Missouri Law Review

Volume 29
Issue 2 *Spring 1964*

Article 8

Spring 1964

Recent Cases

Recent Cases

CORPORATION RESIDENCE FOR PURPOSES OF VENUE IN MISSOURI

State ex rel. Bowden v. Jensen[1]

Suits brought solely against a corporation in Missouri must be commenced in accordance with section 508.040, RSMo 1959, and under this section residence of the corporation is not a venue consideration.[2] When a corporation has been sued along with other individual defendants, the question of the corporation's residence becomes important. In joint defendant cases where all defendants are not corporation,[3] venue is governed by section 508.010(2) which provides, "When there are several defendants, and they reside in different counties, the suit may be brought in any such county,"[4] or 508.010(3) which provides, "When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides." In the multiple defendant case venue is proper as to all defendants so long as the suit is brought in a county where one of the defendants resides.[5] Therefore for purposes of venue the determination of a corporation's residence is important only when the defendant corporation's residence is asserted as the basis for venue in a suit against more than one defendant.

The above statutory provisions governing venue have been in force in Mis-

---

1. State *ex rel.* Bowden v. Jensen, 359 S.W.2d 343 (Mo. En Banc 1962).

2. "Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business." § 508.040, RSMo 1959.

3. In State *ex rel.* Baker v. Goodman, 364 Mo. 1202, 274 S.W.2d 293 (En Banc 1954), it was held that where two corporations are sued jointly the special statute applicable to corporation's venue should govern over the general venue statute. Therefore venue was determined under § 508.040, RSMo 1949, rather than under § 508.010(2), RSMo 1949.

4. In State *ex rel.* Columbia Nat'l Bank v. Davis, 314 Mo. 373, 284 S.W. 464 (En Banc 1926), the court adopted the rule then stated at 14A C. J. *Corporations* § 2879 (1921) that:

> A statute fixing the venue in actions against corporations does not apply where a corporation is sued jointly with another. But this rule is not applicable where no cause of action exists against the codefendant, or where plaintiff dismisses the suit as to him before the trial.

5. State *ex rel.* Columbia Nat'l Bank v. Davis, *supra* note 4; State *ex rel.* Bowden v. Jensen, *supra* note 1.

souri for many years[6] and *State ex rel. Henning v. Williams*[7] in 1939 seemed to have decided what determined corporate residence for venue purposes. In the *Williams* case corporate residence was defined by adopting part of the venue statute applicable when a corporation is the sole defendant; thus a corporation resided for purposes of venue "in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."[8] This result was justified by the court on the grounds that the statutes and cases indicated a corporation must have one or more residences where it would be subject to service;[9] that if sued alone a suit might be brought in any one of several possible residences;[10] and therefore there seemed to be no good reason that residence be determined in any different manner when its residence is the basis for venue over multiple defendants.

The rule of the *Williams* case is no longer the law in Missouri and the departure has created a situation of confusion in recent years. The enactment of The General and Business Corporation Law of Missouri in 1943 (now chapter 351, RSMo 1959) created the basis for abandoning the *Williams* rule and the supreme court has struggled with a chain of cases involving statutory interpretation in an attempt to settle what constitutes a corporation's residence for venue purposes. *State ex rel. Bowden v. Jensen*[11] is the most recent, but perhaps not the last decision regarding the problem.

The first case to consider the problem following the enactment of the 1943 Corporation Law was *State ex rel. O'Keefe v. Brown.*[12] There the last sentence of a provision dealing with how to change a registered office or registered agent[13] was seized upon as the basis for the decision. The sentence read then, as it does today, "The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained." The individual codefendant objected to venue because the *domestic* corporation, whose residence was claimed by plaintiff as the basis for venue, maintained its registered office in a different county from that in which suit had been brought. Venue was found to be improper because the statute defining residence applied "with equal force to venue statutes."[14]

---

6. State *ex rel.* Standard Fire Ins. Co. v. Gantt, 274 Mo. 490, 203 S.W. 964 (En Banc 1918), traces the history of early venue statutes in Missouri.

7. State *ex rel.* Henning v. Williams, 345 Mo. 22, 131 S.W.2d 561 (En Banc 1939).

8. § 508.040, RSMo 1959.

9. "Each corporation shall have and maintain a public office or place in the state for the transaction of its business, where legal service may be obtained upon it." §§ 4596, 4597, RSMo 1929; see also § 4598 Mo. ST. ANN. 1937. Today similar provisions are found in § 351.370, RSMo 1959, and § 351.380, RSMo 1959.

10. § 723, RSMo 1929 [today § 508.040, RSMo 1959].

11. State *ex rel.* Bowden v. Jensen, *supra* note 1.

12. State *ex rel.* O'Keefe v. Brown, 361 Mo. 618, 235 S.W.2d 304 (En Banc 1951).

13. Mo. LAWS 1943 § 10, at 410; 351.375(4), RSMo 1949 [today 351.375(4), RSMo 1959].

14. State *ex rel.* O'Keefe v. Brown, *supra* note 11, at 306.

The next case was *State ex rel. Whiteman v. James*,[15] where it was announced that the statutory determinant of a *domestic* corporation's residence was also determinative of a *foreign* corporation's residence for purposes of venue. The court relied on the *Brown* case and then commented, "Plainer language that that used to prescribe or fix residence of a corporation 'for all purposes' could hardly be found. Certainly one purpose is that of venue under this statute."[16] It was observed that this result was proper notwithstanding the fact that when sued alone a corporation might be sued in one of several counties.

Judge Hyde dissenting in the *James* case felt that a reasonable construction of section 351.375 was "that it adds another office to those where service can be made and venue established." Justifying this position he said that the general provisions found in section 351.375 should not control the specific provisions of sections 508.010 and 508.040 which were intended as venue statutes.

Therefore the word from the supreme court was that residence as to both *domestic* and *foreign* corporations is only in the county where the corporation maintains its registered office and agent. Then in *State ex rel. Stamm v. Mayfield*,[17] the court said of the *James* case, "To the extent that it holds that the last sentence of section 351.375 is applicable to foreign corporations, *State ex rel. Whiteman v. James* is disapproved." The *Mayfield* case involved venue over a foreign insurance company and an individual defendant based on the foreign insurance corporation's residence, alleged to be in St. Louis. But the insurance company had no registered office in the state, although it did maintain an office in St. Louis. The court found venue proper because the corporation law does not apply to insurance companies[18] and section 351.625, RSMo 1949, dealing with the manner in which a foreign corporation may change the address of its registered office did not incorporate the last sentence of 351.375 which had to do with the "manner" of registering the office.[19]

---

15. State *ex rel.* Whiteman v. James, 364 Mo. 589, 265 S.W. 298 (En Banc 1954).

16. Under § 351.015(1), RSMo 1963 Supp., "corporation" is defined to include "corporations organized under this chapter or subject to some or all of the provisions of this chapter except a foreign corporation" unless the context otherwise requires.

17. State *ex rel.* Stamm v. Mayfield, 340 S.W.2d 631 (Mo. En Banc 1960).

18. Insurance companies are among those to which Missouri's General and Business Corporation Law does not apply. § 351.690, RSMo 1959, provides:

> The provisions of this chapter shall be applicable to existing corporations as follows:
> (1) . . .
> (2) No provisions of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and nonprofit corporations; . . .

19. "Section 351.375 applies to foreign corporations only to the extent that 351.625 incorporates it by reference, and the last sentence of 351.375 which was the basis of the James decision is not properly includable in the reference." State *ex rel.* Stamm v. Mayfield, *supra* note 17, at 633.

The reason that § 351.375 applies only to domestic corporations in the absence of incorporation by reference is that § 351.375 refers to "corporation" and under

Therefore following the *Mayfield* case Missouri lawyers were left in doubt as to what satisfied the residence requirement of 508.010 when a *foreign* corporation's Missouri residence was to serve as the basis for venue over several defendants.[20] As to *domestic* corporations the *Brown* case remained and as to those corporations exempted from the act the *Henning* case seemed to set the rule.

The stage was set for *State ex rel. Bowden v. Jensen*[21] where an original proceeding in mandamus was brought in the Missouri Supreme Court to require the circuit judge to retain jurisdiction of an individual defendant. It was held that venue was improper where the suit had been brought in Jackson County against an individual defendant, who resided in Franklin County, and a foreign business corporation whose registered office and registered agent were maintained in the City of St. Louis, even though it had offices and conducted business in Jackson County. The majority of the court indicated the *Mayfield* opinion should not have disapproved the *James* case in so far as it held that 351.375 applied to foreign corporations. The fact that 351.375 was not incorporated by reference into the statutes dealing with foreign corporations was held not to be controlling as the court found other basis for concluding that the registered office of a foreign corporation would serve as the only residence of such a corporation for purposes of the venue statute. The majority looked to 351.620,[22] which requires a foreign corporation to maintain a registered office and registered agent, and decided the purpose of the statute was to give such a "corporation a fixed, definite and certain location where a representative of the corporation may be found." It reasoned that this location in law amounted to residence of the corporation in this state and that only one such residence is required. The court further said it was good business practice and properly protected the rights of the individual defendants to so construe the statutes. It pointed out that otherwise the individual defendant had a difficult time ascertaining whether venue was proper as to it when the corpora-

---

§ 351.015(1) *supra*, such language would not apply to foreign corporations unless the context otherwise required. Section 351.625 specifically applies to foreign corporations and refers to § 351.375 as to the manner of changing the registered office or agent, but 351.625 says nothing regarding what should constitute a foreign corporation's residence in Missouri nor does it refer to 351.375 to determine that matter.

20. It was suggested that Mayfield, by dicta, raised the question as to whether the rule of the Whiteman case applied to a foreign corporation and the author suggested, "so if you have a case involving a foreign corporation why you might be able to escape the harshness of the *Whiteman* rule." Smith & Milholland, *Recent Developments in the Missouri Law of Torts,* 36 MACA BULL. 18 (Fall 1962).

21. State *ex rel.* Bowden v. Jensen, *supra* note 1.

22. § 351.620, RSMo 1959 provides in part:

1. Each foreign corporation authorized to transact business in this state shall have and continuously maintain in this state:
   (1) A registered office which may be, but need not be, the same as its place of business in this state;
   (2) A registered agent, which agent may be either an individual, resident in this state, whose business office is identical with such registered office, or a corporation authorized to transact business in this state having a business office identical with such registered office.

tion's residence served as the basis for venue under 508.010(2) because the question would be one of fact whether or not the corporation was doing business as usual and customary in that county. Thus the residence of a *foreign* business corporation is now determined in the same manner as the residence of a *domestic* corporation, by merely looking to the Secretary of State's office to see where the corporation's registered office is located. The only difference between the two is the statutory road of interpretation which leads to the result.

Judges Hyde and Storckman dissented from the majority's application of Missouri statutes in the *Jensen* case. The dissenters agreed that the *Mayfield* case did not control because that case had to do with a foreign insurance company. But they again asserted in Judge Hyde's opinion that the proper construction of 351.375 is that it "only adds another office to those where service can be made and venue established."[23]

The dissenters felt that the problem sentence of 351.375 standing alone falls short of precluding any other location or residence for the purpose of venue and service of summons.[24] Further the dissent notes that there did not appear to be any intent to change the venue laws radically through the enactment of the section in question. From looking to all the statutes possibly bearing on the problem and construing them in pari materia so as to give as full effect as possible to each, they felt there was no intent to change the rule of the *Henning* case.[25]

The dissenters queried what would result if a corporation failed to maintain a registered office or agent in Missouri as contemplated by 351.375 and 351.625, there being no provision for alternate venue. The dissent then rests with a recognition that hardship cases are bound to occur regarding venue but that the legislature could provide a remedy to the problem by enacting legislation similar to that given the federal courts under the doctrine of forum non conveniens wherein courts would have the power, in the interest of justice, to transfer cases to a different county when such a transfer would provide a place of trial more convenient to litigants and witnesses.[26]

---

23. State *ex rel.* Bowden v. Jensen, *supra* note 1, at 351.

24. " 'The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.' The O'Keefe and Whiteman cases seem to regard the provision as if it reads 'for all purposes of venue,' but it does not have that effect. At best, venue is only one of several purposes involved. . . . [The] sentence should be considered as if it read: 'The location or residence of any corporation shall be deemed *for the purpose of venue* to be in the county where its registered office is maintained.' The language of the provision standing alone falls short of precluding any other location or residence for the purpose of venue and service of summons." State *ex rel.* Bowden v. Jensen, *supra* note 1, at 353.

25. State *ex rel.* Henning v. Williams, *supra* note 7.

26. The dissent was referring to 28 U.S.C.A. § 1406(a), which provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C.A. § 1404 also provides relief in the interest of convenience as follows:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The reasoning of the dissent is appealing as there appears to have been no intent expressed in the General Business and Corporation Law to change the rules or create new ones regarding venue.[27] It seems proper to state that had such an intent existed it would clearly have been set out. However, the majority result gives Missouri lawyers a definite and certain residence where suit must be brought when either a *domestic* or *foreign* corporation's Missouri residence is to serve as the basis for venue in a multi-defendant case where a codefendant is an individual. In a profession which is plagued by much uncertainty, this result will surely be beneficial; however, the fact that many foreign corporations have their registered offices in St. Louis or Kansas City might cause trial inconvenience, and the dissent's suggestion concerning a forum non conveniens transfer statute in Missouri seems an excellent remedy to the problem. Uncertainty remains where the residence of an exempted corporation is asserted as the basis for venue or where a corporation has failed to maintain a registered office. As to the exempted corporation, the *Mayfield* case establishes that residence remains a question of fact as to the county in which such corporation conducts its usual and customary business. Whether the "usual and customary place of business" rule will satisfy residence requirements when a corporation fails to maintain a registered office remains to be seen. Under the present rule it would seem if a corporation has no registered office it must be considered a nonresident.

These problems could of course be avoided by suing in the county where one of the other defendants resides. But if the other defendant happens to be a nonresident individual and the corporate defendant fails to maintain a registered office, perhaps suit could be maintained in any county in the state under 508.010(4).[28]

WADE H. FORD, JR.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

27. § 351.690, RSMo 1959.

28. § 508.010(4), RSMo 1959 provides, "When all defendants are nonresidents of the state, suit may be brought in any county in this state. . . ."

PROCEDURE—MISSOURI—USE OF DEPOSITIONS AS EVIDENCE

Pettus v. Casey[1]

Plaintiff was allegedly injured when his automobile was struck by defendant's delivery truck. Defendant's truck was being driven by his employee, Walton. Although Walton was present in the courtroom, his deposition was read into evidence by the plaintiff. The defendant's objection was overruled, and neither party called the deponent as a witness. Following a judgment of $25,000 for plaintiff, the trial court sustained the defendant's motion for a new trial on the ground it had erred in permitting the deposition to be read into evidence while the deponent was present.

The Supreme Court of Missouri affirmed the order granting a new trial. The court said that reading the deposition into evidence when the deponent was present in the courtroom had the effect of denying and preventing the cross-examination of the witness to which defendant was entitled as a matter of right.

The confusion in the case apparently arose from the substantial adoption of federal rule 26(b),[2] regarding the scope of examination for depositions, into Missouri rule 57.01[3] without also adopting federal rule 26(d),[4] regarding the use of depositions. Rather than adopting federal rule 26(d),[5] which clearly explicates the uses of depositional statements, Missouri incorporated two former statutory provisions[6] into rules 57.29[7] and 57.44,[8] which govern the use of depositions in Missouri. The two rules[9] are not as clear and precise as their federal counterpart,[10] and it may have been thought that with the new scope of examination and other changes made by the Missouri rules the language dealing with the use of depositions might be given a new construction. However, the decision in the principal case leaves little doubt that the supreme court intends to follow the case-law already established in regard to the statutory provisions[11] now embodied in the Missouri Rules of Civil Procedure.

Although the Missouri rules[12] do not distinguish between deponents as parties and non-parties, as do the federal rules,[13] the results are closely parallel. A party's deposition may be used as an admission whether he is in court and ready to testify

---

1. 358 S.W.2d 41 (Mo. 1962).
2. Fed. R. Civ. P. 26(b).
3. Mo. R. Civ. P. 57.01. This rule replaces § 492.080, RSMo 1959.
4. Fed. R. Civ. P. 26(d).
5. Fed. R. Civ. P. 26(d). § 2 clearly provides that the deposition of an adverse party may be used for any purpose. § 3 clearly provides that the deposition of a witness may be used by any party for any purpose upon any one of five enumerated occurrences, such as sickness, incarceration, etc.
6. §§ 492.400, 492.570, RSMo 1959.
7. Mo. R. Civ. P. 57.29. Taken from § 492.400, RSMo 1959.
8. Mo. R. Civ. P. 57.44. Taken from § 492.570, RSMo 1959.
9. Mo. Civ. P. 57.29, 57.44.
10. See note 5 *supra.*
11. §§ 492.400, 492.570, RSMo 1959.
12. Mo. R. Civ. P. 57.29, 57.44.
13. Fed. R. Civ. P. 26(d).

or not.[14] The deposition of a non-party witness may not be used as evidence, if the witness is present at the trial.[15] However, the presence of a witness in court subsequent to the date on which his deposition was read will not justify its exclusion, barring any collusion.[16] Also, the deposition of an agent may be used as evidence, even though the deponent is present, if it qualifies as an admission of the agent's principal, and the principal is a party to the suit.[17]

The results reached by the Missouri construction are in accord with the majority of jurisdictions. Most courts permit the use of depositions as evidence, although the deponent is present, if the deponent is a party,[18] but refuse to do so if he is not a party.[19] There are states, however, that permit the use of depositions, when the deponent is present, although the deponent is not a party.[20] There are also several interesting variations of the foregoing general rules.[21]

---

14. Pulitzer v. Chapman, 337 Mo. 298, 85 S.W.2d 400 (1935); Kneezle v. Scott County Milling Co., 113 S.W.2d 817 (Spr. Mo. App. 1938); Dawes v. Williams, 328 Mo. 680, 40 S.W.2d 644 (1931); Bogie v. Nolan, 96 Mo. 85, 9 S.W. 14 (1888); Wilt v. Moody, 254 S.W.2d 15 (Mo. 1953); Cox v. Reynolds, 18 S.W.2d 575 (St. L. Mo. App. 1929).

15. Barber Asphalt Paving Co. v. Ullman, 137 Mo. 543, 38 S.W. 458 (1896); Schmitz v. St. Louis, I. M. & S. Ry., 119 Mo. 256, 24 S.W. 472 (1893); Winegar v. Chicago, B. & Q. R. Co., 163 S.W.2d 357 (K.C. Mo. App. 1942); Vest v. Kresge, 213 S.W. 165 (K.C. Mo. App. 1919); Maplewood Planing Mill & Stair Co. v. Pennant Constr. Co., 344 S.W.2d 629 (St. L. Mo. App. 1961).

16. Benjamin v. Metropolitan St. R. Co., 133 Mo. 274, 34 S.W. 590 (1896).

17. Henry v. First Nat'l Bank, 232 Mo. App. 1071, 115 S.W.2d 121 (K.C. Ct. App. 1938).

18. Cusumano v. Pitzer Trucking Co., 209 N.Y.S.2d 715 (1961); Musellam v. Flowers, 211 N.Y.S.2d 87 (1961); Dunahoo v. Brooks, 128 So.2d 485 (Ala. 1961); Higgs' Ex'x v. Higgs' Ex'x, 286 Ky. 236, 150 S.W.2d 681 (1941); Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922 (1936); Louisville & N. R. Co. v. McCoy, 261 Ky. 435, 87 S.W.2d 921 (1935); Raidt v. Blount, 294 Ky. 172, 171 S.W.2d 233 (1943); Ray v. Henderson, 27 Cal. Rptr. 847 (1963); Robinson v. North American Life & Cas. Co., 30 Cal. Rptr. 57 (1963); Rogers v. Yarbrough Const. Co., 291 S.W.2d 459 (Tex. Ct. Civ. App. 1956); Southern Pac. Co. v. Cavallo, 323 P.2d 1 (Ariz. 1958); Stevens' Adm'r v. Watt, 266 Ky. 608, 99 S.W.2d 753 (1936); Superior Forwarding Co. v. Sikes, 349 S.W.2d 818 (Ark. 1961); Texas Employers' Ins. Ass'n v. Pillow, 268 S.W.2d 716 (Tex. Ct. Civ. App. 1954); White v. Walstrom, 118 N.W.2d 578 (Iowa 1962); Wilson v. Gregory, 313 Ky. 326, 231 S.W.2d 14 (1950).

19. Chase v. Watson, 294 P.2d 801 (Okla. 1956); Cote v. Sears, Roebuck & Co., 86 N.H. 238, 166 A. 279 (1933); Davies v. Columbia Gas & Elec. Co., 68 N.E.2d 571 (Ohio 1938); Goldstein v. Pennsylvania Greyhound Lines, 23 N.J. Super. 126, 92 A.2d 637 (1952); Henry's Adm'x v. Illinois Cent. R. R., 282 Ky. 101, 137 S.W.2d 1081 (1940); Higgs' Ex'x v. Higgs' Ex'x, 286 Ky. 236, 150 S.W.2d 681 (1941); Mobile Infirmary v. Eberlein, 119 So.2d 8 (Ala. 1960); Nauts v. Stahl, 128 Ohio St. 115, 190 N.E. 242 (1934); Nolty's Adm'r v. Fultz, 261 Ky. 516, 88 S.W.2d 35 (1935); Stevens' Adm'r v. Watt, 266 Ky. 608, 99 S.W.2d 753 (1936).

20. Chandler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); International Harvester Co. v. Sartain, 32 Tenn. App. 425, 222 S.W.2d 854 (1949); Jacobs v. Mutual Life Ins. Co. of N.Y., 341 Ill. App. 293, 93 N.E.2d 516 (1950); Russ Mitchell, Inc. v. Houston Pipe Line Co., 219 S.W.2d 109 (Tex. Ct. Civ. App. 1949).

21. In Florida, a deposition is admissible into evidence when it appears that the memory of the deponent was clearer, at the time the deposition was taken, than when he testifies at the trial. Anderson v. Gaither, 120 Fla. 263, 162 So. 877 (1935).

The principal case reflects the traditional importance associated with safeguarding the right of cross-examination in Missouri,[22] accompanied by the fact that depositions have always been considered secondary evidence, not to be used when the viva voce testimony of a deponent is available. Undoubtedly, the provisions in both the Missouri[23] and the federal rules[24] providing for the use of depositions when the deponent is unavailable for certain enumerated reasons reflects a preference for oral testimony given in open court before the trier of facts.

Such a preference for oral testimony does not work an unnecessary hardship upon either party. If the deponent is present in court, he may be called to the stand and the beneficial information may be elicited from the witness. If counsel is reluctant to call the witness in fear of damaging cross-examination, there yet remains the possibility of joining the deponent as a party to the suit in some cases. In the principal case, plaintiff could have sued the employee (deponent) and the employer as codefendants. The deposition of the employee would then have been that of a party-opponent and could have been read into evidence.

RAY E. KLINGINSMITH

PRODUCT LIABILITY—MISSOURI—IMPLIED WARRANTY—THE END OF PRIVITY

Morrow v. Caloric Appliance Corporation[1]

Mrs. Morrow, the plaintiff, purchased a gas range and oven from H. R. Lewis, an appliance dealer in East Prairie, Missouri. Mr. Lewis had purchased the range from the Uregas Company in Cape Girardeau, Missouri, which was a distributor for defendant Caloric Appliance Corporation. Before Mr. Lewis had his employee install the range it was inspected for any defects and was found to be in good order. The employee installed the range in plaintiff's house and connected the gas line to the range, and then made a further check to be sure that the range was in proper working order.

In Georgia, the admission of a deposition, when the deponent is present at the trial, is largely within the discretion of the trial judge. Chandler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935).

In Illinois, any objection as to the deponent's availability must be raised at the time the deposition is taken. If no objection is raised at that time, the deposition may be read at the trial. Jacobs v. Mutual Life Ins. Co., 341 Ill. App 293, 93 N.E.2d 516 (1950).

22. Gurley v. St. Louis Transit, 259 S.W.2d 895 (St. L. Mo. App. 1924); Hofburg v. Kansas City Stock Yards Co., 283 S.W.2d 539 (Mo. 1955); Sconce v. Jones, 343 Mo. 362, 121 S.W.2d 777 (1938); State *ex rel.* DeWeese v. Morris, 359 Mo. 194, 221 S.W.2d 206 (1949); State v. Laspy, 298 S.W.2d 357 (Mo. 1957); State v. Thompson, 280 S.W.2d 838 (Mo. 1955).

23. Mo. R. Civ. 57.29, 57.44.

24. Fed. R. Civ. P. 26(d).

1. Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963).

Plaintiff used the range for cooking without mishap for five or six days. Then while using the range she heard a hissing noise and discovered flames coming up and around a pan on one of the top burners. She extinguished the fire before any damage occurred.

The same employee who installed the range checked it and found some of the valves to be defective. He corrected this defect, checked the range, and restored it to operation. About a week later the same thing occurred on the left side of the range and the plaintiff's entire house and personal belongings were consumed in the resulting fire. The installing employee testified at the trial that in his opinion the fire was caused by faulty valves used in the construction of the gas range.

The Morrows submitted their case on the sole theory that the defendant, Caloric Appliance Corporation, impliedly warranted that the range was reasonably fit and suitable as a gas range for home use. Defendant contended that in the absence of privity of contract there can be no implied warranty by the manufacturer. At the trial the jury awarded plaintiff $3,700. Defendant appealed to the Springfield Court of Appeals and that court transferred[2] the appeal to the Missouri Supreme Court on issues involving the due process clause of the United States Constitution which are not discussed herein.[3]

The supreme court isolated the issue in the following terms:

> The precise question now presented to *this court* (for the first time, insofar as we have found) is whether privity of contract is necessary in order for an ultimate consumer to recover from a manufacturer on an implied warranty, or perhaps stated more frankly, whether a manufacturer of an instrumentality which is imminently dangerous if defectively manufactured is to be held to strict liability upon proof of the defect and of causation.[4]

The court affirmed the judgment for the plaintiff and held that privity of contract is not a prerequisite to a recovery against a manufacturer for defects in a mechanical product which is imminently dangerous when defective.

When a defect in a manufactured product causes injury the most logical thing to do is to look to the manufacturer as a source of compensation for the damages. Prior to this decision it was only the exceptional case that allowed the injured party to recover damages from the manufacturer in the absence of privity of contract.[5]

The first and most notable exception to the requirement of privity of contract for recovery from the manufacturer of a defective product was found in the cases involving food and drink. The first case in Missouri allowing recovery from the producer of a packaged food or drink without privity was *Madouros v. Kansas City Coca-Cola Bottling Co.*[6] where plaintiff sought to recover for injuries

2. Morrow v. Caloric Appliance Corp., 362 S.W.2d 282 (Spr. Mo. App. 1963).

3. For a discussion of this aspect see Anderson, *Personal Jurisdiction over Outsiders*, 28 Mo. L. Rev. 336, at 372 (1963).

4. Morrow v. Caloric Appliance Corp., *supra* note 1, at 51.

5. For a comprehensive discussion of this entire area see Roberts, *Implied Warranties—the Privity Rule and Strict Liability—the Non-food Cases*, 27 Mo. L. Rev. 194 (1962), cited by the court in the Morrow decision.

6. 230 Mo. App. 275, 90 S.W.2d 445 (K.C. Ct. App. 1936).

resulting from the partial consumption by plaintiff of a bottle of Coca-Cola containing a decayed mouse. The Kansas City Court of Appeals held that since defendant had bottled goods for human consumption, defendant impliedly warranted that the goods were fit for human consumption regardless of privity of contract. This exception has been consistently reaffirmed by the Missouri courts of appeals.[7]

Even though well established in the courts of appeals this exception was not adopted by the Missouri Supreme Court until the case of *Midwest Game Co. v. M.F.A. Milling Co.*[8] A fish food manufactured by defendant was deficient in certain ingredients essential to a "complete" fish food, and because it was not "complete," plaintiff had costly losses. The court held that the general rule that there is an implied warranty of fitness on food packaged and processed for human consumption is controlling.[9] Even though there was no foreign matter present, the court said that trade usage and custom as to "complete" fish food raises an implied warranty that the product does in fact contain all ingredients necessary to make it "complete." The court extended the food and drink exception to food for animals on the theory that where food is supplied for animals, in something other than its raw state, the exception applies also to food consumed by animals. The court has since reaffirmed this position.[10]

In the *Morrow* case the court relies on the line of food and drink cases as an indication of the way the law in Missouri has been moving toward the removal of the privity requirement. The court points out that the *Midwest Game v. M.F.A. Milling Co.* case held that implied warranty of fitness "*should at least be extended* to food for consumption by animals. . . ." (emphasis added), suggesting that it would ultimately be extended further.

The food and drink exception indicated a trend in the law in Missouri, but the case of *Worley v. Procter & Gamble Mfg. Co.*[11] gave strong direction to Missouri law toward the decision in the *Morrow* case. Plaintiff had used the defendant's product "Tide" in her restaurant for washing dishes and developed a skin infection. It was held that plaintiff could recover from defendant manufacturer regardless of privity of contract. The court caused subsequent confusion as to what was the basis for its decision by referring to a statement on the Tide box "Tide is kind to your hands" which has led some to believe the case was decided on express warranty.[12] Any controversy that may have arisen out of this con-

7. Representative cases: Nemela v. Coca-Cola Bottling Co., 104 S.W.2d 773 (St. L. Mo. App. 1937) (bugs in Coca-Cola); McNicholas v. Continental Baking Co., 112 S.W.2d 849 (St. L. Mo. App. 1938) (glass in bread); Carter v. St. Louis Dairy Co., 139 S.W.2d 1025 (St. L. Mo. App. 1940) (glass in milk); Helms v. General Baking Co., 164 S.W.2d 150 (St. L. Mo. App. 1942) (pieces of steel in bread); Foley v. Coca-Cola Bottling Co., 215 S.W.2d 314 (St. L. Mo. App. 1948) (tacks in Coca-Cola); Strawn v. Coca-Cola Bottling Co., 234 S.W.2d 223 (K.C. Mo. App. 1950) (cigar in Coca-Cola); Williams v. Coca-Cola Bottling Co., 285 S.W.2d 53 (St. L. Mo. App. 1955) (worms in Coca-Cola).

8. 320 S.W.2d 547 (Mo. 1959).

9. Citing Carter v. St. Louis Dairy Co., *supra* note 7.

10. Albers Milling Co. v. Carney, 341 S.W.2d 117 (Mo. 1960).

11. 241 Mo. App. 1114, 253 S.W.2d 532 (St. L. Ct. App. 1952).

12. Professor Anderson in his comprehensive article, *Observations on the Law of Implied Warranty of Quality in Missouri: 1960*, 1960 WASH. U.L.Q. 71, takes

fusion was ended for practical purposes by the court in the *Morrow* case when the court declared that in the *Worley* case plaintiff "was entitled to invoke the theory of implied warranty . . . without privity of contract."[13] Thus construed as a case of implied, rather than express warranty, the *Worley* case is perhaps the strongest prior Missouri decision in favor of the position taken in the *Morrow* case. Obviously the *Worley* case was an extension of the abandonment of privity beyond the food and drink exception.

In the course of development of the law in this area there have been two federal district court cases, applying Missouri law, which reached curious results. In *McIntyre v. Kansas City Coca-Cola Bottling Co.*[14] plaintiff was injured when an unopened bottle of Coca-Cola exploded. The court held that this was a case of implied warranty of merchantability on a non-food product and under existing Missouri law recovery for breach of an implied warranty could be maintained only in food and drink cases and in cases involving a sale of goods for a particular purpose.[15] In *Ross v. Phillip Morris Company, Ltd.*[16] plaintiff sought damages for injuries allegedly resulting from smoking cigarettes produced by defendant, basing recovery on implied warranty. The court first denied recovery on the grounds that the food and drink exception had not been adopted as law by the Missouri Supreme Court and in all other cases privity was required. In a subsequent unpublished opinion[17] the same court reversed itself on the basis of *Midwest Game Co. v. M.F.A. Milling Co.* wherein the Missouri Supreme Court had adopted the food and drink exception to the privity requirement.[18] The federal court felt this new case included cigarettes intended for human consumption. The court in *Morrow* discounted these and other federal cases in determining the true state of Missouri law.

For a number of years the major block in the development of implied warranty in Missuori was *State ex rel. Jones Store v. Shain.*[19] Plaintiff was seeking to recover from the retailer for injuries from dye that faded out of a blouse purchased by plaintiff. The supreme court, en banc, held that for there to be an implied warranty in the sale of a non-food or drink article defendant must have sold the

---

the position that the *Worley* case was decided on express warranty and therefore was not really an extension of Missouri law on this subject. He logically bases this conclusion on the reference by the court in *Worley* to the printed matter on the box of "Tide," and the decision in *Williams v. Coca-Cola Bottling Co., supra* note 7, where the St. Louis Court of Appeals refers to *Worley* as decided on express warranty. An annotation in 75 A.L.R.2d 39, 87, treats the *Worley* case as based on implied warranty. However on pages 82 and 83 the same annotation refers to *Worley* as a case of express warranty. To further confuse the issue the court in *Worley* made extensive reference to Chapter IX in WILLISTON, SALES, which is entitled "Implied Warranties of Quality."

13. Morrow v. Caloric Appliance Corp., *supra* note 1, at 52.

14. 85 F.Supp. 708 (W.D. Mo. 1949); see 1960 WASH. U.L.Q. 71, at 78.

15. State *ex rel.* Jones Store v. Shain, 352 Mo. 630, 179 S.W.2d 19 (1944); Zesch v. Abrasive Co., 353 Mo. 558, 183 S.W.2d 140 (1944).

16. 164 F.Supp. 683 (W.D. Mo. 1958).

17. No. 9494 (W.D. Mo., Oct. 22, 1959).

18. *Supra* note 8.

19. *Supra* note 15.

product for a particular purpose with the buyer relying on the seller's judgment that it was fit for that purpose. The particular purpose had to be some special one outside of the ordinary use of the product.[20] The *Shain* case was disregarded in the *Morrow* decision since it did not involve privity of contract, but rather was a case against the immediate retailer of the blouse and therefore distinguishable.

In *Smith v. Ford Motor Co.*[21] recovery of damages was denied for structural and mechanical defects in an automobile purchased by plaintiff. Plaintiff contended defendant had impliedly warranted that the automobile was safe for use and free from defects in manufacturing. No property loss or personal injuries were involved and recovery was only sought on the ground that the car was "a lemon." The court held that where recovery based on implied warranty had been granted in the past, an element of tort with personal injuries had been present, citing *Worley v. Procter & Gamble Mfg. Co.*[22] The court in *Morrow* makes little or no attempt to distinguish the *Smith* case, probably because in *Morrow* there was actual property loss caused by the defects.

In *Morrow* the court points also to the trend in other states to apply implied warranty without privity of contract. Two notable cases cited are *Henningsen v. Bloomfield Motors, Inc.* involving a defective automobile,[23] and *Greenman v. Yuba Power Products, Inc.* involving a defective power tool.[24] Both cases contain an extensive discussion of implied warranty and its background, and both are landmark decisions in their respective states, establishing implied warranty without privity of contract.[25] In *Morrow* the court shows that it intends to follow this forward looking trend.

The importance of the *Morrow* decision to Missouri law is significant. The case is strong since there was only property damage and the court still felt compelled to obviate the necessity of privity of contract beyond the previously existing exceptions. The court met the question squarely and refused to draw any arbitrary or synthetic distinctions between the mouse in the Coca-Cola, defectively processed food for animals, and an imminently dangerous defective automobile or gas range.

The effect of the decision is limited since both in posing the issue and in deciding the case, the court limited the effect of its holding to recovery for injury only from those products which are imminently dangerous when defective and used in the manner in which they were intended to be used. The court shows the logical progression to the *Morrow* decision by pointing out the exceptions to the privity requirement previously established in Missouri. *Worley v. Procter & Gamble Mfg. Co.*,[26] if viewed in retrospect as a case of implied warranty, definitely

20. See also Zesch v. Abrasive Co., *supra* note 15.
21. 327 S.W.2d 535 (St. L. Mo. App. 1959).
22. *Supra* note 11.
23. 32 N.J. 358, 161 A.2d 69 (1960); 27 Mo. L. REV. 194, 198 (1962).
24. 59 Cal.2d 57, 377 P.2d 897 (1962); 28 Mo. L. REV. 663.
25. Other cases also mentioned: Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963); State Farm Mutual Ins. Co. v. Anderson-Weber Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); and 50 New Walden, Inc. v. Federal Insurance Co., 39 Misc.2d 460, 241 N.Y.S.2d 128 (1963).
26. *Supra* note 11.

shows the trend in the Missouri decisions toward the position taken in the *Morrow* case. It is still a significant step from allowing a recovery for personal injuries to allowing a recovery for property loss only. It is here, in allowing recovery without privity of contract for property loss alone, that the *Morrow* decision takes on its real significance.

The court states that it is motivated in making this decision by a desire to modify the harsh results of the antiquated doctrine of caveat emptor in the modern world of mass consumption of manufactured products. No wiser or more just reason could be found in light of the many injustices that have occurred in the past when that doctrine was followed without qualification.

DENNIS W. SMITH

PROPERTY—FORFEITURE PROVISIONS IN MISSOURI INSTALLMENT LAND CONTRACTS

Plymouth Securities Co. v. Johnson[1]
Domyan v. Dornin[2]
Poole v. Roloff[3]

An installment land contract typically allows a purchaser of land to take immediate possession prior to obtaining legal title to the land. The vendor retains legal title as security until the full purchase price is paid. Prior to the final payment made pursuant to the contract, the purchaser has only an equitable interest in the land. Upon receipt of the final payment, the vendor is required to convey the land to the purchaser thereby vesting legal title in the purchaser and extinguishing any security interest which the vendor has in the land.

In the event of a purchaser's failure to comply with the terms of an installment land contract, the typical contract provides that all prior payments made by the purchaser may be retained by the vendor as liquidated damages for the purchaser's non-performance. Such a forfeiture provision, if strictly enforced by the courts, can, when viewed from the standpoint of a purchaser, lead to a harsh and oppressive result, viz., the provision for liquidated damages may in reality become a provision for a penalty.

The effect given to such contracts in the United States in general and in Missouri in particular has been discussed in Porter, *Installment Contracts for the Sale of Land in Missouri.*[4] The purpose of this note is to serve as supplement to Mr. Porter's discussion of the effect given to the forfeiture provisions in installment land contracts by the Missouri courts.

---

1. 335 S.W.2d 142 (Mo. 1960).
2. 356 S.W.2d 70 (Mo. 1962).
3. 361 S.W.2d 340 (St. L. Mo. App. 1962).
4. 24 Mo. L. REV. 240 (1959).

Plymouth Securities Co. v. Johnson[5] arose over an installment land contract between Plymouth Securities Company, a business trust (frequently referred to as a Massachusetts or a common law trust),[6] and defendants Johnson and Maysack. The contract was for the sale of approximately 180 acres of land, the principal asset of the trust, which the trustees were authorized to subdivide into lots and improve "for residences, businesses, cemetery, park or other purposes." The land, located in St. Louis County, was known as Laurel Hills Cemetery.

By the terms of the contract, defendants, as Purchasers, agreed to organize and establish a sales agency to sell grave lots, crypts and niches, having minimum gross sales of $100,000 for each of the years 1946 and 1947, $150,000 for each of the years 1948, 1949 and 1950, and $200,000 for each year thereafter until the purchase price had been paid in full to Plymouth Securities Company.

The purchase price was $225,000 and the assumption of all of the Seller's liabilities. In payment of the $225,000, Purchasers agreed to set aside and pay to Seller an amount equal to ten per cent of the gross sales price of all lots sold.[7] Such payments were to be made "on or before the 15th day of each month for all lots, on which deeds have been delivered during the calendar month next preceding." A grace period was provided in the event of failure to meet the minimum quota of sales in any one year. The Purchasers were allowed six months immediately following the close of the year in which the default occurred, during which time they were required "to make all payments and quotas current."

Legal and record title to all the land was to remain vested in Seller until the purchase price of $225,000 was paid in full and until the contract was fully performed by the Purchasers. Article VI of the contract further provided that the Seller could cancel all rights of the Purchasers "in event of the failure on the part of Purchasers to comply with all of the terms of this contract to be by them performed," and that "all property and improvements and other assets shall thereupon revert to Seller as compensation or damages for the use of its property and as liquidated damages, and not as a penalty for the breach of this agreement."

The vice-president of Plymouth Securities Company notified defendants as of February 18, 1957, that there had been "a failure on the part of Purchasers to comply with all of the terms" of the contract and that "the Seller will, after sixty (60) days from date hereof, cancel all rights of the Purchasers under the aforementioned agreement for Purchasers' failure to comply with the agreement."

Plaintiffs filed suit December 11, 1957, to eject the defendant from the premises for their failure to comply with all the terms of the contract as provided by Article VI. In answer, defendants pleaded that plaintiffs as a class had received benefits under the contract in excess of $175,000; that plaintiffs had not tendered

---

5. *Supra* note 1.

6. For a detailed discussion of the nature of business trusts see Annot., 156 A.L.R. 22 (1945).

7. In Fratcher, *Trusts and Succession in Missouri*, 27 Mo. L. REV. 93, 114 (1962), notice was taken that this case made no mention of the usual rule that a trustee may not sell trust property on credit without express authorization by the terms of the trust. The authorities cited by Mr. Fratcher did not involve business trusts, and it is doubtful whether this "usual rule" applies to business trusts.

a return of the benefits received; that after the purported cancellation of the contract on April 20, 1957, defendants had made several payments under the terms of the contract which plaintiffs had accepted and retained; and therefore, that plaintiffs were not entitled to the relief requested. Defendants also counterclaimed for specific performance of the contract.

The trial court found that the defendant Purchasers had paid plaintiffs $124,-294.34 on the original $225,000.00 purchase price and that at least $70,000.00 had been paid by defendants on obligations of Plymouth which they had assumed. The trial court further found that defendants had offered to pay plaintiffs the balance due under the terms of the contract. Other evidence tended to show that the land remaining had a reasonable market value in excess of $300,000.

Plaintiffs were also found to have accepted payments under the terms of the contract subsequent to the February 18, 1957, letter, which gave notice of the cancellation of the contract sixty days therefrom.

Accordingly, the trial court ordered that plaintiffs' causes of action be dismissed and that defendants pay plaintiffs $100,705.66 ($225,000.00 less $124,294.34) within ten days after the order became final. Plaintiffs were ordered to take all steps necessary to carry out their obligations under the contract concurrently with the payment by defendants.

Plaintiffs appealed to the Missouri Supreme Court contending that the trial court erred in refusing to declare a cancellation of the contract and eject the defendants from the premises for failure to comply with all the terms of the contract as provided. The supreme court affirmed holding that the trial court properly refused to declare a cancellation of the purchase contract for the default of the Purchasers. The acceptance of payments on the purchase price after the default waived such default as to the time of payment. Furthermore, the covenants which plaintiffs claimed were breached were chiefly ancillary to the promise to pay the purchase price and the present value of the property far exceeded the balance due on the purchase price. Also, defendant Purchasers, upon payment of the balance due under the contract, were allowed specific enforcement of the contract notwithstanding their being in default as to the time of payment of installments under the contract.

This case thereby seems illustrative of certain principles suggested in Porter, *Installment Contracts for the Sale of Land in Missouri.*[8] There, the strictness of the language used by the St. Louis Court of Appeals in *Atkinson v. Smothers*[9] was questioned. In that case, the court said:

> The principle is firmly established that when one goes into possession under a contract of purchase, and then makes default in the payment of the purchase price in accordance with the terms of the contract, he may be turned out by the vendor in an action of ejectment.

This language was questioned in light of the fact that the court cited for support only cases in which the forfeiture consisted of merely a down payment made

8. *Supra* note 4.
9. 291 S.W.2d 645, 648 (St. L. Mo. App. 1956).

to bind the agreement and not a forfeiture of other payments made prior to default. The statement was made by Mr. Porter:

> Considering the extreme penalty possible when all payments are forfeited, it would seem highly improbable that the court intended to apply the doctrine of the cases it cited as strictly as indicated.[10]

That statement would seem to have been well warranted in view of the principal case where the court said:

> [I]f the amount or value of the property stipulated as liquidated damages for breach of contract is greatly disproportionate to the ensuing loss, the court will construe it to be a penalty and restrict the damages recovered to those actually suffered. . . . The present value of the property far exceeds the balance due on the purchase price. In these circumstances the court properly refused to declare a forfeiture.[11]

Also, by holding that by accepting payments of the purchase price after such payments were in default plaintiff waived the terms of the contract as to time of payment, the *Plymouth Securities Co.* case seemingly illustrates the increasing importance of waiver in regard to land installment contracts. The Porter article notes:

> [T]he issue of waiver . . . has become increasingly important. This has been in large measure due to the convenience waiver presents to the courts which have been forced to deal with the strict forfeiture provisions. If the court can find, even on slight grounds, that there has been a waiver of the strict provisions, the tendency is to seize that as a means for relieving against the forfeiture.[12]

This language was used in emphasizing the importance of waiver in allowing a purchaser in default under an installment land contract to maintain an action for specific performance of the contract. To illustrate the point, the case of *Bogad v. Wachter*[13] was cited. This is the same authority that was subsequently relied upon in the *Plymouth Securities Co.* case in holding that there had been a waiver of the terms of the contract as to the time of payment. Thus, the fact that the issue of specific performance arose by counterclaim in an action for ejectment against a purchaser in default rather than in a specific performance action originally brought by a purchaser in default would seem to make no difference. The issue of waiver seems equally applicable in either situation.

Attention should also be given to the court's conditioning its award of specific performance to defendants upon payment by defendants of the balance due under the contract. It should be noticed that defendants had previously offered to pay this amount to plaintiffs in order that the contract could become fully executed.

---

10. Porter, *Installment Contracts for the Sale of Land in Missouri, supra* note 4, at 254.

11. Plymouth Securities Co. v. Johnson, *supra* note 1, at 152, citing Bogad v. Wachter, 365 Mo. 426, 283 S.W.2d 609 (1955).

12. Porter, *Installment Contracts for the Sale of Land in Missouri, supra* note 4, at 249. *Cf.* GILL, MISSOURI TITLES § 1659 (4th ed. 1960).

13. 365 Mo. 426, 283 S.W.2d 609 (1955).

The importance of these facts are illustrated by the later case of *Domyan v. Dornin*,[14] where the Missouri Supreme Court denied the right of the sellers under an installment contract to eject the purchaser and retake the land pursuant to a forfeiture clause which provided for the retaining of payments and the retaking of possession by seller in case of default by purchaser in making payments at the time provided by the contract. The court held that seller had waived the requirement of timely payment by the acceptance of a payment of interest on a delinquent payment. However, purchaser was denied specific performance of the contract due to his inability to pay the balance due on the contract, the court saying:

> Specific performance should not be decreed on behalf of a purchaser of real estate unless such purchaser is able and willing to perform his part of the contract.[15]

The *Domyan* case is thus an additional illustration of the tendency of Missouri courts to find a waiver of a forfeiture provision as a measure of liquidated damages whenever possible.

Waiver of such a provision has also been found in order to allow a purchaser under an installment land contract to maintain an action for trespass against the seller of the land subject to the contract. In *Poole v. Roloff*[16] plaintiffs were in possession of a farm as purchasers under an installment land contract which contained a forfeiture provision allowing sellers to retain all payments as liquidated damages and to enter and retake the premises if purchasers failed to make delinquent payments within thirty days after notice that the payments were in default. Sellers gave notice of default on July 1, 1958, but thereafter orally assured purchasers that if the back payments were made and current payments continued, sellers would not consider the contract void. Thereafter, sellers accepted payments from the purchasers.

In April 1959 sellers went on the premises and removed timber. Purchasers brought an action for trespass. Sellers contended that because of the July 1958 notice, purchasers did not have the possession of the land necessary to maintain an action of trespass.

The court held, citing *Bogad v. Wachter*,[17] that sellers had waived the forfeiture provision by accepting late payments and by recognizing the contract's existence in communications with purchasers several times after the purported July 1958 cancellation; and that therefore purchasers had sufficient possession to maintain an action for trespass.

Thus, Missouri courts today seem hesitant to give full effect to forfeiture provisions as measures of liquidated damages in installment land contracts. They are likely to find that such provisions have been waived by the vendor due to such acts as his acceptance of late payments of principal or of interest on late payments

---

14. *Supra* note 2.
15. *Id.* at 72.
16. *Supra* note 3.
17. *Supra* note 11.

after the delinquency of those payments.[18] Furthermore, waiver of forfeiture provisions is equally likely to be found in any of the following in which a land installment contract is involved: viz., an action for ejectment by a vendor, an action for specific performance by a defaulting vendee, a counterclaim for specific performance by a defaulting vendee who is defendant to an action for ejectment, or even a trespass action by a defaulting vendee against his vendor concerning the land that is the subject of the contract. The finding that such a forfeiture provision has been waived would be very likely if the value of the land subject to the forfeiture provision substantially exceeded the amount still unpaid under the contract.[19]

JOHN E. PARRISH

REAL PROPERTY—CONSTRUCTION OF WILLS IN MISSOURI—LIFE ESTATE OR FEE SIMPLE

Shaw v. Wertz[1]

Silas H. Mellot died testate in 1918 and at the time of his death owned certain real estate. Decedent died childless, and was survived by his wife, Clara M. Mellot, four brothers and four sisters. The single dispositive sentence in his will was as follows:

> Therefore, be it known to all concerned, that I S. H. Mellot at my death (and after my just debts are paid) do Will and Bequeath all the remainder of my property of whatsoever nature, to my beloved wife Mrs. Clara M. Mellot-nee Roy, she to have complete control and free will in the management and disposal of same so long as she may live.[2]

After the death of Silas H. Mellot, Clara M. Mellot occupied the land until her death in 1951. She left a will which purportedly devised the above described premises to defendant Marie Dale. Plaintiff Shaw and other heirs at law of decedent, Silas H. Mellot, brought this action to determine title to and partition realty devised by Clara M. Mellot to defendant Marie Dale.

Plaintiffs contended that Clara M. Mellot received only a life estate and upon her death the land reverted to them as heirs at law of Silas H. Mellot. It was

---

18. *Cf.* GILL, MISSOURI TITLES § 1659 (4th ed. 1960).

19. In light of the recent decision in Berry v. Crouse, 376 S.W.2d 107 (Mo. 1964), the same result sought by the use of an installment land contract with a forfeiture provision might be obtainable in *some circumstances* by executing an installment land contract *without* a forfeiture provision and *subsequently* executing a lease of the same land with an option to buy, the lease providing for rental payments of the same amount and due at the same time as the installment payments under the sales contract.

1. 369 S.W.2d 215 (Mo. 1963).
2. *Id.* at 217.

defendant's contention that Clara M. Mellot received a fee simple absolute and that her subsequent devise to Marie Dale effectively conveyed an absolute estate. Thus, the primary question before the court in this case was whether Clara M. Mellot received a fee simple or merely a life estate.

In 1825 Missouri codified the common law rule as to devises that technical words are not necessary to create a fee, and raised a presumption that the testator intended to pass his entire estate.[3] With respect to deeds, in 1835 Missouri abolished the requirement of words of inheritance to create a fee simple and created a presumption that the grantor intended to pass his entire estate.[4] Thus, standing alone, the first phrase of testator's devise,

> I . . . do Will and Bequeath all the remainder of my property of whatsoever nature, to my beloved wife Mrs. Clara Mellot-nee Roy, . . .[5]

would have passed an estate in fee simple to testator's widow. Therefore, the decisive question before the court was the effect of the subsequent additional language,

> . . . she to have complete control and free will in the management and disposal of the same so long as she may live.[6]

The cardinal rule in the interpretation of a will is that the intention of the testator shall control,[7] and that intention shall be gathered from the whole instrument[8] by giving every clause in the will full effect.[9] Accordingly, in the principal case the court found that testator's language, "I . . . do Will and Bequeath all the remainder of my property of whatsoever nature . . . ," purported to dispose of his entire estate to his wife, and a construction of a mere life estate, accompanied with an added power of disposal, would be contrary to his expressed intention.[10] This construction is in conformity with the presumption that a testator intends to dispose of his whole estate and to die intestate as to none of it.[11]

In a much stronger case for a life estate construction, the Kansas supreme court in *Walker v. Koepcke*,[12] nevertheless held the limitation, "I give, devise and bequeath to my wife, . . . All the remainder . . . During her natural life," as passing an estate in fee simple. In so holding, the court based its decision on the intention of the testator and the presumption against partial intestacy.[13] Where the language of the testator shows a contrary intent, however, the presumption

---

3. § 19, at 795, RSMo 1825.
4. § 2, at 119, RSMo 1835.
5. Shaw v. Wertz, *supra* note 1, at 217.
6. *Ibid.*
7. Hayes v. St. Louis Union Trust Co., 280 S.W.2d 649 (Mo. 1955); Adams v. Simpson, 358 Mo. 168, 213 S.W.2d 908 (1948); Crews v. Crews, 240 S.W. 149 (Mo. 1922); Smith v. Hutchinson, 61 Mo. 83 (1875).
8. Lewis v. Lewis, 345 Mo. 816, 136 S.W.2d 66 (1940).
9. Scullin v. Mercantile-Commerce Bank & Trust Co., 361 Mo. 337, 234 S.W.2d 597 (1951).
10. Shaw v. Wertz, *supra* note 1, at 217.
11. Tellerson v. Taylor, 282 Mo. 204, 220 S.W. 950 (1920).
12. 177 Kan. 617, 282 P.2d 382 (1955).
13. *Ibid.*

against partial intestacy is of no avail.[14] Thus, in construing the whole instrument, the subsequent language in the last phrase of the quoted limitation in *Walker v. Koepcke* could very well have defeated the presumption against partial intestacy.

Testator's intention in the principal case, as indicated by the limitation, is open to either of two possible constructions. Either he intended that an estate in fee simple absolute should pass to his wife, to be enjoyed in fact by her during her lifetime,[15] or he intended the estate should be limited to the period of her lifetime with an additional power of disposal.[16] These alternatives result from the ambiguity of this limitation, and the courts have not been uniform in construing limitations of this type. Some courts have upheld the creation of a fee simple in limitations such as, "in fee simple for life,"[17] "to W, her heirs and assigns, for her lifetime,"[18] or "as long as life doth last."[19] These decisions were based on testator's intention as disclosed by considering the entire instrument and the surrounding circumstances. Other courts, finding an intention contrary to a fee, have construed similar language as passing only a life estate to the devisee.[20]

---

14. Crowson v. Crowson, 323 Mo. 633, 19 S.W.2d 634 (1929).
15. Pfeifer v. Wright, 34 F.2d 690 (N.D. Okl. 1929).
16. Smith v. Smith, 359 Mo. 44, 220 S.W.2d 10 (1949).

I am indebted to Professor Willard L. Eckhardt, of the University of Missouri School of Law, for a suggestion as to another possible meaning not advanced in either brief. The words, "she to have complete control and free will in the management and disposal of same so long as she may live," may have been designed to give a female the sole and separate use of her fee simple, free from any interference or control by a husband she might marry. The usual form to accomplish such purpose was a gift to the female "to her sole and separate use, free from the interference or control of her said husband or of any future husband she may have"; the basic gift might be "to W," or "to W and her heirs." See WHITTELSEY, MISSOURI FORM BOOK §§ 485-86 (1857); PATTISON, MISSOURI FORM BOOK §§ 171-72 (2d ed. by Herron, 1912). Such a provision has not been necessary as to Missouri land since the Married Women's Act of 1889, § 451.250 RSMo 1959, but for some years thereafter could be useful in a will as to land the testator might own in other states. The 1912 edition of PATTISON carries no indication that the "sole and separate use" clauses are no longer needed in Missouri, and these 1912 forms appear to be ones for current use.

In the principal case the will was executed in 1912 and the testator died in 1918. There must have been some "sole and separate use" clauses in wills as late as 1918. An examination of probate records might indicate that at one time the language used in the will in the principal case was in somewhat general use, or was a reasonable facsimile of such a clause. If the words in question comprise a "sole and separate use" clause, then they are given a function to serve other than cutting a fee down to a life estate.

Professor Eckhardt pointed out that the extensive use in Missouri of the fee tail limitation in favor of a female may have been to provide in a crude way for a separate estate for a married woman, and that its continued popularity after 1889 may have been the result of habit rather than of any real function to be served.

17. McAllister v. Tate, 11 Rich. L.(S.C.) 509, 73 Am. Dec. 119 (1818).
18. Lambe v. Drayton, 182 Ill. 110, 55 N.E. 189 (1899).
19. *In re* Brown, 119 Kan. 402, 239 Pac. 747 (1925).
20. *E.g.*, Kiplinger v. Kiplinger, 185 Ind. 81, 113 N.E. 292 (1916) (To W, *she to have full control for and during her natural life; held,* Life Estate); Embry's Ex'x v. Embry's Devisees, 31 Ky. Law Rep. 295, 102 S.W. 239 (1907) (To W, *to do with as she may please during her life; held,* Life Estate); Johns v. Johns, 86 Va. 333, 10 S.E. 2 (1889) (To W, *to hold and enjoy as she thinks best; held,* Life Estate.

The Supreme Court of Missouri in deciding the instant case relied heavily on the Oklahoma decision in the case of *Pfeifer v. Wright*.[21] In construing the limitation, "And I give and bequeath to my wife, . . . to be used by her so long as she lives and enjoys the same,"[22] the court there held that the clause, "to be used by her so long as she lives and enjoys the same,"[23] was insufficient to cut down the fee simple in the devise. After discussing the rule that testator's intention must prevail in the construction of will, the Oklahoma court said,

> The reasonable construction to be placed upon the words employed in the will, "to be used by her so long as she lives and enjoys the same," is that the deceased expressed a desire that the widow might enjoy the estate; certainly she could not enjoy it if she were not living, so the insertion of these words, "so long as she lives," was a way of expressing desire concerning her enjoying the estate.[24]

In the *Pfeifer* case, plaintiff contended the wife was given a life estate rather than a fee. This was rejected by the court because the language employed therein did not clearly express the devise of a life estate.[25] The court further reasoned that since there was no designated remainder over after the decease of his wife, testator intended a complete disposition of his property in this devise.[26]

Although the holding in the Oklahoma case is consistent with the decision in the instant case, the cases can be distinguished. In the *Pfeifer* case the limitation did not contain an express grant of the power of disposal, whereas in the instant case the testator expressly provided for a power of disposal in the devisee. Accordingly, appellants in the instant case contended that the express devise of the power of disposal is a contradiction to the devise of a fee, because the owner of a fee already has the full power to convey the same and there is no need to mention specifically a power of disposition.[27] It is well settled in Missouri that a life estate will not be enlarged to a fee simple by expressly giving a power of disposal.[28] However, it does not necessarily follow that the express limitation of a power of disposal would reduce a fee simple to a life estate.[29] In fact a fair test whether a fee is created is to ascertain from the document whether or not there is provided an unlimited power of disposal.[30]

---

21. Pfeifer v. Wright, *supra* note 15.
22. *Id.* at 691.
23. *Ibid.*
24. *Id.* at 693.
25. Pfeifer v. Wright, *supra* note 15.
26. *Ibid.*
27. Brief for Appellant, Shaw v. Wertz, p. 9.
28. Smith v. Smith, 359 Mo. 44, 220 S.W.2d 10 (1949); Masterson v. Masterson, 344 Mo. 1188, 130 S.W.2d 629 (1939); Blumer v. Gillispie, 338 Mo. 1113, 93 S.W.2d 939 (1936); Hamner v. Edmonds, 327 Mo. 281, 36 S.W.2d 929 (1931); Tisdale v. Prather, 210 Mo. 402, 109 S.W. 41 (1908); Evans v. Folks, 135 Mo. 397, 37 S.W. 126 (1896); Lewis v. Pittman, 101 Mo. 281, 14 S.W. 52 (1890); Rubey v. Barnett, 12 Mo. 3 (1848).
29. Vaughan v. Compton, 361 Mo. 467, 235 S.W.2d 328 (1950); Presbyterian Orphanage v. Fitterling, 342 Mo. 299, 114 S.W.2d 1004 (1938); Fries v. Fries, 306 Mo. 101, 267 S.W. 116 (1924).
30. Owensboro Banking Co. v. Lewis, 269 Ky. 277, 106 S.W.2d 1000 (1937).

In recognizing the possibility of a life estate accompanied with a power of disposal, prior Missouri decisions have confined this result to two types of limitations. They have required either an express limitation of a life estate followed by a power of disposal,[31] or a general devise with a power of disposal followed by a shifting executory interest.[32] Moreover, in the case of a shifting executory interest following a power of disposal, Missouri cases show a strong preference for construing a limitation as creating a life estate and remainder in fee, subject to a power in the life tenant, rather than as a defeasible fee with power and shifting executory interest.[33] Thus, the decision of this court was in accord with prior decisions insofar as the limitation in question contained neither an express limitation of a life estate followed by a power of disposal, nor an express remainder provision.

However, a further examination of Missouri authority reveals a prior decision of the Missouri Supreme Court reaching a different result in the construction of a limitation somewhat similar to, but distinguishable from, that in the instant case. The Missouri case of *Rubey v. Barnett*[34] dealt with the construction of a limitation which read,

> First, my will is that my beloved wife, Polly Horn, have all my estate, both real and personal, so long as she may live: secondly, my will is, that my wife dispose of all said estate as she may think most advisable at her death.[35]

This court there held that the wife acquired only a life estate in the property with a reversion in testator's heirs.[36] This often cited case established the rule in Missouri that,

> When an express estate for life is given, and afterwards a power of disposition is conferred, then the devisee takes but a life estate with a power of disposition, and if no disposition is made, the reversion will go to the heirs of the devisor.[37]

The court there distinguished this case from the earlier New York case of *Jackson v. Robins*[38] where the court stated,

> [A]nd we may lay it down as an incontrovertible rule, that where an estate is given to a person generally, or indefinitely, with a power of dis-

31. Cases cited note 28 *supra.*
32. Glidewell v. Glidewell, 360 Mo. 713, 230 S.W.2d 752 (1950); English v. Ragsdale, 347 Mo. 431, 147 S.W.2d 653 (1940); Aurien v. Security Nat'l Bank Savings & Trust Co., 137 S.W.2d 679 (St. L. Mo. App. 1940); Graham v. Stroh, 342 Mo. 686, 117 S.W.2d 258 (1938); Presbyterian Orphanage v. Fitterling, 342 Mo. 299, 114 S.W.2d 1004 (1938); Blumer v. Gillespie, 338 Mo. 1113, 93 S.W.2d 939 (1936); Sorenson v. Booram, 317 Mo. 516, 297 S.W. 70 (1927); Schneider v. Kloepple, 270 Mo. 389, 193 S.W. 834 (1917); Gibson v. Gibson, 239 Mo. 490, 144 S.W. 770 (1912); Armor v. Frey, 226 Mo. 646, 126 S.W. 483 (1910). See also 11 U. Mo. BULL. (Law Series) 37-51 (1916).
33. *Ibid.*
34. 12 Mo. 5 (1848).
35. *Id.* at 7.
36. Rubey v. Barnett, *supra* note 34.
37. *Id.* at 7.
38. Jackson v. Robins, 16 Johns. R. 537 (N. Y. 1819).

> position, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal.[39]

The *Rubey* case was the exception to the rule rather than the rule because the life estate was expressly given in the first instance.

In the opinion in the instant case the Missouri Supreme Court did not discuss the *Rubey* case which was cited by both counsel. Nevertheless, it can be distinguished from the instant case through a close examination of each limitation. In the *Rubey* case the limitation read essentially (emphasis added), "To W, *so long as she may live* . . . , that my wife dispose of all said estate as she may think most advisable at her death,"[40] whereas the limitation in the present case read (emphasis added), "To W, . . . she to have complete control and free will in the management and disposal of same *so long as she may live.*"[41] In the *Rubey* case the language which might denote a life estate preceded the grant of the added power of disposal. However, in the instant case the language which might denote a life estate is posited subsequent to the general devise and power of disposal. Thus, the determination of the quantity of the estate seemingly depends on the position of the specific language within the limitation. Because the general devise with the added power of disposal preceded the language which might denote a life estate, the instant case is within the earlier rule of *Jackson v. Robins* rather than the exception to the rule as was the *Rubey* case.

In deciding the instant case the Missouri Supreme Court did not consider the possible applicability of its prior decision in the case of *Hunter v. Hunter*[42] as it was not cited by either counsel. The court there held the devise,

> I give and devise unto my mother, . . . and unto my sister, . . . as joint tenants with the right of survivorship, all of the real estate which I may own at the time of my death,[43]

created a joint life estate with a remainder in the whole going to the survivor as an estate in fee simple. The court held that § 474.480, RSMo 1957 Supp., the section raising a presumption of a fee, was not applicable because there was a contrary intention arrived at by giving effect to "with the right of survivorship."[44] The court rejected the argument that the words, "with the right of survivorship," were simply descriptive of the principal incident of a joint tenancy in fee. Applying this doctrine to the present case, the logical result, to give effect to every leading word in the will, would have been a life estate with an added power of disposal and a reversion in the heirs at the death of the first taker because the words would serve no useful function if the widow got a fee.[45] In fact, the de-

---

39. *Id.* at 587.
40. Rubey v. Barnett, *supra* note 35.
41. Shaw v. Wertz, *supra* note 1.
42. 320 S.W.2d 529 (Mo. 1959).
43. *Id.* at 530.
44. Hunter v. Hunter, *supra* note 42, at 532.
45. See note 16, *supra.*

termination of a life estate in the instant case would have been more feasible than in the *Hunter* case because of the express words, "so long as she may live."[46] However, since the *Hunter* case was not before the court, it did not consider its possible application. But unless the application of the doctrine set forth in the *Hunter* case is limited to limitations dealing with concurrent interests, the instant case could easily have been decided differently.

This was a close case, with no exact precedent, and could have been decided either way. The case reemphasizes the point that if a life estate rather than a fee is intended, the draftsman should use clear and explicit language. On the other hand, if a fee is intended, it should not be left to the statutory presumption, but should be expressly so limited.

JOHN K. PRUELLAGE

WORKMEN'S COMPENSATION—"ACCIDENT" RELATED TO STRAIN—MISSOURI COURTS APPLY NARROW CONSTRUCTION

Hall v. Mid-Continent Mfg. Co.[1]

Claimant was a 47 year old woman employee of a manufacturing company operating under the Missouri Workmen's Compensation Law.[2] Part of her job consisted of "notching" long pieces of aluminum by using a machine which rested on the floor. Claimant suffered extensive abdominal adhesions and a hiatus hernia when in an effort to break loose a piece of aluminum stuck in the machine, she placed her foot on the machine and pulled and strained as hard as she could. The machine had stuck on previous occasions during the year immediately preceding the injury, and claimant had on prior occasions either broken the aluminum loose in the described manner or solicited help from other employees.

Claimant sought Workmen's Compensation benefits by reason of an "accident,"[3] arising out of and in the course of her employment. The Kansas City Court of Appeals affirmed a judgment of the circuit court approving findings of the Industrial Commission, denying compensation. The court said:

> The Commission found "it was routine for the employee on occasion to place her foot on the machine for additional pulling power as she struggled to remove the extrusion." . . . That on this occasion she was not exerting any more force or pulling in any different manner than on other occasions. And further, the strain cannot be said to have been abnormal

46. Shaw v. Wertz, *supra* note 1.

1. Hall v. Mid-Continent Mfg. Co., 366 S.W.2d 57 (K.C. Mo. App. 1963).
2. Ch. 287 RSMo 1959.
3. Ch. 287.020 (2), RSMo 1959 provides: "The word 'accident' as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury."

or unexpected—"Only the result, to-wit; the injury, can be said to have been unexpected."[4]

Confusion and controversy has haunted the Missouri courts as to whether a compensable "accident" within the meaning of the Missouri Workmen's Compensation Law is the cause or the result of a strain, and whether the strain itself may be a usual or expected one, or must be one which is unusual or unexpected. The definition of the term "accident" is the same today as it was under the original act;[5] however, Missouri courts have been inconsistent in construing the term "accident" in particular fact situations, some of which seem irreconcilable. Early courts of appeals cases[6] were based on a popular concept of "accident" which did not distinguish between "event" or "accident" and the resulting injury. Undoubtedly claimant in the present case would have recovered under the law as expressed in the earlier cases even though her injury resulted from doing work in the usual or routine manner.

Without expressly overruling these earlier decisions, the Missouri Supreme Court, in *State ex rel. Hussman-Ligonier Co. v. Hughes,*[7] rejected the view that a strain or exertion while doing ordinary work in the usual manner could give rise to an unexpected result. Claimant in the *Hussman* case suffered a coronary occlusion while carrying a bucket of water in the performance of his usual duties. Denying compensation the court held that the injury itself would not constitute the "event" or "accident," because if it did, the employer in effect would be an unlimited insurer going beyond the purpose of the Workmen's Compensation Law.[8] The result of the *Hussman* case has been a narrow rule applied to allow compensation only where the facts and evidence show the strain itself was unusual or abnormal.[9]

---

4. Hall v. Mid-Continent Mfg. Co., *supra* note 1, at 63.

5. *Supra* note 3; See Mo. Laws 1925, at 375, § 7 (b).

6. Carr v. Murch Bros. Constr. Co., 223 Mo. App. 788, 792, 21 S.W.2d 897, 899 (St. L. Ct. App. 1929), holding: "The 'unexpected or unforeseen event; as used in this statute, includes an unexpected or unforeseen event (result) ensuing from a usual and intentional act or movement of the claimant done in the ordinary course of his employment. This is the meaning of the term 'accident' as it is ordinarily understood, and there is nothing in the statute to indicate that the term is there used in the restricted and technical sense. . . ."

Accord, Guillod v. Kansas City Power and Light Co., 224 Mo. App. 382, 18 S.W.2d 97 (K.C. Ct. App. 1929); Drecksmith v. Universal Carloading & Distributing Co., 18 S.W.2d 86 (St. L. Mo. App. 1929). All three cases allowed compensation for "accident" caused by usual strain while the employee was doing his routine work in the usual manner.

7. State *ex rel.* Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 153 S.W.2d 40 (1941), based in part on Delille v. Holton-Seelye Co., 334 Mo. 464, 66 S.W.2d 834 (1933), and Joyce v. Luse-Stevenson Co., 346 Mo. 58, 139 S.W.2d 918 (1940), *rev'd,* State *ex rel.* Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 153 S.W.2d 40 (1941).

8. State *ex rel.* Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 326, 153 S.W.2d 40, 42 (1941).

9. Crow v. Missouri Implement Tractor Co., 307 S.W.2d 401 (Mo. En Banc 1957); State *ex. rel.* United Transps., Inc., v. Blair, 180 S.W.2d 737 (Mo. En Banc 1944); Brotherton v. International Shoe Co., 360 S.W.2d 108 (Spr. Mo. App. 1962); Williams v. Anderson Air Activities, 319 S.W.2d 61 (Spr. Mo. App. 1958).

Missouri courts have not definitely decided whether the unusual or abnormal strain for which compensation may be awarded can arise while the employee is engaged in his usual activities or whether it must occur while the employee is doing his work in an abnormal manner. The cases seem to hold the latter, but there is at least some dictum in favor of recovery even though the employee is engaged in his usual activities.[10] Regardless which view is correct, a rule such as followed in Missouri, which allows compensation only for unusual or abnormal strains, as in the present case, represents a definite minority view, as the overwhelming majority of states consider injuries caused by strain as compensable accidents within the meaning of workmen's compensation laws even though the work being done at the time of the injury was routine and the strain causing the injury was not unusual or abnormal.[11] Much criticism has been directed by eminent authorities in the field of workmen's compensation towards those states, such as Missouri, which still cling to this narrow construction of "accident."[12]

The Michigan Supreme Court in *Shepard v. Michigan Nat'l Bank*,[13] partially in response to Dean Roscoe Pound's "bad eminence" criticism,[14] recognized that it had been grudgingly construing "accident" so as to defeat the purpose of its Workmen's Compensation Act, and allowed an award for an "injury" caused by a usual strain while the employee was doing her ordinary work. Before the *Shepard* case, Michigan courts, like the present Missouri courts, had construed "event"

---

10. Crow v. Missouri Implement Tractor Co., 307 S.W.2d 401, 405 (Mo. En Banc 1957); Brotherton v. International Shoe Co., 360 S.W.2d 108, 114 (Spr. Mo. App. 1962); Williams v. Anderson Air Activities, 319 S.W.2d 61, 65 (Spr. Mo. App. 1958).

11. LARSON, WORKMEN'S COMPENSATION LAW, § 38.20 (1952), lists at least forty states which have allowed compensation for injuries resulting from usual exertion even though the employee was engaged in his usual duties. Compensation has been allowed for hernia, cerebral hemorrhage, arterial or blood-vessel rupture, ruptured aneurism, apoplexy, ruptured appendix, herniated intervertebral disc, stomach rupture, dislocated kidney, dislocated cervical cord, and detached retina; 5 SCHNEIDER, WORKMEN'S COMPENSATION, § 1446 (3d ed. 1946). See Annot., 98 A.L.R. 205 (1935), for a collection of cases pertaining specifically to hernia.

12. Pound, *Comment on Recent Important Workmen Compensation Cases*, 15 NACCA L.J. 45, 54 (1955), in which Dean Roscoe Pound severely criticized the Michigan Supreme Court for its decision in Nichols v. Central Crate & Box Co., 340 Mich. 232, 65 N.W.2d 706 (1954), in which an employee was denied compensation for a paralytic stroke caused by attempting to raise a log in the ordinary course of his work. Dean Pound remarked: "Michigan has attained a bad eminence in narrow interpretation and application of the Workmen's Compensation Act. Larson reminds us [1 LARSON, WORKMEN'S COMPENSATION LAW, §§ 38.00, 38.10, 38.20 (1952)] that before any American state adopted the phrase 'injury by accident' from the British Act, the English courts had settled that although the cause was routine and accidental, it was enough if the effect on the employee was unexpected and catastrophic and so accidental. As it is well settled when a statute which has been authoritatively construed is adopted by legislators elsewhere the construction is deemed adopted with the text, this should be enough, and such is the holding in the majority of jurisdictions." See 19 NACCA L.J. 34 (1957); 20 NACCA L.J. 32 (1957).

13. Shepard v. Michigan Nat'l Bank, 348 Mich. 577, 83 N.W.2d 614 (1957). In *accord*, Coombe v. Penegor, 348 Mich. 635, 83 N.W.2d 603 (1957).

14. 15 NACCA L.J. 45, 54 (1955).

or "accident" to embody only the cause aspect, excluding the unexpected result of ordinary work.[15] *Shepard* reconstrued "accident" to include both the unexpected cause and the unexpected result.[16]

Accidental injuries have been defined in many ways;[17] one recognized workable definition is that offered by the Arkansas Supreme Court in *Bryant Stave & Heading Co. v. White*:

> An accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury. In short, that an injury is accidental when either the cause or the result is unexpected or accidental, although the work being done is usual or ordinary.[18]

This writer's opinion is that the Missouri Supreme Court should reconsider its narrow construction of the term "accident," and in the next case in which the question is properly presented, readopt the view of the earlier courts of appeals cases[19] and align Missouri with the overwhelming majority of states allowing compensation for an injury caused by a strain such as in the present case. This narrow intrepretation of "accident" defeats the purpose of the Workmen's Compensation Law as stated by the Missouri Supreme Court itself:

> The fundamental purpose of the Legislature in inacting the Workmen's Compensation Law was, *as a matter of public welfare*, to place upon industry the losses sustained by workmen and their dependents by reason of injuries and death arising out of and in the course of *employment*—the theory being that compensation for such losses should be paid by industry rather than to leave the injured employee or his dependents to bear such loss alone.[20]

The decision in the present case is not only inconsistent with the purpose of the Law; it is absurd to say that a strain exerted which pulls, breaks, and tears the tissues of the human body "cannot be said to have been abnormal or unexpected."[21]

The Missouri courts today enjoy the "bad eminence" which distressed the Michigan Supreme Court prior to the *Shepard* case. Much truth and wisdom is

---

15. Wieda v. American Box Board Co., 343 Mich. 182, 72 N.W.2d 13 (1955). Note particularly the dissenting opinion which is the basis for the majority opinion in Shepard v. Michigan Nat'l Bank, *supra* note 13.

16. Shepard v. Michigan Nat'l Bank, *supra* note 13, at 603, 83 N.W.2d at 625.

17. Bryant Stave & Heading Co. v. White, 227 Ark. 147, 296 S.W.2d 436 (1956).

18. *Id.* at 155, 296 S.W.2d at 441.

19. *Supra* note 6.

20. Hickey v. Board of Education, 363 Mo. 1039, 1043, 256 S.W.2d 775, 777 (1953), *citing* Beatty v. Chandeysson Elec. Co., 238 Mo. App. 868, 879, 190 S.W.2d 648, 654 (1945); § 287.800, RSMo 1959.

21. Hall v. Mid-Continent Mfg. Co., 366 S.W.2d 57 (K.C. Mo. App. 1963).

found in the forceful majority opinion in that case by Justice Talbot Smith, native of Fayette, Missouri and former Professor of Law at the University of Missouri:

> Thus in one state after another a rule of reason consonant with the purpose of the act replaces arbitrary judicial fiat. Neither Arkansas,[22] . . . nor Florida[23] acted under the whip of legislative compulsion. Each was secure in the knowledge that a court has inherent power to purge itself of its own errors. Failing in this duty, the day inevitably approaches when a court will stand alone, while the stream of life flows by, avoiding, but not being impeded by, the curious derelict in its path.[24]

WILLIAM F. SUTTER

22. Bryant Stave & Heading Co. v. White, *supra* note 17.
23. Gray v. Employers Mutual Liab. Ins. Co., 64 So.2d 650 (Fla. 1953).
24. Shepard v. Michigan Nat'l Bank, *supra* note 13 at 583, 83 N.W.2d at 615.