 5, reversing a directed verdict for the defendant on the basis of contributory negligence found as a matter of law, cases from thirteen jurisdictions were included in the opinion. Perkins v. Byrnes dealt with a drowning at a public bathing beach.

16. 76 Ore. 333, 148 Pac. 1137 (1915).

17. Boll v. Spring Lake Park, Inc., *supra* note 1, at 864.

18. Johnson v. Hot Springs Land & Improvement Co., *supra* note 14, at 340, 148 Pac. at 1140.

A second violation of the patron's duty, subjecting oneself to danger "where a casual observation on the part of the plaintiff would have revealed the dangerous condition"[19] is exemplified in *Ryan v. Unity, Inc.*,[20] *Day v. Trion Co.*,[21] and *Stungis v. Wavecrest Realty Co.*[22] In *Ryan*, the doorman of one hotel dived into the pool of another hotel at five o'clock in the morning. It was dark and the pool contained only two feet of water. He failed "to give the slightest heed to existing conditions at that particular time" or "to perceive that which would be obvious to him upon the ordinary use of his own senses."[23] On the testimony of the only eyewitness in the *Day* case, plaintiff came to the edge of the partially empty pool, stood for a few minutes, and then dived in. The court stated that "by the exercise of very slight care the decedent could have avoided the injury."[24] In *Stungis*, plaintiff made a deep sailor dive into relatively shallow water from a platform not designed for diving. His wife was standing on one side of the platform in full view. He had walked over eighty feet through the water to get to the platform and should have been aware of the water's depth. The plaintiff failed "to use all of the senses with which nature had endowed him," and "to exercise his faculties for his own protection."[25]

As to the present status of the law, it can be said that the court recognizes two situations in which a plaintiff will be barred as a matter of law from recovery for injuries received while patronizing a public bathing establishment. If the plaintiff knew or appreciated the dangerous condition and nevertheless subjected himself to it, or if the plaintiff failed to observe a dangerous condition which a prudent person should have observed under the same circumstances, he will be held contributorily negligent as a matter of law.

Although it has been contended that the present Supreme Court of Missouri would be reluctant to find contributory negligence as a matter of law in the case of a minor,[26] the St. Louis Court of Appeals did so find rather recently in *McFarland v. Grau*,[27] one of the cases of which the Missouri Supreme Court said, "We do not disagree. . . ."[28] In any event, there is no reason to doubt that had the *Boll* case involved one of the two situations described above, the court would have found contributory negligence as a matter of law on the part of the adult plaintiff.

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19. Boll v. Spring Lake Park, Inc., *supra* note 1, at 864.
20. 55 So.2d 117 (Fla. 1951).
21. 56 Ga. App. 1, 192 S.E. 88 (1937).
22. 124 Neb. 769, 248 N.W. 78 (1933).
23. Ryan v. Unity, Inc., *supra* note 19, at 118.
24. Day v. Trion Co., *supra* note 20, at 4, 192 S.E. at 90.
25. Stungis v. Wavecrest Realty Co., *supra* note 21, at 776, 248 N.W. at 80.
26. Starnes, *Contributory Negligence of a Minor as a Matter of Law in Missouri*, 1959 WASH. U. L. Q. 281, at 293 (1959).
27. 305 S.W.2d 91 (St. L. Mo. App. 1957).
28. Boll v. Spring Lake Park, *supra* note 1, at 863.

ZONING—VALIDITY OF ORDINANCE RESTRICTING PRIVATE SCHOOLS

Urnstein v. Village of Town and Country[1]

The recent Missouri Supreme Court case raised, for the first time in Missouri, the validity of a municipal zoning ordinance restricting private schools.

Landowner brought suit for a declaratory judgment as to the constitutionality of a village zoning ordinance as applied to landowner's private school. The landowner owned Sherwood Day School, a private institution run for profit, that had operated since 1945. In 1950, the Village of Town and Country was incorporated, encompassing the Sherwood Day School. Zoning Ordinance 50 was adopted in 1951 which placed landowner's property in a "Zone 'A' Residential District." Section 2, Article III of this ordinance provided:

> A building or premises shall be used only for the following purposes:
> 1. Single family dwellings
> 2. Churches
> 3. Public schools, elementary and high . . .
> 5. Accessory buildings and uses customarily incident to the above uses . . .[2]

On June 1, 1961, landowner filed an application for a permit to erect an additional school building. This was denied on the ground that the use contemplated was in violation of the zoning ordinance.

Thereupon the landowner brought this suit for a declaratory judgment, challenging the validity of the ordinance, and the circuit court entered judgment declaring that the zoning ordinance was unconstitutional as applied to the plaintiff's private school. Upon appeal to the Missouri Supreme Court, the judgment was affirmed.

Section 89.020 allows municipalities to regulate the location and use of buildings, structures and land for trade, industry, residence or other purposes so long as it is for the purpose of promoting health, safety, morals or the general welfare of the community.[3] However, the Missouri Supreme Court has construed the municipality's power to extend only to private property and has held that various words in the enabling statute are not to be broadened to grant the power to regulate free public schools and churches.[4] The result in the principal case might possibly be construed as a further limitation on the municipality's power.

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1. 368 S.W.2d 390 (Mo. 1963).
2. *Id.* at 392.
3. § 89.020, RSMo 1959 provides:

> For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

4. Congregational Temple Israel v. City of Creve Coeur, 320 S.W.2d 451, 454 (Mo. 1959); State v. Ferriss, 304 S.W.2d 896, 902 (Mo. En Banc 1957). See

The court was careful to point out that this case does not involve public schools, churches, or even private institutions other than those of an academic nature. Further, non-conforming use might have been the basis of a good argument.[5] However, the decision stated that the extension or changing of a non-conforming use was not a problem as posed by the litigants. Thus, this decision delved into a new isolated area, private academic schools.

This case was brought to the supreme court with just a few stipulated facts and issues. The court, noting this, commented that this had "the necessary effect of strictly limiting the issues and the scope of this court's review and decision."[6] The only information the court had in regard to the school was that it was of an academic nature with grades from one through twelve, that it was run for profit by husband and wife as a partnership, and that it has existed since 1945.

The Missouri Zoning Laws allow municipalities to pass ordinances "For the purpose of promoting health, safety, morals or the general welfare of the community . . . ."[7] In affirming the circuit court's decision, the supreme court stated:

> In the limited circumstances of this record . . . there is an insufficient relation in the stipulated facts and the general welfare and as applied to these plaintiffs and this school the ordinance is arbitrary and unreasonable and, as the trial court held, therefore unconstitutional.[8]

It is difficult to determine which constitutional basis the court applied. The cases it referred to used the denial of the equal protection of the laws principle.[9] This would be to say that there is no distinction between this private school under these stipulated facts, and public schools under the same circumstances—which it has already been decided cannot be restricted—and that the two are of the same class. Thus, it would be unconstitutional to allow one but not the other. To do so would be a denial of the equal protection of the laws.[10] It is likely that the court did not apply a denial of due process principle because, as it suggested, this principle would only apply if the ordinance had the effect of excluding all types of schools or a particular type of school such as all private schools.[11] If the court had applied the due process principle, it could be argued that this decision would have added private schools to the limitations on municipal zoning powers, in that

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Olson, *The Missouri Municipality's Power to Zone and Quasi-Public Uses*, 26 Mo. L. Rev. 45 (1961).

5. Women's Christian Ass'n v. Brown, 190 S.W.2d 900 (Mo. 1945); 1 Yokley, Zoning and Practice § 146 (1948).
6. *Supra* note 1, at 392.
7. § 89.020, RSMo 1959.
8. *Supra* note 1, at 395.
9. Cases cited *supra* note 4.
10. Duncan v. Missouri, 14 S. Ct. 570, 571, 152 U.S. 377, 382 (1894); Louisville & N.R. Co. v. Bosworth, 230 F. 191, 207 (E.D. Ky. 1915); Langbein v. Board of Zoning Appeals, 135 Conn. 575, 67 A.2d 5 (1949); City of Miami Beach v. State, 128 Fla. 750, 175 So. 537 (1937); Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951); State v. Northwestern Preparatory School, 228 Minn. 363, 37 N.W.2d 370 (1949); 1 Rathkopf, Law of Zoning and Planning, 252 (3d ed. 1956).
11. Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950); Annot., 36 A.L.R.2d 655 (1954).

this approach would have treated private schools as a *class* represented in this and the ordinance as an attempt to restrict all private schools. Thus, the inference could possibly be made then that the ordinance would be unconstitutional as to private schools in general. However, it appears that the court was reluctant to take this broad area away from the municipality's zoning power and favored instead the narrower limitation which is a product of the denial of the equal protection of the laws principle.

Therefore, the *Urnstein* case does not hold that all private schools will be exempt from zoning laws. The court pointed out that the "profit motive and its finances should be relevant circumstances."[12] If applied to a somewhat different set of facts, it is feasible that a zoning ordinance restricting a private school could have a sufficient relationship to the promotion of health, safety, morals or the general welfare of the community to be held constitutional. It was also noted that "there are numerous distinctions in public and private schools, including the fact that they often serve different interests and purposes. . . ."[13] This further indicates that, confronted with different facts, the court may decide that an ordinance restricting private schools is constitutional and is in the furtherance of the promotion of health, safety, morals or the general welfare of the community and is not a violation of the equal protection of the laws.

Therefore, the precedent value of this case as applied to the broad classification "private schools" is doubtful. It appears that the court will decide each case on its own merits as to whether a zoning ordinance can constitutionally restrict private schools. This has been the procedure in other areas of zoning.[14] In *Fairmont Inv. Co. v. Woermann*,[15] a case dealing with a request to the zoning board to allow a hotel to expand its frontage out to the street, the supreme court said:

> . . . when the courts consider the specific question of the applicability of those ordinances to particular property, the constitutionality must depend upon the facts of the particular case under consideration.

If this be the result, it would seem that the determination of which party has the burden of proof would be of the utmost importance. There seems to have been some confusion in the *Urnstein* case as to where that burden lies. In *Flora Realty & Investment Co. v. City of Ladue*,[16] the court said:

> The zoning ordinance in question having been enacted by the legislative body of the city pursuant to the police power is presumed to be valid. Appellant having challenged the constitutionality of the ordinance on the ground of unreasonableness as applied to its property has the burden of proving unreasonableness.

This burden on the plaintiff seems to be the general rule.[17] Thus, it would seem

12. *Supra* note 1, at 395.
13. *Supra* note 1, at 395.
14. Landau v. Levin, 213 S.W.2d 483, 484 (Mo. 1948); Taylor v. Schlemmer, 183 S.W.2d 913, 916 (Mo. 1944); 1 YOKLEY, ZONING LAW AND PRACTICE § 28 (2d ed. 1953).
15. 210 S.W.2d 26, 29 (Mo. 1948).
16. 246 S.W.2d 771, 778 (Mo. En Banc 1952).
17. State v. North Kansas City, 228 S.W.2d 762 (Mo. En Banc 1950); 1 METZENBAUM, LAW OF ZONING 98 (2d ed. 1955).

from this rule that the plaintiff had the burden of proving the zoning ordinance unreasonable as applied to its school. Perhaps the plaintiff met this burden to the circuit court's satisfaction. However, it would seem that on appeal to the Missouri Supreme Court, whether the defendant had the burden of proof or not, it should not have agreed to any stipulation which omitted specific evidence proving the ordinance to be in the furtherance of the promotion of the health, safety, morals or the general welfare of the community and therefore constitutional as to the plaintiff's private school. This should have been done if for no other reason than to better insure and protect its position.

Since the court is probably going to decide each case on its own merits and facts and not set down any general rule in regard to private schools, it would behoove each party to take it upon himself to set out sufficient facts to protect his own interest and viewpoint.

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