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Recent Cases

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ADMISSIBILITY OF JUVENILE'S STATEMENTS IN CRIMINAL PROSECUTIONS

State v. Sinderson[1]

On March 6, 1967, 14 year old Robert Eugene Sinderson, accompanied by his mother and uncle, turned himself over to the Joplin police department. Prior to interrogation, the juvenile officer and a police officer informed the defendant, his mother and uncle of his constitutional rights under the fifth and sixth amendments.[2] The defendant waived his rights, and this waiver was affirmed by his mother.[3] Interrogation was conducted by the juvenile officer and the police. At no time did the juvenile officer interview or interrogate the defendant outside the presence of the police officers. His mother and uncle were informed that they could remain with the defendant at all times. The interrogation continued for about four hours, resulting in the defendant's signed statement.

At a subsequent hearing the juvenile court found that the defendant was not a proper subject to be dealt with under the Juvenile Code and that he should be prosecuted under the general criminal law.[4] Sinderson was then tried and convicted of first degree robbery.[5] The trial court found the statement made by the defendant on March 6 to be voluntary and admitted it into evidence. On appeal, the Missouri Supreme Court affirmed the conviction, holding that the interrogation of Sinderson by police officers in conjunction with the juvenile officer was not a violation of section

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1. 455 S.W.2d 486 (Mo. 1970).

2. The statement read to defendant, his mother and uncle was that required by Miranda v. Arizona, 384 U.S. 436 (1966).

3. A statement of waiver was signed by the defendant, and witnessed by his mother and uncle, and by the juvenile officer and police officer. State v. Sinderson, 455 S.W.2d 486, 489 (Mo. 1970).

4. § 211.071, RSMo 1969, provides:

> In the discretion of the judge of the juvenile court, when any petition under this chapter alleges that a child of the age of fourteen years or older has committed an offense which would be a felony if committed by an adult, or that the child has violated a state or municipal traffic law or ordinance or that a minor between the ages of seventeen and twenty-one years over whom the juvenile court has jurisdiction has violated any state law or municipal ordinance, the petition may be dismissed and such child or minor may be prosecuted under the general law, whenever the judge after receiving the report of the investigation required by this chapter and hearing evidence finds that such child or minor is not a proper subject to be dealt with under the provisions of this chapter.

5. After transfer to criminal court, defendant had at first been charged with first degree murder, but the trial resulted in a hung jury. Thereafter, a grand jury indicted him on a charge of robbery in the first degree. This matter was referred by the circuit court to the juvenile court, which again transferred defendant to the circuit court for prosecution under the general criminal law. State v. Sinderson, 455 S.W.2d 486, 488 (Mo. 1970).

211.061 (1) of the Juvenile Code,[6] and that the admission of the defendant's statement into evidence was not barred by section 211.271 (3) of the Juvenile Code as it existed at the time the defendant was tried.[7] The court refused to adopt an absolute prohibition as to statements made by juveniles to juvenile officers. Instead, it held that a confession made by a juvenile to a juvenile officer, not rendered inadmissible on state or federal constitutional grounds, may be used against the juvenile in a prosecution under the general criminal law subsequent to waiver of jurisdiction by the juvenile court.[8]

The juvenile court systems in the United States were established as a result of a reform which began early in the twentieth century.[9] The sys-

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6. § 211.061 (1), RSMo 1969 provides:

> When a child is taken into custody with or without warrant for an offense, the child together with any information concerning him and the personal property found in his possession, shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him.

7. § 211.271 (3), RSMo 1959, which was in effect at the time of Sinderson's trial, provided:

> Evidence given in cases under sections 211.011 to 211.431 is not lawful or proper evidence against the child for any purpose whatever in a civil, criminal or other proceeding except in subsequent cases under sections 211.011 to 211.431.

This section was amended as of October 13, 1969. § 211.271 (3), RSMo 1969 now provides:

> After a child is taken into custody as provided in section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under this chapter.

8. State v. Sinderson, 455 S.W.2d 486, 493-95 (Mo. 1970).

Aside from statutory exclusions, the admissibility of a juvenile's confession is dependant upon his being informed of his rights under the fifth and sixth amendments (*see* cases cited note 15 *infra*) and upon his voluntary waiver of these rights. Most courts strengthen the presumption against waiver to take into account the lack of maturity of the child and look to the "totality of the circumstances" surrounding the waiver to determine its validity. *See, e.g.,* Gallegos v. Colorado, 370 U.S. 49 (1962) (confession held inadmissible); Haley v. Ohio, 332 U.S. 596 (1948) (confession held inadmissible); People v. Johnson, 70 Cal. 2d 469, 450 P.2d 265, 74 Cal. Rptr. 889 (1969) (confession held inadmissible); People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967), *cert. denied,* 392 U.S. 945 (1968) (confession held admissible); People v. Robinson, 274 Cal. App. 2d 514, 79 Cal. Rptr. 213 (1969) (confession held admissible); People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466 (1968), *petition for cert. dismissed,* 397 U.S. 660 (1970) (confession held admissible); State v. Taylor, 456 S.W.2d 9 (Mo. 1970) (waiver of counsel prior to lineup held voluntary); *In re* Nelson, 58 Misc. 2d 748, 296 N.Y.S.2d 472 (N.Y. City Fam. Ct. 1969) (confession held inadmissible); Commonwealth v. Tabb, 433 Pa. 204, 249 A.2d 546 (1969) (confession held inadmissible). *See also* cases collected, Annot., 87 A.L.R.2d 624 (1963); Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?,* 19 HAST. L.J. 223 (1967).

9. The first juvenile court act was passed in Illinois in 1899. R. PERKINS, CRIMINAL LAW 841 (2d ed. 1969). For a general historic survey see Parker, *Some Historical Observations on the Juvenile Court,* 9 CRIM. L.Q. 467 (1967); Nicholas, *History Philosophy and Procedures of Juvenile Courts,* 1 J. FAM. L. 151 (1961).

tem has developed on the premise that the state stands in the role of *parens patriae* toward the wayward juvenile.[10] In juvenile cases, the state, as *parens patriae,* was given the task not to determine the guilt or innocence of the child, but rather "what had best be done in his interest and in the interest of the state to save him from a downward career."[11] In this process criminal stigma was to be avoided and the juvenile spared the experience of a criminal trial.[12] According to this theory a juvenile was not accused of a specific crime and was not placed on trial; therefore the rights of an accused did not arise.[13] However, beginning with the landmark case of *In re Gault,*[14] juvenile offenders were granted many of the rights of an adult criminal.[15]

Initial jurisdiction by the juvenile court, however, does not always insure the juvenile offender complete insulation from criminal prosecution. In certain instances the juvenile court may exercise its statutory authority and waive jurisdiction over the child and thereby subject him to the normal criminal processes.[16] Since the overall atmosphere of juvenile court investigations and proceedings are nonpunitive,[17] the juvenile offender is encouraged to speak freely with officers of the court.[18] A later waiver of jurisdiction by the juvenile court could place the juvenile in the

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10. Kent v. United States, 383 U.S. 541, 554-55 (1965); State v. Couch, 294 S.W.2d 636, 639 (St. L. Mo. App. 1956). *See also In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied,* 348 U.S. 973 (1955). The term *parens patriae* is defined as the father or parent of his country; in England, the King; in America, the people. The government is thus spoken of in relation to its duty to protect and control minor children and guard their interests. Helton v. Crawley, 241 Iowa 296, 312, 41 N.W.2d 60, 70 (1950).

11. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 119-20 (1909).

12. State v. Tolias, 326 S.W.2d 329, 333 (Mo. 1959); *In re* C——, 314 S.W.2d 756, 760 (Spr. Mo. App. 1958). For discussion of the development of the juvenile court concept *see* R. PERKINS, CRIMINAL LAW 841 (2d ed. 1969); Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers,* 27 U. PITT. L. REV. 894 (1966). Those jurisdictions holding that proceedings in a juvenile court are not criminal prosecutions are listed in Pee v. United States, 274 F.2d 556, 561-62 (D.C. Cir. 1959).

13. *See, e.g.,* United States *ex rel.* Yonick v. Briggs, 266 F. 434 (W.D. Pa. 1920); State v. Heath, 352 Mo. 1147, 1150, 181 S.W.2d 517, 519 (1944); *Ex parte* Naccarat, 328 Mo. 722, 726, 41 S.W.2d 176, 178 (En Banc 1931); Minor Children of F.B. v. Caruthers, 323 S.W.2d 397, 400 (St. L. Mo. App. 1959); *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied,* 348 U.S. 973 (1955).

14. 387 U.S. 1 (1967). In *Gault, the* Supreme Court held that the due process clause of the fourteenth amendment requires that the states provide notice of hearing and charges, the right to counsel, the privilege against self incrimination, and the right to confrontation to a juvenile in a proceeding in which he is threatened with a deprivation of his liberty; *see* Katcham, *Guidelines from Gault: Revolutionary Requirements and Re-appraisal,* 53 VA. L. REV. 1700 (1967).

15. *In re* Winship, 397 U.S. 358 (1970), held that due process requires proof beyond a reasonable doubt during the ajudicatory stage of a delinquency proceeding which may result in the juvenile's confinement. However, in McKeiver v. Pennsylvania, —— U.S. ——, 91 St.Ct. 1976 (1971), the Supreme Court held that a juvenile was not entitled to a trial by jury in juvenile proceedings. *See* Annot., 100 A.L.R.2d 1241 (1965).

16. *See* § 211.071, RSMo 1969, quoted note 4 *supra.*

17. Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959); State v. Harold, 364 Mo. 1052, 1055, 271 S.W.2d 527, 529 (1954).

18. *E.g.,* State v. Arbeiter, 449 S.W.2d 627 (Mo. 1970).

precarious position of having his prior statements to the juvenile officer or court used against him in a subsequent criminal prosecution.

In three cases prior to *Sinderson*, the Missouri Supreme Court considered the use of a juvenile's statements to police officers and juvenile authorities in a criminal proceeding instituted after waiver of jurisdiction by the juvenile court.[19] In the first case, *State v. Arbeiter*,[20] hereinafter referred to as *Arbeiter I*, the court held that statements elicited from a juvenile by police officers, in disregard of the provision of the Juvenile Code which requires a police officer who arrests a juvenile to take him immediately before the juvenile court or juvenile officer,[21] were inadmissible in a criminal prosecution subsequent to waiver of jurisdiction by the juvenile court. On this basis, the court reversed Arbeiter's conviction for first degree murder and remanded the case for a new trial.[22] In order to obtain admissions which Arbeiter had made while in custody of juvenile authorities for use in the second trial, the circuit attorney filed a motion for a subpoena duces tecum to inspect the records of the juvenile court pertaining to Arbeiter's detention.[23] After issuing a preliminary writ of prohibition to quash the subpoena, the Missouri Supreme Court in *State ex rel. Arbeiter v. Reagan*,[24] hereinafter referred to as *Arbeiter II*, quashed the writ, holding that the juvenile court's waiver of jurisdiction and certification of Arbeiter for trial under the general criminal law gave rise to a power in the circuit court to order the inspection of his records by persons having a legitimate interest therein, including the circuit attorney and the defendant's counsel.[25] Arbeiter was again tried and convicted. He appealed his conviction, and in *State v. Arbeiter*,[26] hereinafter referred to as *Arbeiter III*, the Missouri Supreme Court reversed. The court held that the statements made by Arbeiter to the juvenile oficer, which were presented to and considered by the juvenile court prior to waiver of jurisdiction were made inadmissible in a criminal prosecution by section 211.271 (3) RSMo 1959.[27] Protection of the child offender from abuse of the *parens patriae* position of the juvenile court was apparently the reason for the holding. Pointing out why Arbeiter's statements were not admissible, the court stated:

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19. All three of these cases concerned the statements of a fifteen year old boy named Arbeiter: State v. Arbeiter, 449 S.W.2d 627 (Mo. 1970); State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371 (Mo. En Banc 1968); State v. Arbeiter, 408 S.W.2d 26 (Mo. 1966).

20. 408 S.W.2d 26 (Mo. 1966).

21. *See* § 211.061 (1), RSMo 1969, quoted note 6 *supra*.

22. State v. Arbeiter, 408 S.W.2d 26 (Mo. 1966). The Arizona Supreme Court reached the same result under a similar statute in State v. Shaw, 93 Ariz. 40, 378 P.2d 487 (1963).

23. This motion was filed pursuant to Mo. R. CRIM. P. 25.19.

24. 427 S.W.2d 371 (Mo. En Banc 1968).

25. State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371, 377-78 (Mo. En Banc 1968). *See* McKinnis, *Juvenile Social Records and Criminal Discovery*, 35 Mo. L. REV. 113 (1970), in which the author is critical of the decision on the grounds that allowing disclosure of juvenile files negates the purpose of the juvenile courts by destroying the confidentiality of the proceedings, thus indicating a shift away from the type of thinking upon which the theory of *parens patriae* is based.

26. 449 S.W.2d 627 (Mo. 1970).

27. *Id.* at 632-33; *see* § 211.271 (3), RSMo 1959, quoted note 7 *supra*.

> This would permit the juvenile officer to procure the admission of the juvenile in the relaxed, nonadversary atmosphere of the juvenile interrogation and make the statement admissible in subsequent criminal proceedings.[28]

However, *Arbieter III* did *not* adopt a rule calling for strict prohibition of all juvenile statements in subsequent criminal proceedings. This question was left open to future decision.[29]

In *Sinderson* the court clarified the decision in *Arbeiter I*[30] and answered the question left open by *Arbeiter III*.[31] Concluding that there had been no violation of section 211.061 (1),[32] the court decided that *Arbeiter I* did not prohibit the admission into evidence of the statements of a juvenile to police oficers when the juvenile had not been taken into custody and when the interrogation was arranged by the juvenile officer and conducted in his presence.[33] The Court held that Sinderson's statements were not rendered inadmissible by either section 211.271 (3) of the Juvenile Code as it existed at the time of his trial, or by the decision in *Arbeiter III*.[34] The court pointed out that the fact situation in *Sinderson* was quite different from that in *Arbeiter III*. In the *Sinderson* case the juvenile was given a warning meeting constitutional standards prior to questioning and the interrogation was conducted in an adversary atmosphere.[35] After reviewing the facts surrounding Sinderson's statement on March 6, the court stated:

> The evidence shows that the setting in which defendant gave his statement was not a relaxed, nonadversary *parens patriae* situation, as in Arbeiter III. Rather he was warned as to the consequences of making a statement. He was in the police station and a police captain was participating actively. Under this set of facts, we hold that the statement was not made inadmissible by § 211.271 (3). . . .[36]

In *Sinderson,* the court also rejected appellant's contention that the admission of his statement was fundamentally unfair, thereby refusing to adopt the position supported by *Harling v. United States*.[37] *Harling* is cited as the leading case for the proposition that *all* admissions of a juvenile made to juvenile court authorities before the juvenile court waives

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28. State v. Arbeiter, 449 S.W.2d 627, 633 (Mo. 1970).
29. *Id.* at 631.
30. State v. Arbeiter, 408 S.W.2d 26 (Mo. 1966).
31. State v. Arbeiter, 449 S.W.2d 627 (Mo. 1970).
32. *See* § 211.061 (1), RSMo 1969, quoted note 6 *supra.*
33. State v. Sinderson, 455 S.W.2d 486, 491-92 (Mo. 1970).
34. *Id.*
35. *Id.* at 492; State v. Arbeiter, 449 S.W.2d 627, 633-34 (Mo. 1970); *see also* Judge Finch's concurring opinion in State *ex rel.* Arbeiter v. Reagan, 427 S.W.2d 371, 379 (Mo. En Banc 1968).
36. State v. Sinderson, 455 S.W.2d 486, 492-93 (Mo. 1970). The court was referring to § 211.271 (3), RSMo 1959 as it existed at the time of Sinderson's trial. *See* statutes quoted note 7 *supra.*
37. 295 F.2d 161 (D.C. Cir. 1961).

jurisdiction are inadmissible in a subsequent criminal proceeding.[38] Instead the court stated:

> Presuming that federal constitutional Fifth & Sixth Amendment rights are granted, we believe that an absolute prohibition is not required so long as it is made clear to the juvenile that criminal responsibility can result and that the questioning authorities are not operating as his friends but as his adversaries.[39]

In June, 1969, the Missouri General Assembly amended section 211.271 (3) of the Juvenile Code, to become effective on October 13, 1969. The express language of the statute prohibits the use in a criminal prosecution of any statement made to the juvenile officer or juvenile court personnel prior to waiver of jurisdiction by the juvenile court.[40] Although the amended version of the statute was mentioned both in *Arbeiter III*[41] and in *Sinderson*.[42] It was said not to govern in either case because both cases arose before its passage.[43] However, the court in *Arbeiter III* indicated that the new provision would act as a complete bar to the use in a criminal proceeding of a juvenile's statement made to juvenile authorities prior to waiver of jurisdiction by the juvenile court.[44] Speaking of the use of a juvenile's statements in the situation later raised by *Sinderson,* the court in *Arbeiter III* stated that "the legislature . . . has put the question here raised at rest by amending paragraph 3 of § 211.271. . . ."[45] It would seem that a case similar to *Sinderson* arising after October 13, 1969, would be decided differently, and that Missouri by statute has joined the ranks of the jurisdictions which follow the doctrine of absolute prohibition as

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38. *Id.* at 164; *accord,* State v. Maloney, 102 Ariz. 495, 433 P.2d 625 (1967); Francois v. State, 188 So. 2d 7 (Fla. App. 1966). The *Harling* decision was based on the proposition that the *parens patriae* relation must be protected. Missouri and other jurisdictions have distinguished the situaion where the questioning authorities were acting as adversaries to the juvenile; *e.g.* State v. Sinderson, 455 S.W.2d 486. (Mo. 1970); People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967), *cert. denied,* 392 U.S. 945 (1968); People v. Magee, 217 Cal. App. 2d 443, 31 Cal. Rptr. 658 (1963), *cert. denied,* 376 U.S. 925 (1964); People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466 (1968), *petition for cert. dismissed,* 397 U.S. 660 (1970); People v. Connolly, 33 Ill. 2d 128, 210 N.E.2d 523 (1965); State v. Lewis, 468 P.2d 899 (Ore. Ct. App. 1970); State v. Gullings, 244 Ore. 173, 416 P.2d 311 (1966).

39. State v. Sinderson, 455 S.W.2d 486, 493 (Mo. 1970); *accord,* State v. Gullings, 244 Ore. 173, 416 P.2d 311 (1966).

40. *Compare* § 211.271 (3), RSMo 1969 *with* § 211.271 (3), RSMo 1959; *see* statutes quoted note 7 *supra.*

41. State v. Arbeiter, 449 S.W.2d 627, 634 (Mo. 1970).

42. State v. Sinderson, 455 S.W.2d 486, 493 (Mo. 1970).

43. Since State v. Arbeiter, 449 S.W.2d 627 (Mo. 1970), had excluded the statement on the basis of the prior version of § 211.271 (3), the court did not rule on the retroactive application of the amended version of the statute. However, in State v. Sinderson, 455 S.W.2d 486 (Mo. 1970), the court rejected the contention that the amended version of § 211.271 (3) merely clarified the previously existing provision, and therefore refused to apply the statute retroactively to bar Sinderson's statements.

44. Sate v. Arbeiter, 449 S.W.2d 627, 634 (Mo. 1970).

45. *Id.*

laid down by *Harling v. United States.*[46] Although in interpreting the amended version of section 211.271 (3) the Missouri courts could avoid a complete prohibition by ruling that the legislative purpose was to protect the *parens patriae* relationship and that the admission into evidence of otherwise admissible statements given by a juvenile in an adversary atmosphere would not be an undermining or abuse of the *parens patriae* philosophy, it is unlikely that this will result.[47] Considering the dicta in *Arbeiter III*[48] and the clear prohibitive language of the statute, it is more likely that the Missouri courts will follow the express language and render inadmissible in a criminal prosecution all statements made by a juvenile to juvenile authorities prior to waiver of jurisdiction by the juvenile court. This interpretation, together with the decision in *Arbeiter I* barring the admission of statements elicited by the police, leaves the juvenile offender in the position that no statement elicited from him prior to waiver of jurisdiction by the juvenile court could be used as evidence against him or "for any purpose whatsoever in any proceeding, civil or criminal. . . ."[49] other than proceedings under the Juvenile Code.

GEORGE M. BOCK

SETTLEMENT WITH ONE JOINT TORT-FEASOR NOT A BAR TO RECOVERY OF STATUTORY MAXIMUM IN MISSOURI WRONGFUL DEATH ACTION

Crowder v. Gordons Transports, Inc.[1]

Walter W. Crowder, domiciled in Arkansas, died in Missouri on July 27, 1965 as a result of injuries received the same day in a collision between a tractor-trailer owner by the St. Louis-San Francisco Railway Co. ("Frisco"), which he was driving in the course of his employment, and a tractor-trailer transport operated by James J. Gray. Gray was driving the transport in the course of his employment by Gordons Transports, Inc. ("Gordons"), a Tennessee corporation engaged in interstate commerce in Arkansas, Missouri, and other states. The accident occurred in Missouri less than one mile north of the Arkansas border. Crowder was survived by his widow,

46. 295 F.2d 161 (D.C. Cir. 1961); *accord,* State v. Maloney, 102 Ariz. 495, 433 P.2d 625 (1967).

47. If the purpose of § 211.271 (3), as amended, is to protect the *parens patriate* relationship from abuse, it would not serve this purpose to apply the statute to bar admission of evidence procured in a situation where the *parens patriae* relationship was non-existent. *Cf.* State v. Arbeiter, 449 S.W.2d 627, 632 (Mo. 1970).

48. State v. Arbeiter, 449 S.W.2d 627, 634 (Mo. 1970).

49. § 211.271 (3), RSMo 1969, quoted note 7 *supra.* However, this would not render inadmissible in a criminal proceeding a juvenile's spontaneous statement to police prior to being taken before juvenile authorities; *see* Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961); State v. Sinderson, 455 S.W.2d 486, 492 (Mo. 1970); State v. Arbeiter, 408 S.W.2d 26, 31 (Mo. 1966).

1. 419 F.2d 480 (8th Cir. 1969).

Ruth, and two minor sons on whose behalf this wrongful death action was brought.

On June 30, 1966, Ruth Crowder, in consideration of the payment of $30,000 made to her individually and as administratrix, gave Frisco, a common carrier subject to F.E.L.A., her written covenant not to sue.[2] Shortly thereafter, the present action was commenced against Gordons in the Federal District Court for the Western District of Arkansas. After considerable preliminary hassling,[3] the plaintiffs sought relief under the Missouri Wrongful Death Act[4] which contained a limitation of $25,000 on the damages that could be awarded.[5] The court granted the defendant's motion for summary judgment.[6] On appeal, the Eighth Circuit Court of Appeals reversed, holding that a settlement with one of two alleged joint tort-feasors does not bar a wrongful death action against the other even when the amount paid by the settling party exceeds the statutory maximum for wrongful death.[7]

It was long held at common law that the wrongful death of an individual did not give rise to a cause of action.[8] Such an action was first created in England by Lord Campbell's Act of 1846.[9] Missouri first enacted a wrongful death statute in 1855 with a $5,000 limit on recoverable damages;[10] however, the statute involved in this case, which was adopted in 1955,[11] limited damages to $25,000.[12] On the other hand, the Federal Em-

2. The distinction between a covenant not to sue and a release is somewhat confused in Missouri cases, and would probably make no practical difference in this discussion. *See* New Amsterdam Cas. Co. v. O'Brien, 330 S.W.2d 859 (Mo. 1960); Judd v. Walker, 158 Mo. App. 156, 138 S.W. 655 (St. L. Ct. App. 1911).

3. A motion to dismiss with leave to amend pleadings was granted; plaintiffs amended seeking relief under the Missouri wrongful death statute rather than the Arkansas statute. A motion to dismiss on grounds that the Missouri statute of limitations had run was granted. 264 F. Supp. 137 (W.D. Ark. 1967). On appeal the amendment was held to relate back and was, therefore, within the period of limitation. 387 F.2d 413 (8th Cir. 1967).

4. §§ 537.080-.090, RSMo 1959 [now §§ 537.080-.090, RSMo 1969].

5. § 537.090, RSMo 1959 read as follows:

> Amount of damages recoverable—In every action brought under section 537.080, the jury may give to the surviving party or parties who may be entitled to sue such damages, not exceeding twenty-five thousand dollars, as the jury may deem fair and just for the death and loss occasioned, with reference to the necessary injury resulting from such death and having regard for the mitigating or aggravating circumstances attending the wrongful act, neglect or default resulting in such death.

This section was amended in 1967 to increase the limit to $50,000. § 537.090, RSMo 1969.

6. 289 F. Supp. 166 (W.D. Ark. 1968).

7. 419 F.2d at 485.

8. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808); Higgins v. Butcher, 80 Eng. Rep. 61 (K.B. 1607); *accepted in U.S.*, Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., 25 Conn. 265 (1856); Carey v. Berkshire R.R., 55 Mass. 475 (1848).

9. Fatal Accidents Act, 9 & 10 Vict., c. 93 (1846).

10. C. 51, at 647, RSMo 1855. For a history of early wrongful death acts in Missouri, *see* Cummins v. Kansas City Pub. Serv. Co., 334 Mo. 672, 66 S.W.2d 920 (En Banc 1933).

11. §§ 537.080-.100, RSMo 1959 (amended subsequent to the date this cause of action arose, §§ 537.080-.100, RSMo 1969).

12. § 537.090, RSMo 1959, quoted note 5 *supra*.

ployers Liability Act,[13] to which Frisco was subject, includes an action for wrongful death of covered employees but contains no limit on damages the jury may award.

The question to be answered in *Crowder* was what effect the covenant not to sue entered into with Frisco had on plaintiff's cause of action against Gordons. The original common law rule in Missouri was that a release of one tort-feasor operated as a release of all joint tort-feasors.[14] This rule was changed in 1915 by a statute[15] which has been consistently applied to allow a claimant to "settle with one of two or more joint tort-feasors and release that particular joint tort-feasor from further liability, and still hold and sue the others for the balance of damages."[16] Notwithstanding this statutory change, the claimant is entitled to only one satisfaction of his claim. Thus, once he has received full compensation for his injuries, he may not recover from another wrongdoer.[17] Under this reasoning, the covenant not to sue settlement with Frisco would bar plaintiffs from proceeding against Gordons only if it was found that the settlement was a "full satisfaction" for their injuries.

The wording of the statute permitting release of a joint tort-feasor is that the claimant may recover "the balance of said *claim* or *cause of action.*"[18] This wording would seem to require a $30,000 settlement to be interpreted as a "full satisfaction" of the "claim or cause of action," thus barring a subsequent recovery from a joint tort-feasor. However, the court held that section 537.090[19] did not purport to say damages could not exceed $25,000, but merely fixed an arbitrary and artificial maximum on the amount the jury can award.[20] The court relied on Missouri cases in con-

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13. 45 U.S.C. §§ 51-59 (1964).

14. Dulaney v. Buffum, 173 Mo. 1, 73 S.W. 125 (1903); Hubbard v. St. Louis & M. R.R., 173 Mo. 244, 72 S.W. 1073 (1903).

15. § 537.060, RSMo 1969 (in part):

> It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released.

16. Booker v. Kansas City Gas Co., 231 Mo. App. 214, 219, 96 S.W.2d 919, 923 (K.C. Ct. App. 1936), *quoted with approval,* New Amsterdam Cas. Co. v. O'Brien, 330 S.W.2d 859, 864 (Mo. 1960); *accord,* Vinson v. East Tex. Motor Freight Lines, 280 S.W.2d 124 (Mo. 1955); Berry v. Kansas City Pub. Serv. Co., 343 Mo. 474, 121 S.W.2d 825 (1938); Roberts v. Atlas Life Ins. Co., 236 Mo. App. 1162, 163 S.W.2d 369 (K.C. Ct. App. 1942); Farrell v. Kingshighway Bridge Co., 117 S.W.2d 693 (St. L. Mo. App. 1938); Burton v. Joyce, 22 S.W.2d 890 (St. L. Mo. App. 1930); Judd v. Walker, 158 Mo. App. 156, 138 S.W. 655 (St. L. Ct. App. 1911).

17. New Amsterdam Cas. Co. v. O'Brien, 330 S.W.2d 859 (Mo. 1960); Meyers v. Kennedy, 306 Mo. 268, 267 S.W. 810 (En Banc 1924); McEwen v. Kansas City Pub. Serv. Co., 225 Mo. App. 194, 19 S.W.2d 557 (K.C. Ct. App. 1929); Judd v. Walker, 158 Mo. App. 156, 138 S.W. 655 (St. L. Ct. App. 1911).

18. § 537.060, RSMo 1969 (emphasis added), quoted note 15 *supra.*

19. § 537.090, RSMo 1959, quoted note 5 *supra.*

20. 419 F.2d at 483.

cluding that "the statutory limit is not meant to be the maximum value of human life. . . ."[21] This statement, put in the context in which it was used by the Missouri court, is an answer to the argument that the jury cannot award damages at or near the maximum when plaintiff's loss was less than it might have been under other circumstances. The complete statement, originating in the leading case of *Marlow v. Hafziger Baking Co.*, is that

> the statutory limit . . . is not meant to be the maximum value of human life, which can only be recovered upon showing the greatest imaginable loss of life expectancy and earning power under the most aggravating circumstances.[22]

The court in *Crowder* then held that the policy of the Federal Employers Liability Act[23] required that settlements thereunder should not operate to prevent plaintiffs from recovering, in a subsequent suit against a joint tort-feasor, the balance of any damages which they can prove up to the limit under the Missouri wrongful death provisions.[24] The United States Supreme Court commented in *Burnett v. New York Central Railroad* that F.E.L.A. "has a uniform operation, and neither is nor can be deflected therefrom by local statutes."[25] This uniform operation would clearly be defeated by applying the varying limitations on recovery in wrongful death statutes to plaintiffs suing under F.E.L.A.[26] Thus, if plaintiffs settled with Gordons first and then sought to sue Frisco under F.E.L.A., the fact that they had already received the limit under the Missouri Act would not bar recovery for any further damages which they could prove.

The Eighth Circuit Court of Appeals allowed logic to prevail by holding that the order in which plaintiffs proceeded against defendants should make no difference in the amount which they were entitled to recover, and that the limitation in the Missouri act applied only to the recovery from Gordons and not to the total amount which plaintiffs could receive for their losses arising out of the accident. F.E.L.A. liability on the part of one defendant thus enables a partial avoidance of the wrongful death limitation of the Missouri statute.

Although the federal court of appeals applied "Missouri law," one may speculate as to whether the Missouri Supreme Court would, in fact, decide this question the same way. In *Myers v. Kennedy*,[27] which was not referred to in *Crowder*, the Missouri Supreme Court allowed a covenant not

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21. *Id.*

22. Marlow v. Hafziger Baking Co., 333 Mo. 790, 801, 63 S.W.2d 115, 121 (1933); *accord*, Waller v. Oliver, 296 S.W.2d 446 (Mo. 1956); Huffman v. Mercer, 295 S.W.2d 27, 35 (Mo. 1956); Combs v. Combs, 284 S.W.2d 423, 426 (Mo. 1955); Steeger v. Meehan, 63 S.W.2d 109, 114 (Mo. 1933).

23. 45 U.S.C. §§ 51-59 (1964).

24. 419 F.2d at 485.

25. 380 U.S. 424, 433 (1965); *accord*, Chesapeake & O. Ry. v. Kelly, 241 U.S. 485, 491 (1916); Graham v. Thompson, 357 Mo. 1133, 212 S.W.2d 770 (En Banc 1948); Mooney v. Terminal R.R. Ass'n of St. L., 352 Mo. 245, 76 S.W.2d 605 (1944).

26. In fact, over two-thirds of the jurisdictions have no maximum limit at all on recovery under wrongful death acts. W. PROSSER, LAW OF TORTS § 121, at 932 (3d ed. 1964).

27. 306 Mo. 268, 267 S.W. 810 (En Banc 1924).

to sue settlement for $6,000 with a streetcar company, a concurrent tort-feasor liable for the wrongful death under a penalty statute,[28] to be deducted from the $10,000 maximum allowed by the actual and punitive damages statute then in force.[29] The resulting maximum, $4,000, was recovered from the driver of a private car also involved in the accident.

The fact situation in *Crowder* presents several other issues not considered by the court. First, there is a possibility that Ruth Crowder may have appropriated the entire cause of action. In *Spencer v. Bradley*,[30] the Missouri Supreme Court held that a partial release of certain parties by the husband of the deceased, even though accompanied by an express reservation, appropriated the entire cause of action to himself and barred the children from suing other parties. Since Ruth Crowder had settled with Frisco under F.E.L.A. both in her individual capacity as well as in her capacity as administratrix, and was now seeking to sue on behalf of the children under the wrongful death statute, it might well have been argued that *Spencer* precluded any further suit. *Spencer,* however, has not been referred to in subsequent Missouri cases nor has any other state taken a similar position in applying changes in the common law doctrine that a release of one joint tort-feasor is a release of all.

A more interesting possibility arises out of the multi-state relationships involved. The Arkansas wrongful death statute[31] contains no arbitrary maximum limit on the damages award, providing merely that the jury "may fix such damages as will be fair and just compensation for the pecuniary injuries."[32] Since the case was filed in federal court in Arkansas, and the general rule is that the federal courts in diversity cases apply the law of the state in which they sit (including the conflict of laws rules),[33] the question of which wrongful death provisions govern depends on the Arkansas conflict of laws requirements. The federal district court applied the rule of *lex loci delicti,* in accordance with numerous Arkansas cases,[34] which made the law of Missouri applicable.

In Missouri, however, following *Kennedy v. Dixon*[35] in which the Missouri Supreme Court adopted the "most significant contacts" rule in tort cases, the judge might well have found Arkansas to have the most significant contacts with the case, and therefore would have applied the Arkansas wrongful death act with no limitations on damages.

Thus, in order for the plaintiffs in *Crowder* to take advantage of the Missouri conflicts rule it would be necessary to convince the district court that Arkansas would apply the whole law of the place of the tort, including

28. § 4217, RSMo 1919.
29. § 4218, RSMo 1919.
30. 351 S.W.2d 202 (Mo. 1961).
31. ARK. STAT. ANN. §§ 27-906 to -910 (Replacement vol. 3A, 1962).
32. ARK. STAT. ANN. § 27-909 (Replacement vol. 3A, 1962).
33. Griffin v. McCoach, 313 U.S. 498 (1941); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
34. Trotter v. Ozarks Rural Elec. Co-op. Corp., 226 Ark. 722, 294 S.W.2d 498 (1956); Wheeler v. Southwestern Greyhound Lines, 207 Ark. 601, 182 S.W.2d 214 (1944); Tipler v. Crafton, 202 Ark. 351, 150 S.W.2d 625 (1941); American Ry. Express Co. v. Davis, 152 Ark. 258, 238 S.W. 50 (1922).
35. 439 S.W.2d 173 (Mo. En Banc 1969).

the conflicts of laws rules, which in this case would refer back to the substantive law of Arkansas. This doctrine, known as *renvoi,* has been rejected by most jurisdictions considering the question;[36] however, the only Arkansas case in point avoided decision on whether to follow the *renvoi* doctrine after determining that the result would be the same.[37]

Still another approach would be the argument that the Arkansas Supreme Court would, if presented with the proper fact situation, adopt the "most significant contacts" or "center of gravity" rule for tort cases. This is the rule of the *Restatement (Second) of Conflict of Laws,*[38] the Uniform Commercial Code,[39] and a growing number of jurisdictions for tort cases.[40] Furthermore, since the rule of *lex loci delicti* is not constitutionally required it is within the power of a state to apply its law to any issue in which it has a substantial interest.[41]

Support for the "significant contacts" approach can be found in previous Arkansas cases.[42] *Gentry v. Jett*[43] allowed recovery under the Arkansas Workman's Compensation statute, by an Arkansas resident with an Arkansas employer, for an injury occuring in Oklahoma. *McGinty v. Ballentine Produce, Inc.*[44] applied the law of the place of the tort, but commented favorably on the "most significant contacts" rule; the court pointed out that the only contact Arkansas had was location of the defendant's place of business, whereas the residence of the decedent, place of mishap, and appointment of the administratrix were all in Missouri.[45]

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36. Griswold, *Renvoi Revisited,* 51 HARV. L. REV. 1165, 1170 (1938).

37. Cooper v. Cherokee Village Dev. Co., 236 Ark. 37, 364 S.W.2d 158 (1963).

38. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (1964).

39. UNIFORM COMMERCIAL CODE § 1-105; *See* § 400.1-105, RSMo 1969, and ARK. STAT. ANN. § 85-1-105 (Supp. I vol. 7C, 1961).

40. Emmert v. United States, 500 F. Supp. 45 (D.D.C. 1969); Merchants National Bank & Trust Co. v. United States, 272 F. Supp. 409 (D. N.D. 1967) (stating South Dakota, if presented with the proper case, would follow the most significant relationship rule); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Abendschein v. Farrell, 11 Mich. App. 662, 162 N.W.2d 165 (1968) (applying the rule to the specific fact situation, but saying it was without power to overrule *lex loci*); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Craig v. Columbus Compress & Warehouse Co., 210 So. 2d 645, 649 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. En Banc 1969); Clark v. Clark, 107 N.H. 351, 353, 222 A.2d 205, 208 (1966); Maffatone v. Woodson, 99 N.J. Super. 559, 240 A.2d 693 (1968); Babcock v. Jackson, 19 N.Y.2d 473, 191 N.E.2d 279 (1963); Casey v. Manson Constr. & Eng'r Co., 247 Ore. 274, 428 P.2d 898 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Woodward v. Stewart, 243 A.2d 917 (R.I. 1968); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

41. Richards v. United States, 369 U.S. 1 (1961); Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962).

42. However, the Arkansas Supreme Court has upheld *lex loci* in tort cases whenever the question has been presented. *See* Bell Transp. Co. v. Morehead, 437 S.W.2d. 234 (Ark. 1969); Trotter v. Ozarks Rural Elec. Co-op. Corp., 226 Ark. 722, 294 S.W.2d 498 (1956); Wheeler v. Southwestern Greyhound Lines, 207 Ark. 601, 182 S.W.2d 214 (1944).

43. 235 Ark. 20, 356 S.W.2d 736 (1962).

44. 241 Ark. 533, 408 S.W.2d 891 (1966). This case involves statutory construction rather than a conflict of law question but the reasoning allows a direct analogy to conflicts cases.

45. *Id.* at 535, 408 S.W.2d at 893.

Thus, plaintiffs might also have been successful if they had sued under the Arkansas wrongful death act and convinced the federal judge that Arkansas would adopt either the "most significant contacts" approach or the dubious *renvoi* doctrine. In addition, they could have sued in Missouri under the doctrine of *Kennedy v. Dixon*.[46]

Success on the conflicts question could have avoided the whole problem for plaintiffs,[47] but the Eighth Circuit Court of Appeals reached a commendable result in the case as presented. The court followed logic in cutting through the tangle of verbal statements of law and holding that the order in which plaintiffs proceeded against the defendants was irrelevant. Settlement with the F.E.L.A. defendant should not bar the plaintiffs from recovering against a joint tort-feasor in a Missouri wrongful death action if they can prove additional damages. This decision will enable survivors to be compensated for a greater share of their actual losses, at least in one special case, for a wrongful death resulting in liability under Missouri law.

DAVID C. CHRISTIAN

LIABILITY FOR TORTS OF PERSONAL REPRESENTATIVES

Barnett v. Schumacher[1]

In this action for slander, plaintiff alleged that he had presented a note executed by the decedent to the defendant-executor and that, upon examination of the note in the presence of a third party, the defendant-executor claimed it had been forged by the plaintiff. The defendant-executor filed a motion to dismiss upon the grounds, among others, that he was charged only in his representative capacity and not as an individual, and that the petition did not constitute a cause of action against the defendant-executor either as an individual or in his capacity as executor. The circuit court sustained the motion and dismissed the petition.[2] On appeal the Missouri Supreme Court held that plaintiff had a cause of action against the executor in his individual capacity but not against the estate, stating:

> [T]he office of a personal representative is a naked trust; [the trustee] is restricted in the performance of acts connected with or incident to the execution of his trust and cannot create a new obligation so as to bind the estate.[3]

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46. 439 S.W.2d 173 (Mo. En Banc 1969).

47. The prior settlement with Frisco would not operate as a release of the joint tort-feasor under Arkansas law. It makes no difference whether the agreement was interpreted as a covenant not to sue (Douglas v. Thompson, 206 Ark. 92, 176 S.W.2d 717 (1944); Arkansas Power & Light Co. v. Liebe, 201 Ark. 292, 144 S.W.2d 29 (1940); Missouri Pac. R.R. v. Burks, 196 Ark. 1104, 121 S.W.2d 65 (1936)) or whether it is considered to be a release (ARK. STAT. ANN. § 34-1004 (1947)). Thus, under Arkansas law, there would be no obstacle to plaintiffs' recovering all damages suffered.

1. 453 S.W.2d 934 (Mo. 1970).
2. *Id.* at 936.
3. *Id.* at 937.

In other words, "an estate cannot be held liable for a tort committed by an executor, administrator or trustee, even though the tort is committed in the course of the administration of the estate."[4] This general rule has been applied in a number of situations including those involving negligence,[5] trespass,[6] and fraudulent misrepresentation by the fiduciary.[7]

Certain exceptions to this general rule, however, have been created under which the estate may be exposed to liability.[8] These exceptions fall into two categories: indirect and direct liability. The first category, indirect liability, applied to two situations. The first situation occurs when the plantiff recovers against the fiduciary in his personal capacity and the personal representative or trustee is entitled to indemnify himself from the estate.[9] The fiduciary has this right of indemnification only if he is not personally at fault.[10] For example, under the doctrine of respondeat superior, a trustee or personal representative may be held liable for the torts of his employees, but would have a right of indemnification since he was not personally at fault.[11] The second situation arises when a tort creditor, unable to satisfy his judgment against the fiduciary personally, is subrogated to the fiduciary's right of exoneration from the estate.[12] Both of these

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4. *Id.* at 936.

5. T. L. Horn Trunk Co. v. Delano, 162 Mo. App. 402, 142 S.W. 770 (St. L. Ct. App. 1912). The court held that the estate was not liable for the negligence of the administratrix, who failed to keep a water tank in repair in a building belonging to the estate.

6. Brown v. Floyd, 163 Ala. 317, 50 So. 995 (1909). The estate was held not liable for the unwarranted and unlawful trespass of the executor.

7. Richardson v. Palmer, 24 Mo. App. 480 (K.C. Ct. App. 1887). The estate was held not liable for the fraudulent misrepresentation of the administrator in the sale of a bull at an administrator's sale.

8. Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928); Fratcher, *Trustees' Powers Legislation,* 37 N.Y.U.L. REV. 627, 653 (1962); 39 MICH. L. REV. 673, 674 (1941).

9. RESTATEMENT (SECOND) OF TRUSTS § 247 (1959) provides: "The rules stated in §§ 244 and 245 are applicable to liabilities in tort incurred by the trustee in the course of the administration of the trust."

§ 244 provides: "The trustee is entitled to indemnity out of the trust estate for expenses properly incurred by him in the administration of the trust."

10. RESTATEMENT (SECOND) OF TRUSTS, Explanatory Notes § 247, comment *a* at 624 (1959) provides: "If the liability was incurred in the proper administration of the trust and the trustee was not personally at fault in incurring the liability, he is entitled to indemnity out of the trust estate."

11. RESTATEMENT (SECOND) OF TRUSTS, Explanatory Notes § 247, comment *b* at 624 (1959) provides:

> Where a tort to a third person results from the negligence of an agent or servant properly employed by the trustee in the administration of the trust, and the trustee is not personally at fault, although the trustee is liable to the third person, he is entitled to indemnity out of the trust estate.

12. RESTATEMENT (SECOND) OF TRUSTS § 268 (1959). *See also* Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N.Y.S. 566 (1908). The general rule seems to be that a claimant having a right of subrogation can have no greater rights than one to whose rights he is subrogated. Plate Glass Underwriters' Mut. Ins. Co. v. Ridgewood Realty Co., 219 Mo. App. 186, 269 S.W. 659 (K.C. Ct. App. 1925). So it would seem that if a fiduciary is liable to the estate from another transaction, this would limit the claimant's rights in a subrogation action against the estate.

situations involve circuitry;[13] the initial action in each case is against the personal representative or trustee in his individual capacity, not directly against the estate. This produces a possibility of duplicative litigation when one suit would suffice.[14] Furthermore, this problem is compounded by the fact that the majority view seems to be that the plaintiff's recovery in the initial action is not limited in amount to the value of the assets of the estate.[15] Obviously there is a possibility that the trustee or executor will not be fully indemnified.

The second category, direct liability, pertains to actions where the estate is reached directly by a suit against the personal representative or trustee in his official capacity.[16] Direct liability of the estate has been allowed in the following situations: (1) where property passes into the estate at the time of decedent's death and the executor wrongfully detains the property believing it to belong to the estate;[17] (2) where the will or trust expressly subjects the estate to liability for the fiduciary's torts;[18] (3) where a tort benefits the estate or trust and the fiduciary is not at fault;[19] (4) where a tort is committed in the course of proper trust administration, and the fiduciary is insolvent and not personally at fault;[20] and (5) where a tort is committed while the trustee is acting under the control or supervision of the beneficiaries.[21]

In considering the first of these situations, the Missouri Supreme Court in *State ex rel. Gnekow v. United States Fidelity & Guaranty Co.*[22] seemed

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13. Kirchner v. Miller, 280 N.Y. 23, 19 N.E.2d 665 (1939); *see also* Wright v. Caney River R.R., 151 N.C. 510, 66 S.E. 588 (1909); Ewing v. William L. Foley, Inc., 115 Tex. 222, 280 S.W. 499 (1926).

14. *See generally* Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928); Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N.Y.S. 566 (1908).

15. Wahl v. Schmidt, 307 Ill. 331, 138 N.E. 604 (1923); RESTATEMENT (SECOND) OF TRUSTS § 264 (1959). For an exception to this rule *see* McLaughlin v. Minnesota Loan & Trust Co., 192 Minn. 203, 255 N.W. 839 (1934), where the court held that a trustee's individual liability to pay rent, taxes, and assessments running with the trust's property was limited by the assets of the estate.

16. State *ex rel.* Gnekow v. United States Fidelity & Guar. Co., 349 Mo. 528, 163 S.W.2d 86 (1942); Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928). *See* 31 AM. JUR. 2d *Executors & Administrators* §§ 260, 262-64 (1967). RESTATEMENT (SECOND) OF TRUSTS § 268 (1959) provides:

> If a person to whom the trustee has become personally liable in the course of the administration of the trust cannot obtain satisfaction of his claim out of the trustee's individual property, he can by a proceeding in equity reach trust property and apply it to the satisfaction of his claim to the extent to which the trustee is entitled to exoneration out of the trust estate.

17. State *ex rel.* Gnekow v. United States Fidelity & Guar. Co., 349 Mo. 528, 163 S.W.2d 86 (1942); 31 AM. JUR. 2d *Executors & Administrators* § 262 (1967).

18. Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928); Prinz v. Lucas, 210 Pa. 620, 60 A. 309 (1905); 39 MICH. L. REV. 673 (1941).

19. Whiting v. Hudson Trust Co., 234 N.Y. 394, 138 N.E. 33 (1923); Wright v. Caney River R.R., 151 N.C. 510, 66 S.E. 588 (1909).

20. Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928); Carey v. Squire, 63 Ohio App. 476, 27 N.E.2d 175 (1939).

21. Wright v. Caney River R.R., 151 N.C. 510, 66 S.E. 588 (1909); Ross v. Moses, 175 S.C. 355, 179 S.E. 757 (1935).

22. 349 Mo. 528, 163 S.W.2d 86 (1942).

to indicate, in dicta, that if the administrator or executor wrongfuly detains property of a third party which the estate has acquired at or after the decedent's death, the owner can maintain an action directly against the estate. The court alluded to two prior Missouri cases which stated that "if the administrator still has the specific property, the owner may maintain a suit in replevin for it against the administrator in his official capacity,"[23] and if the administrator has sold it and "receives and uses the proceeds as part of said estate, a court of equity would afford relief to the owner by decreeing payment to be made for such property out of the funds of the estate."[24] Thus, *Gnekow* seems to allow these two remedies to reach the estate directly when the fiduciary wrongfully detains property.[25] It should be noted, however, that the claimant may still elect to maintain an action against the fiduciary in his personal capacity.[26]

The second situation exposes the estate or trust to liability when the will or trust expressly provides for such liability.[27] This principle was upheld in *Birdsong v. Jones*[28] where the will provided "that all liabilities incurred in the operation and management of said trust estate should be paid by said trustees from said trust estate."[29] In this case the court indicated that there was no question that the trustee was personally liable because the plaintiff had suffered injury as a result of the negligence of one of the trustee's employees. The court, however, allowed recovery directly against the estate in accordance with the will.[30] Therefore, this type of provision in the will can expose an estate to direct liability even when the trustee, executor, or administrator has not acted in good faith and has in fact been negligent. *Birdsong* also seems to indicate that in Missouri the doctrine of respondeat superior can be applied by the courts to hold an administrator, executor, or trustee individually liable for the torts of his servants and employees in the administration of the trust or estate.[31]

While there seem to be no Missouri cases directly in point on the last three situations, the third and fourth were at least recognized in *Birdsong v. Jones*.[32] Considering the third exception, which exposes the estate to

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23. *Id.* at 89, *citing* White v. McFarland, 148 Mo. App. 338, 128 S.W. 23 (St. L. Ct. App. 1910).

24. Silsby v. Wickersham, 171 Mo. App. 128, 132, 155 S.W. 1094, 1095 (Spr. Ct. App. 1913). It is important to note that in the Missouri Probate Code there is a statutory alternative to replevin. The statutes provide a remedy to regain wrongfully withheld property by a proceeding in probate court. §§ 473.340-.357, RSMo 1969. Williamson's Estate v. Williamson, 380 S.W.2d 333 (Mo. 1964); *In re* Myers' Estate, 376 S.W.2d 219 (Mo. En Banc 1964); Longacre v. Knowles, 333 S.W.2d 67 (Mo. 1960); Masterson v. Plummer, 343 S.W.2d 352 (Spr. Mo. App. 1961).

25. State *ex rel.* Gnekow v. United States Fidelity & Guar. Co., 349 Mo. 528, 163 S.W.2d 86 (1942).

26. 31 AM. JUR. 2d *Executors & Administrators* § 262 (1967).

27. *See* cases cited note 18 *supra.*

28. 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928).

29. *Id.* at 770, 8 S.W.2d at 99.

30. *Id.* at 771, 8 S.W.2d at 100.

31. *Id.;* RESTATEMENT (SECOND) OF TRUSTS § 264 (1959) provides:
The trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be liable if he held the property free of trust.

32. 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928).

direct liability where a tort benefits the estate or trust and the fiduciary is not at fault, the court quoted from *Wright v. Caney River R.R.*,[33] where that court said, "[I]f it is shown that an obligation has been assumed by an executor for the protection of the estate, and has inured to its benefit, its payment will usually be allowed him in an account with the distributees."[34] As previously stated, the fourth exception exposes the estate to direct liability where a tort is committed in the course of proper trust administration, and the fiduciary is insolvent and not personally at fault.[35] In support of this exception the court mentioned that "in cases where such allowance [indemnity to the trustee] is proper, in order to prevent circuitry of action the estate may be held liable directly to the party injured."[36] As described in the next paragraph, in jurisdictions which do not recognize this exception, the claimant must maintain an initial action against the personal representative and then proceed in equity to reach the estate.[37]

Thus, the general rule of the naked trust, promulgated in *Barnett,* has at least three potential problems. First, there is the possibility that a claimant, unable to satisfy his judgment against an insolvent fiduciary, will also be unable to reach the trust or estate property.[38] This would happen under the present exceptions when the trustee or personal representative is individually at fault. Second, the trustee or personal representative is liable for his torts under the present law whether or not the estate can be reached.[39] This could certainly be a prodigious liability for a trustee or personal representative conducting a dangerous activity, especially since the trustee's liability is not limited to the assets of the estate.[40] This means that even if the trustee has a right of indemnification he may be unable to recover the full amount. Third, there is always a possibility of duplicity in litigation.[41] This can result in time and expense to both the claimant (in an action for subrogation) and the personal representative.

It is interesting, and hopefully a harbinger for Missouri, that section 3-808 of the Uniform Probate Code[42] seems to alleviate the problems under

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33. 151 N.C. 510, 66 S.E. 588 (1909). This case is directly in point with the fifth exception where the estate is held directly liable when a tort is committed while the trustee is acting under the control or supervision of the beneficiaries. The trustee was charged with operating a railroad for the benefit of creditors. An employee was injured due to the negligence of the trustee or his employees, but the court held that the estate was liable since the trustee was an agent of the beneficiaries and under their control.

34. *Id.* at 512; 66 S.E. at 589.

35. Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928); Carey v. Squire, 63 Ohio App. 476, 27 N.E.2d 175 (1939).

36. Birdsong v. Jones, 222 Mo. App. 768, 772, 8 S.W.2d 98, 100 (K.C. Ct. App. 1928).

37. RESTATEMENT (SECOND) OF TRUSTS § 268 (1959).

38. Brown v. Floyd, 163 Ala. 317, 50 So. 995 (1909); T. L. Horn Trunk Co. v. Delano, 162 Mo. App. 402, 142 S.W. 770 (St. L. Ct. App. 1912); Richardson v. Palmer, 24 Mo. App. 480 (K.C. Ct. App. 1887).

39. RESTATEMENT (SECOND) OF TRUSTS § 264 (1959).

40. *Id.*

41. *See* cases cited note 38 *supra.*

42. UNIFORM PROBATE CODE § 3-808 provides:

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless

the present rules. Since the Uniform Probate Code would allow suits against the estate for torts committed by the personal representative "whether or not the personal representative is individually liable . . . ,"[43] a claimant would be in a more advantageous position than under present case law where the estate can be reached directly only in the five previously enumerated exceptions.[44] The claimant could still maintain an action against the personal representative when he is individually at fault.[45]

One of the consequences of the Uniform Probate Code provision would be to protect the personal representative in situations where he is not personally at fault.[46] For instance, in Missouri the trustee is held vicariously liable for the torts of his employees.[47] In this situation the Uniform Probate Code would allow the claimant a suit directly against the estate but not against the personal representative, since he was not individually at fault.[48] The personal representative would never have the problem of seeking indemnity from the estate because he could never be liable when he was not individually at fault,[49] and, for the same reason, would never be liable for a judgment in excess of the estate assets when he was not personally at fault.[50]

Since the Uniform Probate Code would always allow the claimant an action directly against the estate, he would never have to exhaust the fiduciary's assets first before having the right to reach the estate or trust property.[51] Thus, the probability of multiple suits is diminished.

> In summary, the Uniform Probate Code
> would relieve him [the trustee] from personal liability . . . for torts committed in the course of trust administration when he was not personally at fault. It would permit the claimant to sue the

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he fails to reveal his representative capacity and identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

It is important to note that similar provisions are made concerning the individual liability of conservators and trustees in § 5-429 and § 7-306, respectively.

43. UNIFORM PROBATE CODE § 3-808.

44. *See* cases cited notes 12-16 *supra.*

45. UNIFORM PROBATE CODE § 3-808.

46. *Id.* Comment.

47. Birdsong v. Jones, 222 Mo. App. 768, 8 S.W.2d 98 (K.C. Ct. App. 1928). *See also* note 31 *supra.*

48. UNIFORM PROBATE CODE § 3-808.

49. *Id.*

50. *Id.*

51. Carey v. Squire, 63 Ohio App. 476, 27 N.E.2d 175 (1939); UNIFORM PROBATE CODE § 3-808.

trustee . . . and to collect from the trust estate whether or not the trustee is personally liable. The net effect of these changes would be to convert every trust, for purposes of contract and tort liability, into a corporation, with the trustee in the position of general manager of the corporation. This would be fairer than the present rule to both trustees and third party claimants.[52]

C. W. CRUMPECKER, JR.

STATE HIGH SCHOOL ATHLETIC ASSOCIATIONS: WHEN WILL A COURT INTERFERE?

Brown v. Wells[1]

I. INTRODUCTION

This note deals with the legal status of state high school athletic associations: voluntary organizations of high schools formed mainly to promote and regulate competitive athletics between the member schools.[2] The authority of such associations has been challenged in a number of states, in both state and federal courts,[3] the most recent instance being *Brown v.*

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52. Fratcher, *Missouri and the Uniform Probate Code,* 26 J. Mo. B. 349, 365 (1970).

1. — Minn. —, 181 N.W.2d 708 (1970).

2. The typical state high school athletic association is a voluntary association of high schools, governed by a Board of Control. The members of the board are educators, typically superintendents or principals, and are elected by the schools. In Missouri there are eight members of the board; one from each of eight regions in the state. Day-to-day affairs are handled by a "Commissioner." No state money is received. Operating funds are obtained from association-sponsored meets and tournaments. The chief purpose of such associations is to promote and maintain wholesome amateur athletics among its members. To promote this purpose, a detailed set of rules is adopted by the member schools to govern nearly every aspect of interscholastic sports. The starting and ending dates for the season of various sports are prescribed, as well as the dates when practices may commence and cease. Umpires and referees are examined and certified by the association. An extensive list of rules is used to govern the eligibility of student athletes. Such matters as age, scholastic standards, amateur status and inter-school transfers are tightly regulated. A member is bound under penalty of fine or suspension to report all violations of rules. The Commissioner takes initial action on violations. Appeal may be had from his ruling to the Board of Control. The constitution of the association normally provides that the decision of this board is final.

3. *Alabama*: Scott v. Kilpatrick, 286 Ala. 129, 237 So. 2d 652 (1970); *Colorado*: Colorado High School Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956); *Florida*: Sult v. Gilbert, 148 Fla. 31, 3 So. 2d 729 (1941); *Illinois*: Robinson v. Illinois High School Ass'n, 45 Ill. App. 2d 277, 195 N.E.2d 38 (1963), *cert. denied,* 379 U.S. 960 (1965); *Indiana*: State *ex rel.* Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 240 Ind. 114, 162 N.E.2d 250 (1959); *Louisiana*: Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Marino v. Waters, 220 So. 2d 802 (La. App. 1969); *Minnesota*: Brown v. Wells, — Minn. —, 181 N.W.2d 708

Wells.[4] There is no reported case dealing with the status of the Missouri State High School Activities Association (MSHSAA). It is hoped that this note, by examining the cases arising in other states, will shed some light on the status of the Missouri association.

II. The Wells Case

In *Wells* a high school student, by his father, brought suit against the Minnesota State High School League asking that the league be enjoined from enforcing certain restrictions it had placed on hockey activities by students who wished to participate in league hockey matches. The rules about which the student was complaining would make any student ineligible who participated on an independent hockey team, participated in any hockey games, practices or other hockey activities out of season, or attended a hockey training camp which was not sanctioned by the league. The plaintiff contended that the rules were void because they were arbitrary, unreasonable and capricious, and that the rules deprived him of his "constitutional rights, privileges and immunities."[5]

The trial court found in favor of the student and enjoined the league from enforcing its hockey rules. The court stated that a boy should be allowed to follow his legitimate interests without restraint or limitation, except those imposed by law or those necessary to preserve the welfare of his fellow students. The court further stated that the interscholastic hockey matches were an "integral part of the school curriculum," that the rules were not necessary to school welfare, and that the plaintiff had a constitutional right to participate in hockey competition.[6]

The Supreme Court of Minnesota reversed the trial court's decision and dissolved the injunction. The court refused to follow the trial court in delving into the wisdom of the rules at issue. The court recognized that, by the "great weight of authority," a court should not attempt to control the discretion of school boards either singly or as members of an association.[7] It stated that a court would not interfere with the affairs of a state athletic association unless the association's action is "so willful and unreasoning, without consideration of the facts and circumstances, and in such disregard of them as to be arbitrary and capricious."[8] The court noted that educational officials "are apparently of the view that high schools are not obligated to prepare or train students for a career in professional

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(1970); *Ohio*: State *ex rel.* Ohio High School Athletic Comm'n v. Judges of the Court of Common Pleas, 173 Ohio 239, 181 N.E.2d 261 (1962); *Oklahoma*: Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963); Morrison v. Roberts, 183 Okla. 359, 82 P.2d 1023 (1938); *Tennessee*: Tennessee Secondary School Athletic Ass'n v. Cox, 221 Tenn. 164, 425 S.W.2d 597 (1968); *Texas*: University Interscholastic League v. Midwestern Univ., (152 Tex. 124, 255 S.W.2d 177 (1953); *West Virginia*: State *ex rel.* West Virginia Secondary School Activities Comm'n v. Oakley, 152 W. Va. 533, 164 S.E.2d 775 (1968).

4. — Minn. —, 181 N.W.2d 708 (1970).
5. *Id.* at —, 181 N.W.2d at 709.
6. *Id.* at —, 181 N.W.2d at 710.
7. *Id.* at —, 181 N.W.2d at 711.
8. *Id.* at —, 181 N.W.2d at 710-711.

athletics."[9] Since such a policy was not "clearly wrong,"[10] any rules made to further that goal would not be questioned unless one protesting could show that the rules were "not supported by reason or adopted in good conscience."[11]

The *Wells* case is the most recent in a series of cases concerning state high school athletic associations.[12] These cases form a chain of precedent for the general rule that court will usually not interfere with the internal affairs of such associations. Nearly all of the cases find in favor of the associations. But this uniformity of result can not be read as an indication that the law is settled in the area. In all but the two earliest cases in the series, the state appellate courts have either reversed or prohibited a lower court's ruling against the athletic association,[13] or have prohibited the lower court from hearing a complaint against an association.[14] In other words, state athletic associations have consistently been losers at the trial level and winners on appeal. One reason for this phenomena is that new methods of attack are devised by the plaintiffs. Because the athletic associations have muddled along for many years without any recognized authority over their actions in either the statutes or the cases, many facets of their conduct were untested and many more remain untested. Since the associations affect the lives of so many students of so many proud parents, it can be predicted that the state athletic associations, including the one in Missouri, will be embattled and tested by much litigation in the future. What follows is an attempt to point out which matters have already been settled and which have not.

The starting point of any discussion must center on the fact that the athletic associations almost without exception fit under the category "voluntary unincorporated association." Under the headings below a summary is given of the conditions under which a court will intervene in the affairs of voluntary unincorporated associations. Following this will be a discussion of the way courts have treated the state high school athletic associations and the differences and similarities which exist between the law concerning these associations and regular voluntary associations.

III. Judicial Interference with a Voluntary Association

As a general rule, courts will not interfere to control the administration of the constitution or by-laws of a voluntary association.[15] The consti-

9. *Id.* at —, 181 N.W.2d at 711.
10. *Id.*
11. *Id.* at —, 181 N.W.2d at 712.
12. *See* cases cited note 3 *supra.*
13. *See, e.g.,* Scott v. Kilpatrick, 286 Ala. 129, 237 So. 2d 652 (1970); Robinson v. Illinois High School Ass'n, 45 Ill. App. 2d 277, 195 N.E.2d 38 (1963), *cert. denied,* 379 U.S. 960 (1965); Marino v. Waters, 220 So. 2d 802 (La. App. 1969); Brown v. Wells, — Minn. —, 181 N.W.2d 708 (1970); State *ex rel.* Ohio High School Athletic Comm'n v. Judges of the Court of Common Pleas, 173 Ohio 239, 181 N.E.2d 261 (1962); Tennessee Secondary School Athletic Ass'n v. Cox, 221 Tenn. 164, 425 S.W.2d 597 (1968).
14. *See e.g.,* State *ex rel.* Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 240 Ind. 114, 162 N.E.2d 250 (1959); State *ex rel.* West Virginia Secondary School Activities Comm'n v. Oakley, 152 W. Va. 533, 164 S.E.2d 775 (1968).
15. State *ex rel.* Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 240 Ind. 114, 121, 162 N.E.2d 250, 253 (1959).

tution and by-laws of an association are considered a contract between the members.[16] As long as the constitution and by-laws are not illegal, and the association conducts its affairs in good faith and in conformity with its rules, a court will not intervene.[17] When a departure from the rules is suspected, a court will not interfere with an association's internal affairs except upon "the clearest kind of showing" that the constitution and rules have been violated[18] *and,* in most cases, only when the complaining member has a "distinct property right . . . directly involved."[19] Notwithstanding the presence of these factors a court will still be reluctant to intervene, because it is recognized that the field of judicial interference with the actions of voluntary associations in controversies between their members "is and should be a very narrow one."[20] Where the question of the enforcement of certain association rules turns on a factual determination already made by designated officials of the association, a court will almost never overturn the findings of fact, because the association's proceedings "are of a quasi-judicial character, and are no more subject to collateral attack for mere error than are the judgments of a court of law."[21]

IV. Judicial Interference with a State Athletic Association

A. *Common Law*

The cases dealing with state athletic associations basically follow the general rules as to voluntary associations, but there are some differences. The main difference is that a judge is especially hesitant to interfere with the discretion of educational officials. State legislatures normally delegate discretion to local boards of education by statute.[22] The courts recognize that such statutes give these boards broad discretion in matters affecting school management and government.[23] A court may not interfere with such discretion unless a board exercises its power in an arbitrary, unreasonable, capricious or unlawful manner. The Utah case of *Starkey v. Board of Education*[24] recognized that the discretionary power of a school board includes the power to make reasonable rules to regulate extracurricular school activities, including interscholastic athletics.[25] The Utah court ruled that there is a presumption that a school board always acts properly, and that a board rule governing eligibility of students to participate in competitive

16. Junkins v. Local 6313, CWA, 241 Mo. App. 1029, 1038, 271 S.W.2d 71, 76 (Spr. Ct. App. 1954); Robinson v. Nick, 235 Mo. App. 461, 483, 136 S.W.2d 374, 387 (St. L. Ct. App. 1940).
17. Cases cited note 16 *supra.*
18. State *ex rel.* O'Brien v. Petry, 397 S.W.2d 1, 6 (St. L. Mo. App. 1965).
19. Robinson v. Nick, 235 Mo. App. 461, 483, 136 S.W.2d 374, 387 (St. L. Ct. App. 1940); Tennessee Secondary School Athletic Ass'n v. Cox, 221 Tenn. 164, 174, 425 S.W.2d 597, 601 (1968).
20. Junkins v. Local 6313, CWA, 241 Mo. App. 1029, 1037, 271 S.W.2d 71, 76 (Spr. Ct. App. 1954).
21. *Id.*
22. Burns v. Harris, 358 S.W.2d 257, 259 (K.C. Mo. App. 1962).
23. *Id.*; Magenheim v. Board of Educ., 347 S.W.2d 409, 417 (St. L. Mo. App. 1961).
24. 14 Utah 2d 227, 381 P.2d 718 (1963).
25. *Id.* at 230, 381 P.2d at 720.

athletics, if deemed by the board to serve the objectives of the school, will not be unlawfully arbitrary if the eligibility standard is uniformly applied.[26]

Does it necessarily follow that a school board has the power to authorize the school or schools in its district to join a state athletic association? The Supreme Court of Ohio thought so. In the case of *State ex rel. Ohio High School Athletic Association v. Judges of Court of Common Pleas*,[27] the court held, on the basis of a statutory grant of authority to the schools boards which closely resembles that found in Missouri,[28] that a school board had the authority to authorize schools within their district to join a state high school athletic association.[29] In fact, the courts have not discriminated between the discretion of one school board to set rules for athletics and the discretion of groups of schools (*i.e.*, the high school athletics associations) to set rules for athletics:

> Surely the schools themselves should know better than any one else the rules under which they want to compete with each other in athletic events. . . . And if the officials of the various high schools desire to maintain membership in the association, and to vest final rule enforcement authority in the Board of Control, then so far as affects the affairs of the association, the courts should not interfere.[30]

As can be seen, the state high school athletic associations, having both the discretion of a voluntary association and the discretionary power of school boards, are dually protected from judicial intervention. The net effect has been to make these associations impregnable to almost every attack yet devised.

Both protections have been tested. The writer of the dissenting opinion in the 1938 Oklahoma case of *Morrison v. Roberts*[31] argued that high school athletic associations should not enjoy the same degree of immunity from interference as that enjoyed by other voluntary associations[32] because such associations controlled "a field in which the state as a body politic is primarily interested."[33] That idea has never been followed.[34]

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26. *Id.*
27. 173 Ohio 239, 181 N.E.2d 261 (1962).
28. *Compare* OHIO REV. CODE ANN. § 3313.20 (Page 1960):
> The board of education shall make such rules and regulations as are necessary for its government and the government of its employees and the pupils of the schools.

with § 171.011, RSMo 1969:
> The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district.

29. 173 Ohio at 246, 181 N.E.2d at 265.
30. Morrison v. Roberts, 183 Okla. 359, 361, 82 P.2d 1023, 1025 (1938). *See also* Marino v. Waters, 220 So. 2d 802, 807 (La. App. 1969); Tennessee Secondary School Athletic Ass'n v. Cox, 221 Tenn. 164, 175, 425 S.W.2d 597, 601 (1968).
31. 183 Okla. 359, 82 P.2d 1023 (1938).
32. *Id.* at 364, 82 P.2d at 1028 (dissenting opinion).
33. *Id.*
34. The courts have continued to cite rules applicable to general voluntary associations. *See, e.g.*, Scott v. Kilpatrick, 286 Ala. 129, 133, 237 So. 2d 652, 655 (1970).

It has also been argued in several cases that participation in interscholastic sports is an integral part of the educational process, that the right to an education includes the right to participate, and eligibility to participate cannot be taken away by a high school athletic association.[35] This concept strikes at the educational immunity from court intervention enjoyed by athletic associations. But this argument has also been rejected.[36] Although a student may have a constitutional right to go to school and have the right to physical training, it is uniformly held that:

> Participation in interscholastic athletics . . . is a privilege which the school, or a voluntary association whose rules a school agrees to follow, may withdraw if the student fails to qualify for the privilege.[37]

Does this mean high school athletic associations are blessed with limitless discretion? A look at some of the recent cases might indicate this to be true. The West Virginia Supreme Court stated that "courts have no jurisdiction to entertain an appeal from the decisions of such school activities commissions or associations."[38] Both the West Virginia court and the Indiana Supreme Court prohibited lower courts from hearing the complaints of certain students who thought they had been wronged by their high school athletic associations.[39] But it surely cannot be said that, under every conceivable set of circumstances, a court would refuse to enjoin the conduct of a high school athletic association. Although no state court injunction against such an association has ever been permitted to stand on appeal, most courts have qualified their rulings in such a way as to preserve their power to intervene in the future if it is thought necessary.

The courts have most often qualified their holdings by stating that they would intervene in a case where a state high school athletic association acted arbitrarily or where a person's property or contractual rights were involved. Several cases have defined "arbitrary" in this context. One court said that it makes no difference that the rules of an association appear to be arbitrary.[40] The court pointed out that the rule that three strikes retires a batter is arbitrary,[41] and went on to say that the schools were entitled to make as many "arbitrary" rules as they wanted, "so long as the member schools want them."[42] What is prohibited is application of the rules in an arbitrary, inconsistent manner. For example, a Louisiana case held that eligibility rules would not be considered "arbitrary" if the standards were based upon "uniformly applied classifications which bear

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35. *See, e.g.*, Robinson v. Illinois High School Ass'n, 45 Ill. App. 2d 277, 286, 195 N.E.2d 38, 43 (1963), *cert. denied*, 379 U.S. 960 (1965); Marino v. Waters, 220 So. 2d 802, 806 (La. App. 1969).

36. *See, e.g.*, cases cited note 35 *supra*.

37. Marino v. Waters, 220 So. 2d 802, 806 (La. App. 1969).

38. State *ex rel.* West Virginia Secondary School Activities Comm'n v. Oakley, 152 W. Va. 533, 538-39, 164 S.E.2d 775, 779 (1968).

39. *Id.*; State *ex rel.* Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 240 Ind. 114, 124, 162 N.E.2d 250, 255 (1959).

40. Morrison v. Roberts, 183 Okla. 359, 361, 82 P.2d 1023, 1024-25 (1938).

41. *Id.*

42. *Id.*

some reasonable relationship to the objectives."[43] The Minnesota Supreme Court said that so long as there is "room for two opinions on the matter" it would not consider an association's action "arbitrary" even though it may believe the actions to be erroneous.[44]

Several decisions have also considered the question of what kind of "contractual right" or "property right" the courts have in mind as a basis for intervention. The Florida Supreme Court refused to enjoin the suspension of a high school on the argument that such suspension denied the school the right to make contracts with other schools for athletic meets.[45] In a case where a student was ruled ineligible to play high school football, the Louisiana Supreme Court refused to reinstate him or to prevent impairment of his "property right" of possibly receiving a college athletic scholarship.[46] The court found such a right to be too "speculative and uncertain" to warrant protection.[47] A nearly identical result was reached by the Supreme Court of Alabama.[48]

B. *Constitutional Law*

Although a state high school athletic association typically operates without any state sanction, for constitutional law purposes there is sufficient "state action" involved to allow a federal court to entertain a complaint against such associations under 28 U.S.C. § 1343[49] and 42 U.S.C. § 1983.[50] The Court of Appeals for the Fifth Circuit based a finding of "state action" on the Louisiana association's power to control school curricula pertaining to physical education, its power to investigate, discipline and punish member schools (even to the point of keeping one school from

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43. Marino v. Waters, 220 So. 2d 802, 808 (La. App. 1969).
44. Brown v. Wells, ——Minn.——, 181 N.W.2d 708, 711 (1970).
45. Sult v. Gilbert, 148 Fla. 31, 36, 3 So. 2d 729, 731 (1941).
46. Marino v. Waters, 220 So. 2d 802, 806 (La. App. 1969).
47. *Id.*
48. Scott v. Kilpatrick, 286 Ala. 129, 133, 237 So. 2d 652, 656 (1970).
49. *See* Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155, 1157 (5th Cir. 1970). 28 U.S.C. § 1343 (1964) gives a district court jurisdiction to hear such a case, by providing (in part):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

50. *See* Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963). 42 U.S.C. § 1983 (1964) creates a cause of action for certain deprivations of constitutional rights by providing:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

competing with another), and the association's use of state-owned facilities for its athletic events:[51]

> [F]or the state to devote so much time, energy, and other resources to interscholastic athletics and then to refer coordination of those activities to a separate body cannot obscure the real and pervasive involvement of the state in the total program.[52]

The Court of Appeals for the Tenth Circuit grounded a finding of "state action" on the fact that the Oklahoma association was governed by a Board of Control whose membership was composed of high school principals. Since these men were public employees who continued to act in that capacity when serving on the board, enforcement of the association's rules was said to be conduct under color of law for purposes of 28 U.S.C. § 1983.[53]

However, notwithstanding federal court jurisdiction to *hear* a case, no relief can be granted a plaintiff unless he shows that he has been denied some right derived from the United States Constitution. In the few cases reported, the federal courts have restricted themselves to a very limited field. In *Mitchell v. Louisiana High School Athletic Association*,[54] a student argued that his participation in interscholastic athletics was a right and privilege secured by the due process clause of the United States Constitution.[55] The court ruled against this argument. A contrary holding would have resulted in nearly every ruling of a high school athletic association on student eligibility giving rise to a federal case. Although a student deprived of the privilege of playing football his senior year in high school may feel he has had his most important right taken from him, he has not necessarily been deprived of a constitutional right, and a federal judge will not usually intervene.

In the *Mitchell* case the plaintiff also argued that a certain eligibility rule violated the equal protection clause. The rule made a student ineligible his senior year if he elected not to proceed to the next grade in junior high. But the rule did not apply to those who did not move upward because they failed to pass. The court stated that since the classification was neither inherently suspect (*e.g.*, a classification based on race) nor an encroachment on a fundamental right (*e.g.*, the right to vote), it would not intervene.[56] The court thereby declined to follow the active review approach used in cases involving suspect classifications and fundamental interests, and instead adopted the restrained approach which holds that a court will give much deference to discriminations by a state regulatory organization.[57]

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51. Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).
52. *Id.* at 228.
53. Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269, 273 (10th Cir. 1963).
54. 430 F.2d 1155 (5th Cir. 1970).
55. *Id.* at 1157.
56. *Id.* at 1158.
57. *See* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1133 (1969).

Federal courts, in at least two instances, have given redress against actions by athletic associations on the basis of the equal protection clause.[58] Both cases involved instances where two separate athletic associations existed in a state; one for white high schools and another for black high schools. The cases arose in Alabama and Louisiana. In the Alabama case, a three judge panel ruled that there could be only one statewide athletic association and directed the two associations to submit plans for their integration.[59] In the Louisiana case, the fifth circuit affirmed a district court's order that the white association accept into membership any high school which qualified for membership under the constitution of the white association, regardless of race, and regardless of the wishes of the majority of the members of the white association.[60]

V. Third Parties

No case has been found involving a dispute between a state high school athletic association and a person outside normal educational organizations. But it is predictable that such a case may occur at any time. The facts of *Wells* indicate one possibility. In that case, a student was complaining about the Minnesota rule that would make him ineligible to play interscholastic hockey if he attended a hockey training camp which had not been approved by the state association. What if the owner of an unapproved camp had brought the complaint alleging that the rule be enjoined because it was ruining his business? Or what about a complaint by a person who has an athletic event hot-dog concession contract with a school that has been suspended from participation in interscholastic athletics? "Property rights" are certainly involved. But a question exists as to whether such a third party has standing to seek an injunction or to recover for damages resulting from the internal affairs of a voluntary association.

The law on these questions is far from settled. Since no case exists involving a high school athletic association, one must turn to the cases involving other types of voluntary associations. This immediately leads into an examination of the cases and statutes pertaining to restraints of trade, a subject far beyond the scope of this note. No attempt will be made to understand the impact of federal antitrust laws on this point, nor will an attempt be made to examine the varied and confusing array of antitrust statutes of the various states. But a brief look at Missouri's antitrust statutes and a look at several cases involving common law rules will provide some helpful insights.

A. *Missouri Antitrust Statutes*

There is little question that the Missouri antitrust statutes generally can be applied against voluntary associations,[61] but a serious doubt exists

58. *See* Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Lee v. Mason County Bd. of Educ., 283 F. Supp. 194 (M.D. Ala. 1968).

59. Lee v. Mason County Bd. of Educ., 283 F. Supp. 194, 198 (M.D. Ala. 1968).

60. Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 228 (5th Cir. 1968).

61. *See* Empire Storage & Ice Co. v. Giboney, 357 Mo. 671, 210 S.W.2d 55 (En Banc 1948), *aff'd*, 336 U.S. 490 (1949).

as to the applicability of the statutes to the normal activities of a state high school athletic association. In the first place, the statutes apply only to restraints as to products, commodities or articles.[62] This eliminates any use of the statutes by training camp operators or the like, because they deal in services, not articles. But what about the hypothetical concessionaire who is left holding his hot dogs because of restraints by the association? The Supreme Court of Missouri has ruled that the Missouri antitrust statutes do not necessarily give a third party a cause of action against a voluntary association for injuries to that person's business which result from the enforcement of the association's by-laws.[63] So long as the purpose of the association is to protect and promote the legitimate interests of its members and not to restrain trade, "remote or incidental" injuries to the businesses of nonmembers are not actionable.[64] In addition to the problem of remoteness, it can be argued that the Missouri antitrust statutes were never intended to apply to organizations such as the MSHSAA:

> The object of the statute is to promote the public welfare, and not to outlaw harmless combinations, or those which are beneficial in their nature.[65]

B. *Common Law Rights of Third Parties*

Absent statutory authority to the contrary, it can be said that no third party can enjoin or recover damages for any action taken by a state high school athletic association against a member school or pupil of such a school. This is true even when the third party has property rights involved. Although arguments can be made in opposition to the above position, this writer considers it defensible. Support can be found in cases which hold that a third party has no right to complain in court of indirect injuries resulting from the disciplining or threatened disciplining of a member of a voluntary association.[66] The reason behind the rule is that such injuries are too indirect and remote. Just as the tort-feasor is not liable for every repercussion of his wrong, the voluntary association should not be liable for every repercussion resulting from its internal affairs.

A definite protection exists for the association from a charge of common law restraint of trade. There is simply no such cause of action:

> No case can be found in which it was ever held that at common law, a contract or agreement in general restraint of trade was

62. *See* §§ 416.010 *et seq.*, RSMo 1969. *See also* State v. Green, 344 Mo. 985, 130 S.W.2d 475 (1939); Harelson v. Tyler, 281 Mo. 383, 219 S.W. 908 (1920); State *ex inf.* Hadley v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902 (En Banc 1909), *aff'd*, 224 U.S. 270 (1912); Star Publishing Co. v. Associated Press, 159 Mo. 410, 60 S.W. 91 (En Banc 1900); Standard Monument Co. v. Mount Hope Cemetery & Mausoleum Co., 369 S.W.2d 876 (St. L. Mo. App. 1963).

63. Harelson v. Tyler, 281 Mo. 383, 219 S.W. 908 (1920).

64. *Id.* at 399, 219 S.W. at 913; Stephens v. Mound City Liverymen & Undertakers' Ass'n, 295 Mo. 596, 246 S.W. 40 (En Banc 1922).

65. Gladish v. Bridgeford, 113 Mo. App. 726, 733, 89 S.W. 77, 78 (K.C. Ct. App. 1905) (construing § 8966, RSMo 1899, a forerunner of the present statutes). *See generally* Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 Mo. L. REV. 215 (1953).

66. *See* Radio Station KFH Co. v. Local 297, AFM, 169 Kan. 596, 200 P.2d 199 (1950); Downs v. Bennett, 63 Kan. 653, 66 P. 623 (1901).

actionable at the instance of third parties or could constitute the foundation for such action.[67]

VI. Conclusion

It can certainly be said that there are some unsettled legal questions concerning state high school athletic associations. Much uncertainty exists, especially in the area of third party rights. What is truly surprising is that there is almost no legislation setting out the powers and duties of these associations. In Missouri there is no legislation whatsoever. The reputation of the Missouri association, like all its counterparts, is extremely high. It is doubtful that the legislature would refuse to grant some form of statutory authority if it were requested. Such a request may prevent future problems.

Dale C. Doerhoff

MISSOURI SHOWS DESIRE TO ADOPT EMERGENCY EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT

Root v. Gauper[1]

On July 22, 1967, Lonnie Sutton called the local telephone operator from his farm near Louisiana, Missouri and stated that his wife had shot him. He said he was dying, and requested that the operator send him an ambulance. The operator notified the ambulance driver, who, not knowing the location of the Sutton farm, called the town marshal. After informing the ambulance driver of the location of the Sutton farm, the marshal called the county sheriff, and the two of them proceeded separately to the Sutton home. The ambulance arrived first at the Sutton farm, and Lonnie was found unconscious with a bullet wound in his stomach. He was placed in the ambulance and taken to the hospital. On the way, the ambulance passed both the marshal's and the sheriff's cars and informed them by radio that Sutton had been removed from the home and was being taken to the hospital. He was dead on arrival.

The marshal was next to arrive at the Sutton home, but he did not enter until the arrival of the sheriff several minutes later. The two officers, without a search warrant, entered the home where they found no one present but did find a rifle and several bullets which were later entered into evidence. They took pictures of the room showing the position of

67. Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 233-34, 55 N.W. 1119, 1121 (1893), *cited with approval in* Gladish v. Bridgeford, 113 Mo. App. 726, 89 S.W. 77 (K.C. Ct. App. 1905).

1. 438 F.2d 361 (8th Cir. 1971).

the rifle found there and turned over the seized materials to the highway patrol for ballistics examination.

Helen Sutton was arrested the next morning and charged with manslaughter by reason of culpable negligence. At her trial, the defense made timely motion for the exclusion of the evidence obtained by the search of the Sutton home by the officers.[2] This motion was denied. Upon conviction, Helen Sutton appealed to the Missouri Supreme Court. The court upheld her conviction, with two dissents, holding the search without a warrant was proper under an exception to the general rule of search and seizure known as the emergency doctrine.[3]

This appeal having exhausted her state remedies, Helen Sutton Root[4] applied for a writ of habeas corpus.[5] The United States District Court for the Western District of Missouri granted petitioner's writ[6] and adopted as its opinion the earlier dissenting opinion of Judge Finch in *State v. Sutton*,[7] holding the search to be prohibited by the sixth amendment of the Constitution of the United States. Upon appeal, the United States Court of Appeals for the Eighth Circuit affirmed the granting of the writ.[8]

Generally, the police are required to obtain a warrant before searching a private dwelling,[9] but the courts have long realized the existence of situations in which the warrant requirement is impractical.[10] The doctrine of emergency situations was first enunciated in dicta by Justice Jackson[11] when he said, "[T]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."[12] Since the formulation of that now famous sentence, the theory

2. The theory was that if the search was illegal, any evidence found in such a search could not be admitted. This doctrine of the "fruit of the poisonous tree" was first raised in Nardone v. United States, 308 U.S. 338 (1939). This doctrine is applicable to the states through the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Missouri has had an exclusionary rule since 1924. *See* note 31 *infra*.

3. State v. Sutton, 454 S.W.2d 481 (Mo. En Banc 1970).

4. Helen Sutton's last name was changed to Root at the time of the filing of the habeas corpus writ.

5. Root v. Gauper, —F. Supp.— (W.D. Mo. 1970).

6. The basic issue on appeal concerned the constitutionality of the search.

7. 454 S.W.2d 481, 488 (Mo. En Banc 1970) (dissenting opinion).

8. 438 F.2d 361 (8th Cir. 1971).

9. "And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." McDonald v. United States, 335 U.S. 451, 456 (1948). *See* Katz v. United States, 389 U.S. 347, 357 (1967).

10. The following are examples of these situations: when delay entails a risk to life "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," Warden v. Hayden, 387 U.S. 294, 298-99 (1967; automobile cases —when "the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought," Carroll v. United States, 267 U.S. 132, 153 (1925); the right to take blood for alcoholic content tests—Schmerber v. California, 384 U.S. 757 (1966); as a search incidental to a lawful arrest—Chimel v. California, 395 U.S. 752 (1969); with consent by owner of the premises—Martinez v. United States, 333 F.2d 405 (9th Cir. 1964), *vacated*, 380 U.S. 260 (1965).

11. *See* Johnson v. United States, 333 U.S. 10 (1948).

12. *Id.* at 14-15. *See* Walker v. United States, 225 F. 2d 447, 450 (5th Cir. 1955), which defined the exceptions as "limited to search as an incident to arrest, search of a movable vehicle, and search which may be justified under rare circum-

has developed that an emergency sometimes allows the police to proceed without search warrants.[13] The Missouri Supreme Court applied the emergency doctrine in upholding the search in the instant case, but this was rejected by the federal courts as (1) either an incorrect application of law to the facts present here, or (2) a failure of the state to meet its burden of persuasion to bring the facts within the law.[14]

The Missouri Supreme Court based its ruling that there was an emergency present on decisions from other jurisdictions. Maryland, in *Davis v. State*,[15] allowed entrance into a house without a warrant when a pair of feet could be seen from an open window sticking out from under a blood-stained sheet.[16] Delaware adopted the emergency doctrine in *Patrick v. State*[17] when the victim was found on the floor of his home in a bloody mess. The police were allowed to enter without a warrant in the hope that the victim's life could be saved.[18]

The Missouri Supreme Court seemed to find its greatest support for the application of the emergency doctrine to the facts in *Sutton* in the Alaskan case of *Stevens v. State*.[19] Stevens, living on a small island off the Alaskan coast, killed his "buddy" and was arrested by the local constable. After ten hours, police flew in from Juneau, Alaska, and proceeded to search Stevens' home without a warrant. Alaska upheld this as a valid search because "the duty police officer who responds to an emergency call and discovers a homicide is not necessarily a competent officer to conduct the type

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stances to prevent threatened destruction or removal of contraband." The court of appeals in *Root* stated:

> [T]he emergency or exigency doctrine may be stated as follows: police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance.

438 F.2d at 364.

13. We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate.

District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

14. The state also claimed the search to be legal because (1) the items seized were in plain sight of the officers and (2) they had Lonnie Sutton's consent to enter. The Eighth Circuit Court of Appeals rejected both arguments because (1) "[t]he evidence which was seized in this case was not in the plain view of the officers from outside the house," and (2) "any consent which Sutton may conceivably have given to enter his home was given, not to the police officers, but to the commercial ambulance operator." 438 F.2d at 364 (8th Cir. 1971).

15. 236 Md. 389, 204 A.2d 76 (1964), *cert. denied*, 380 U.S. 966 (1965).

16. It is interesting to note that the "body" below the sheet belonged to the defendant, who was aroused from his slumbers thereunder by the entrance of the constabulary.

17. 227 A.2d 486 (Del. 1967).

18. In Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), the defendant lived with his mother in the house where the murder occurred and thereby had standing to challenge the search. In *Patrick*, the defendant lived with the victim, thereby having standing. In *Sutton*, Helen Sutton Root had standing to challenge the search because she lived in the house where she shot her husband.

19. 443 P.2d 600 (Alas. 1968).

of investigation necessary to protect the interests of society."[20] However, as to what the emergency was that made this case analogous to *Sutton*, the *Sutton* opinion does not seem to say. The heavy reliance placed on it by the Missouri Supreme Court seems to be rather puzzling, as the emergency in *Stevens* was caused by the remote location of the island and the inaccessability of a magistrate from whom a warrant could have been obtained.

Thus, the emergency doctrine may be said to be an exception to the warrant requirement and allows the police to enter a dwelling "to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance."[21] In both *Davis* and *Patrick*, the situation of saving a human life obviously was present. In *Sutton*, either no such emergency was present or the state failed to meet its burden of persuasion to establish one.

It is hard to justify the officers' entrance into the Sutton home on the rationale that they believed an injured or dying man was there. The fact that the marshal waited outside several minutes until the sheriff arrived would seem to strongly indicate that in the officers' minds no such emergency was present. The officers had been in touch with the ambulance and knew that Lonnie Sutton had been removed from the house. It seems to be a rather fantastic assumption to believe that the ambulance would have left anyone behind who was also injured. In other words, "[t]here is no other bit of evidence in the record that would even slightly suggest that the officers had any reason for believing that there were any other persons in need of aid."[22] The situation in *Sutton* simply does not support the proposition that the officers entered with a reasonable belief that their mission was the preservation of human life.

Even if the officers may have entered the house to see if the decedent's unknown assailant was still hiding in the house, the search would have been illegal. "That an officer merely suspects that a felon is in a house is a precise example of a situation in which a warrant is required, not of one in which a warrant need not be had."[23]

When the state claims exceptional circumstances dispense with the requirement of obtaining a search warrant, it has the burden of proving such necessity.[24] The court of appeals noted that in the factual situation before

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20. *Id.* at 602-03.
21. 438 F.2d at 364.
22. *Id.* at 365.
23. District of Columbia v. Little, 178 F.2d 13, 18 (D.C. Cir. 1949).
> We think that under the authorities officers without a warrant cannot enter, even without actually breaking, a private dwelling to search for a suspected felon, no permission being given and no circumstances of necessitous haste being present.

Morrison v. United States, 262 F.2d 449, 454 (D.C. Cir. 1958).
24. "The burden is on those seeking the exception to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1951).
> We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 456 (1948). "The Government will be free, upon retrial, to prove, if it can, that the search was reasonable . . . ." Foster v.

it "[t]he State . . . failed to meet its burden of proof showing that the warrantless entry was justified under the emergency doctrine."[25] None of the judges who heard this case disagreed with the emergency doctrine itself, except for Judge Seiler of the Missouri Supreme Court who, in his dissent in *State v. Sutton*,[26] felt that there was no need for the adoption of such a rule in Missouri. Judge Finch, dissenting in *State v. Sutton*, stated his view as follows:

> I am in agreement with the principal opinion that the emergency doctrine is a proper one and should be adopted in this state . . . . My disagreement with the principal opinion relates not to the validity of the emergency rule, but to the sufficiency of the evidence on the motion to suppress to justify application of the emergency doctrine in this case.[27]

The court of appeals recognized the constitutionality of such an exception when it said:

> We recognize the salutory and empirical doctrine of an emergency or exigency making reasonable a warrantless entry and possible search of a home, and further recognize that the Supreme Court of Missouri has the prerogative of accepting that doctrine, but the record here fails to support the application of that doctrine.[28]

No emergency was established in *Root* because of one of two possibilities: (1) there was no emergency or (2) the state failed to prove that there was an emergency. Perhaps the two are so closely related that a distinction such as this is meaningless; but even if such an emergency is present, it must be remembered that the state has the burden of persuasion to prove that the officers did in fact reasonably believe an emergency existed.[29]

Since no emergency existed in this case or at least was not established by the state, the evidence should have been excluded, since it was the product of an illegal search.[30] Because they had no warrant to search and their search was not shown by the state to fall within any exception to the warrant requirement, the Missouri Supreme Court should have reversed

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United States, 281 F.2d 310, 312 (1960); R. DAVIS, FEDERAL SEARCHES AND SEIZURES 383 (1964).

25. 438 F.2d at 365.

26. 454 S.W.2d 481, 488 (Mo. En Banc 1970) (dissenting opinion).

27. State v. Sutton, 454 S.W.2d 481, 493 (Mo. En Banc 1970) (dissenting opinion).

28. 438 F.2d at 365.

29. Delaware set the criterion that the state must show to be the "reasonableness of the belief of the police as to the existence of an emergency, not the existence of the emergency in fact." Patrick v. State, 227 A.2d 486, 489 (Del. 1967). The Eighth Circuit Court of Appeals in *Root* also said the test was one of reasonable belief. 438 F.2d at 364.

30. Evidence obtained by an illegal search and seizure by the State is inadmissible against defendant in a criminal case because admission thereof would violate his constitutional security against unreasonable search and seizure.

State v. Wilkerson, 349 Mo. 205, 209, 159 S.W.2d 794, 797 (1942). *See also* State v. Owens, 302 Mo. 348, 259 S.W. 100 (1924).

the conviction. Since the conviction was vacated by the federal court, the doctrine is not law today in Missouri. But the Missouri Supreme Court has shown that it will apply the emergency exception to the constitutional requirement of a search warrant, especially if the saving of a human life is involved.[31]

ROBERT M. HILL

"SO LONG AS SHE REMAINS SINGLE" CONSTRUCTION AND VALIDITY

Lewis v. Searles[1]

At the age of ninety-five, Hattie L. Lewis, who had never married, sought a declaratory judgment to quiet title to certain real estate and, in the process, construe a clause of her aunt's will which read as follows:

> Second, I devise to my niece, Hattie L. Lewis, all my real and personal property of which I may die seized and possessed, *so long as she remains single and unmarried.* In the event that the said Hattie L. Lewis shall marry, then and in this event I desire that all of my property, both real and personal be divided equally between my nieces and nephews as follows, to the said Hattie L. Lewis, an undivided one third, to Letitia A. LaForge, wife of A. C. LaForge, an undivided one third, and to James R. Lewis an undivided one third.[2]

The plaintiff was thirty-eight years old when the will was executed and fifty-three when the testatrix died. Letitia A. LaForge and James R. Lewis, niece and nephew of the testatrix, survived her but died before the commencement of this suit, leaving descendants who were defendants in this action.[3]

The trial court held that the testatrix intended to give plaintiff a life estate and

> that upon the death of said plaintiff that the fee title to said real estate vest in fee simple one-third to plaintiff, Hattie L. Lewis, one-third to Letitia A. LaForge and one-third to James R. Lewis, or to their descendants, herein above named.[4]

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31. As to the fate of Helen Francis Sutton Root, the defendant, the Eighth Circuit Court of Appeals pointed out that

> the State has the right upon the reversal of a conviction based in part upon unconstitutional evidence to retry the defendant without the tainted evidence. Orozco v. Texas, 394 U.S. 324, 327 (1969). We see no reason to distinguish between a reversal of a conviction on direct appeal and a release obtained by means of the grant of a writ of habeas corpus.

438 F.2d at 365 n.1.

1. 452 S.W.2d 153 (Mo. 1970).
2. *Id.* at 154 (emphasis added).
3. *Id.*
4. *Id.*

Judgment was entered giving plaintiff a life estate and an undivided one-third interest in fee subject to her life estate. The Supreme Court of Missouri reversed and held the plaintiff received a fee simple estate subject to divestiture of an undivided two-thirds interest in the event of her marriage.[5]

The major issue before the court was construction of the phrase "so long as she remains single and unmarried." Numerous cases have construed provisions similar to the one at bar as devising only a life estate,[6] but the *Lewis* court distinguished precedent and held a fee simple interest was conveyed. The cardinal rule of will construction is to ascertain the intent of the testator from the language of the document as a whole,[7] and, unless it would contravene an established rule of law or public policy, such intent must be given effect.[8] The court indicated a preference for passing a fee simple interest if the intent of the testator was to support the devisee or if the testator had some other reasonable purpose. The court also made numerous references to the essence of the construction issue, the search for an expression of the true intent of the testator. Although not expressly overruling leading cases in Missouri, *Lewis* certainly indicates a trend toward construction of such provisions as devises of fee simple estates.

In construing a will, the absence of specific provisions may be relevant in determining the testator's intent. Without indicating the decisiveness of the omissions, the court in *Lewis* took careful note of what the will did not contain. No mention was made in the will of the contingency of plaintiff's death or of a gift or limitation over upon plaintiff's death.[9] This is significant because such silence could result in total or partial intestacy if the devise were only a life estate. Further, it was not stated whether the nephew

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5. *Id.* at 159. The following cases from other states are in accord: Kettler v. Gandy, 270 Ala. 494, 119 So. 2d 913 (1960); Cumming v. Pendleton, 112 Conn. 569, 153 A. 175 (1931); Ramsey v. Holder, 291 S.W.2d 556 (Ky. 1956); Kohout v. Kohout, 4 Ohio Misc. 38, 203 N.E.2d 869 (1965).

6. *See In re* Bernatas' Estate, 162 Cal. App. 2d 693, 328 P.2d 539 (1958); Eller v. Wages, 220 Ga. 58, 136 S.E.2d 730 (1964); Rhodus v. Proctor, 433 S.W.2d 625 (Ky. 1968); King v. King, 234 Miss. 862, 108 So. 2d 220 (1959); Riesmeyer v. St. Louis Union Trust Co., 180 S.W.2d 60 (Mo. 1944); Winget v. Gay, 325 Mo. 368, 28 S.W.2d 999 (1930); Tillerson v. Taylor, 282 Mo. 204, 220 S.W. 950 (1920).

7. *In re* Greenwald's Estate, 19 Cal. App. 2d 291, 65 P.2d 70 (1937); Stern v. Stern, 410 Ill. 377, 102 N.E.2d 104 (1951); Prior v. Prior, 395 S.W.2d 438 (Mo. 1965); Smoot v. Harbur, 357 Mo. 511, 209 S.W.2d 249 (En Banc 1948); *In re* Flyer's Will, 53 Misc. 2d 476, 279 N.Y.S.2d 76 (Sur. Ct. 1967); *In re* Lenhart's Estate, 344 Pa. 358, 25 A.2d 725 (1942); RESTATEMENT OF PROPERTY § 242 (1944).

8. *In re* Cuneo's Estate, 60 Cal. 2d 196, 384 P.2d 1, 32 Cal. Rptr. 409 (1963); *In re* Hampton's Estate, 262 Cal. App. 2d 532, 68 Cal. Rptr. 828 (1968); Norton v. Jordan, 360 Ill. 419, 196 N.E. 475 (1935); *In re* Lawton's Estate, 347 Mich. 143, 79 N.W.2d 463 (1956); *In re* Hill's Estate, 432 Pa. 269, 247 A.2d 606 (1968); RESTATEMENT OF PROPERTY § 242, comment *c* at 1198 (1944).

9. 452 S.W.2d at 156. The importance of a gift over was noted in Buschmeyer v. Eikermann, 378 S.W.2d 468 (Mo. 1964), where the court construed "as long as she remain a single person" as being words of limitation and held the devisee received a determinable life estate. The court indicated that in determining the estate from language in the will it would place much importance on the gift over only upon marriage as intent to pass a determinable fee, but felt bound by *Winget* to hold the devisee took only a determinable life estate. *See* Fratcher, *Trusts and Succession in Missouri*, 30 Mo. L. REV. 82, 94-95 (1965).

and niece were required to survive plaintiff in order to receive their respective one-third interests. The absence of a gift over upon death is significant when the presumption against partial intestacy is considered. In the absence of an express contrary intent or necessary implication, the testator is presumed to have intended to avoid intestacy and dispose of his entire estate.[10] The presumption requires that a provision not be construed to result in intestacy "if by any reasonable construction it can be avoided."[11] Thus, the absence of a gift over indicates a preference for construing the provision as a fee simple rather than a life estate. Although these omissions were not held controlling, the opinion indicates they support a fee simple construction.

In *Winget v. Gay*[12] the court held language similar to that in issue to be words of limitation and not a condition; since an estate so limited may last for life, it was held to be a life estate although it terminated upon marriage.[13] The *Lewis* court distinguished *Winget* merely by noting the failure of the court in *Winget* to mention a predecessor statute of section 474.480, RSMo 1959.[14] This statute eliminated the necessity of the words "heirs and assigns"[15] and creates a presumption in favor of an estate in fee simple, if no intention appears to create only an estate for life and no further devise is made to take effect upon death. Although words of inheritance have never been required to pass a fee simple estate by will, there

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10. St. Louis Union Trust Co. v. Bethesda Gen. Hosp., 446 S.W.2d 823 (Mo. 1969); Shaw v. Wertz, 369 S.W.2d 215 (Mo. 1963); 95 C.J.S. *Wills* § 615 (1957).

11. 95 C.J.S. *Wills* § 615 (1957).

12. 325 Mo. 368, 28 S.W.2d 999 (1930).

13. *Id.* at 372, 28 S.W.2d at 1000. *See* Riesmeyer v. St. Louis Union Trust Co., 180 S.W.2d 60, 62 (Mo. 1944), where the parties agreed a life estate was conveyed by the words "so long as she should remain single," and the court noted that the construction that such language creates a life estate "has the support of judicial authority." It is at least arguable that an estate so limited, could last beyond life since a person single upon death remains single. *See In re* Brown, 119 Kan. 402, 239 P. 747 (1925), where the court construed "for as long as life doth last" as devising a fee simple.

14. § 474.480, RSMo 1959 [now § 474.480, RSMo 1969] states:

> In all devises of lands or other estate in this state, in which the words "heirs and assigns", or "heirs and assigns forever", are omitted, and no expressions are contained in the will whereby it appears that the devise was intended to convey an estate for life only, and no further devise is made of the devised premises, to take effect after the death of the devisee to whom the same is given, it shall be understood to be the intention of the testator thereby to devise an absolute estate in the same, and the devise conveys an estate in fee simple to the devisee, for all of the devised premises.

This statute was effective in substantially the same form when *Winget* was decided.

15. *Id. See* Tillerson v. Taylor, 282 Mo. 204, 220 S.W. 950 (1920), decided only ten years earlier than *Winget*. There the court took notice of the statute, which was in similar form, but found an intent to create only a life estate. In *Tillerson* the language construed was the following:

> I give and bequeath unto my esteemed wife . . . to have and to hold the same and enjoy during her widowhood or so long as she remains my widow. If she remarries or in the event of her remarrying again, I desire that all the property should be divided equally between my brothers and sisters and my wife and her brothers and sisters all sharing alike and equal with my wife. *Id.* at 207, 220 S.W. at 950.

was no presumption at common law that a devise passed a fee simple.[16] Today, however, in practically all jurisdictions in the United States there is a presumption that a devise is in fee, and in most jurisdictions statutes produce this result.[17] The court in *Lewis* notes that if a condition had not been attached to the devise, a fee simple absolute would have been passed,[18] and it is well settled that to cut down an estate in fee, words of a subsequent limiting provision must be as clear and decisive as those of the prior clauses.[19] Although courts in some cases have applied the "implication" theory[20] and written in the words "or upon her death"[21] to find that only a life estate was devised where the will made no mention of the devisee's death, the *Lewis* court found that the Missouri statute requires all estates to pass in fee simple if no intent is expressed to create a life estate or no further devise is made to take effect after death.[22] The court also noted the importance of the gift over being effective only upon marriage when it said: "if she had intended to make the gift over effective on death, she should have said so, as various cases indicate."[23]

The court in *Lewis* refers to the following factors which "mitigate for"[24] the construction of such a provision as a determinable fee: (1) the widow being given *part of the same property* in fee upon re-marriage, (2) the absence of both a gift over upon death and a residuary clause, and (3) the existence of a statute eliminating the necessity for words of inheritance.[25] Although no single factor was held decisive, the above offer guidance on drafting a provision to fulfill the testator's true intent.

In *Lewis* the practical consideration of the value of the two possible estates must not be overlooked; as the court states, "the testatrix clearly intended for plaintiff to have a greater estate if she did *not* marry. . . ."[26]

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16. Doe d. Crutchfield v. Pearce, 145 Eng. Rep. 1427 (Ex. 1815); Roe d. Kirby v. Holmes, 95 Eng. Rep. 697 (K.B. 1757); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 496 (2d ed. 1956).

17. Union Trust Co. v. Madigan, 183 Ark. 158, 35 S.W.2d 349 (1931); Cahill v. Cahill, 402 Ill. 416, 84 N.E.2d 380 (1949); Hopson's Trustee v. Hopson, 282 Ky. 181, 138 S.W.2d 365 (1940); Shaw v. Wertz, 369 S.W.2d 215 (Mo. 1963); Kohout v. Kohout, 4 Ohio Misc. 38, 203 N.E.2d 869 (1965); Fink v. Stein, 158 Pa. Super. 464, 45 A.2d 249 (1946). *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 496-97 (2d ed. 1956). As § 497 states: "If there is no language which could be considered as a gift over, it takes rather clear language to indicate that only a life estate is intended."

18. 452 S.W.2d at 156.

19. Vaughan v. Compton, 361 Mo. 467, 235 S.W.2d 328 (1950); Middleton v. Dudding, 183 S.W. 443 (Mo. En Banc 1916).

20. Annot., 73 A.L.R.2d 484, 488 (1960) states: "In such a situation the courts have readily found an implied gift on death as well as marriage, especially where the gift over is to issue or descendants of the testator." *See* Winget v. Gay, 325 Mo. 368, 28 S.W.2d 999 (1930); Tillerson v. Taylor, 282 Mo. 204, 220 S.W. 950 (1920).

21. *See* Winget v. Gay, 325 Mo. 368, 28 S.W.2d 999 (1930).

22. 452 S.W.2d at 158.

23. *Id.* at 159.

24. *Id.* at 157, *citing* 1951 WASH. U.L.Q. 595.

25. *Id.*

26. *Id.* at 159. Without discussing values of the two possible estates, the court explicitly states the clear intent was that plaintiff's share be reduced upon marriage. The court must have considered the value of the estate in order to effect the true intent of the testatrix.

If the provision is construed as passing a life estate in the whole, subject to divestiture upon marriage into a fee simple interest in an undivided one-third, it may be to plaintiff's advantage to marry. Since she was fifty-three years old when the will was probated, the value of the one-third interest in fee might well exceed the value of the life estate. It is evident that if the actual intent of the testatrix was to support the devisee or to provide an incentive not to marry, the general intent would be to reduce the estate upon marriage,[27] and it would not seem logical or reasonable to reduce a life estate to a fee simple interest in one-third of the property. However, the court merely notes this consideration without further analysis or indication of weight given the respective values.

The second issue, although of lesser importance in this case, is that of validity of the provision. Many older cases in Missouri and elsewhere have followed the general rule that forfeiture provisions in total restraint of marriage are void as against public policy.[28] Dating from at least the Roman civil law,[29] the rule is based on the principle of freedom to marry. The actual basis of the rule may have been a public policy favoring population growth under the guise of freedom to marry.[30] In England this policy conflicted with the policy of allowing at least some parental choice in choosing children's spouses, but was supported by views regarding religion.[31] It should be noted that courts have consistently held the conveyance valid and effective even when the forfeiture provision was held to be against public policy.[32]

In contrast to the general rule on total restraint, partial restraints on marriage have long been held valid in prohibiting marriage to a certain class, person, religion, or until reaching a certain age.[33] The general rule has, moreover, been subject to many exceptions,[34] the most prominent being that of second marriages.[35] Men were said to "have a sort of mournful

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27. *Id.* at 159. This same reasoning would seem to apply whether the specific intent was to reduce the estate, or to transfer property to others when no longer needed by the devisee.

28. *See* Crawford v. Thompson, 91 Ind. 266, 46 Am. R. 598 (1883); Randall v. Marble, 69 Me. 310, 31 Am. R. 281 (1879); Sullivan v. Garesche, 229 Mo. 496, 129 S.W. 949 (1910); Knost v. Knost, 229 Mo. 170, 129 S.W. 665 (1910); Williams v. Cowden, 13 Mo. 211 (1850); *In re* Liberman, 279 N.Y. 458, 18 N.E.2d 658 (1939); *In re* Catlin, 97 Misc. 223, 160 N.Y.S. 1034 (Sur. Ct. 1916); Goffe v. Goffe, 37 R.I. 542, 94 A. 2 (1915); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1514 (2d ed. 1956). *See also* Annots., 122 A.L.R. 7 (1939), and 45 A.L.R. 1220 (1926); 96 C.J.S. *Wills* § 985 (1957); Browder, *Conditions & Limitations in Restraint of Marriage*, 39 MICH. L. REV. 1288 (1941).

29. 6 R. POWELL, REAL PROPERTY ¶ 850 (1970) states:

> In invalidating all provisions in restraint of marriage, the Romans, undoubtedly influenced by the ravages of their civil wars, seem to have stressed the importance of unhampered growth of population.

30. *See* Winters v. Miller, 23 Ohio Misc. 73, 74, 261 N.E.2d 205, 206 (1970).

31. 6 R. POWELL, REAL PROPERTY ¶ 850 (1970).

32. RESTATEMENT OF PROPERTY § 424, comment *d* at 2478 (1944).

33. RESTATEMENT OF PROPERTY § 425, comments *b-e* at 2484-85 (1944); Annot., 50 A.L.R.2d 740 (1956).

34. Annot., 122 A.L.R. 7, 9 (1960).

35. *See* Wise v. Crandall, 215 S.W. 245 (Mo. 1919); Dumey v. Schoeffler, 24 Mo. 170, 69 Am. Dec. 422 (1857); Dumey v. Sasse, 24 Mo. 177 (1857); Walsh v. Mathews, 11 Mo. 131 (1847).

property right, so to speak, in the viduity of their wives. . . ."[36] More recent opinion,[37] however, indicates that the donor may attach a provision divesting an estate upon marriage to carry out a reasonable purpose, except where it is evident such conditions were attached through caprice.[38] The Restatement of Property, for example, follows the general rule that provisions in total restraint of any first marriage are void.[39] However, it makes an exception if the "dominant motive" of the conveyor is to support the conveyee until the event of marriage, and states that each case must be determined by its own circumstances.[40]

It should be noted that the Restatement clearly distinguishes first and second marriages in considering the validity of the conditions.[41] This distinction indicates the two situations are not synonomous, and that first marriage limitations, to be valid, will require more evidence of an intent to support than second marriage limitations. The *Lewis* court suggests "that the cases dealing with devises to widows . . . are fully applicable in our situation,"[42] thus by implication attributing little importance to the first or second marriage distinction. However, it is not clear whether this statement refers to the validity of the restraint or only to the construction issue; prior cases indicate the distinction still exists when considering validity.[43]

The decision in *Lewis* recognizing the validity of the condition follows the rationale clearly stated in *Winget v. Gay*.[44] There the Missouri Supreme Court upheld a similar provision, finding that the testator's purpose was to provide support for a semi-invalid step-daughter until the obligation might be assumed by a husband. The court stated that "when all circumstances are considered,"[45] if the testator's intent was to provide support, the purpose and provision did not "run counter" to public policy.[46] The *Lewis* court, while noting that its decision "perhaps goes one step beyond the holding in *Winget*,"[47] found that the wording of the will expressed the testatrix's intent to provide support for plaintiff until such time as she married.[48]

In earlier cases, decisions on validity frequently revolved around find-

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36. Knost v. Knost, 229 Mo. 170, 129 S.W. 667 (1910).
37. Anderson v. Crawford, 202 Iowa 207, 207 N.W. 571 (1926); Winters v. Miller, 23 Ohio Misc. 73, 261 N.E.2d 205 (1970). *See generally* RESTATEMENT OF PROPERTY § 424 (1944); 6 R. POWELL, REAL PROPERTY ¶ 852 (1970).
38. Annot., 122 A.L.R. 11, 12 (1939).
39. RESTATEMENT OF PROPERTY § 424 (1944).
40. *Id.*, comment *e* at 2479. *See* Winters v. Miller, 23 Ohio Misc. 73, 261 N.E.2d 205 (1970), where the court remands for further evidence, but indicates if the dominant motive is to support then the provision will be given effect.
41. RESTATEMENT OF PROPERTY § 425 (1944).
42. 452 S.W.2d at 159.
43. *See* cases cited note 35 *supra*.
44. 325 Mo. 368, 28 S.W.2d 999 (1930).
45. *Id.* at 372, 28 S.W.2d at 1000.
46. *Id.*
47. 452 S.W.2d at 156.
48. *Id.*

ing such a provision a limitation rather than a condition.[49] A substantial body of authority exists determining the validity of the provision by the form in which it was written.[50] A restraint in the form of a limitation was valid, but a restraint in the form of a condition subsequent was void.[51] Thus, a bequest to a daughter "so long as she remain single" would be valid; but a devise to the daughter and her heirs "but, if she marry to another" would be void.[52] Several decisions have construed the language as a condition or limitation as they deem best.[53] The court in *Lewis* noted this confusion, and indicated that a devise that is to be reduced in event of marriage is generally held to be a condition subsequent.[54] The provision in this case was in the form of a limitation, but the court did not emphasize the distinction. *Powell on Real Property* notes that in some jurisdictions such a distinction is the "tail that wags the dog" and enables courts to uphold the validity of provisions beginning "so long as" and deny effect to those stating "on condition that".[55]

In deciding the validity question, the *Lewis* court placed primary importance on the intent of the testatrix and found the required intent to support in the wording of the will itself.[56] At first glance the decision seems to follow the Restatement test of "dominant motive,"[57] but since the Restatement requires a consideration of the surrounding circumstances,[58] it is arguable that different evidentiary rules are employed to determine the testator's intent. The two rules may be somewhat at odds; since the court in *Lewis* found the intent to support from the wording itself, it is not clear that circumstances sufficient to satisfy the Restatement rule were present. However, the court does mention the plaintiff's age, indicating some attention to the surrounding circumstances as evidence of the testatrix's intent. It should be noted that opposite results could be reached by emphasizing quite different evidence of the testator's intent, *i.e.*, wording versus circumstances.

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49. 6 R. POWELL, REAL PROPERTY ¶ 851 (1970). *See* Anderson v. Crawford, 202 Iowa 207, 207 N.W. 571 (1926); Winget v. Gay, 325 Mo. 368, 28 S.W.2d 999 (1930).

50. *See* Vaughn v. Lovejoy, 34 Ala. 437 (1859); Estate of Horgan, 91 Cal. App. 2d 618, 205 P.2d 706 (1949). *See also* Winters Nat. Bank & Trust Co. v. Shawen, 33 Ohio Op. 2d 28, 205 N.E.2d 135 (1964); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1514 (2d ed. 1956). *See* Harmon v. Brown, 58 Ind. 207 (1877); Anderson v. Crawford, 202 Iowa 207, 207 N.W. 571 (1926); Ruggles v. Jewett, 213 Mass. 167, 99 N.E. 1092 (1912); *In re* Holbrook's Estate, 213 Pa. 93, 62 A. 368 (1905).

51. *See* authorities cited note 50 *supra*.

52. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1514, at 401 (2d ed. 1956).

53. *In re* Fitzgerald's Estate, 161 Cal. 319, 119 P. 96 (1911); Nunn v. Justice, 278 Ky. 811, 129 S.W.2d 564 (1939); *In re* Miller's Will, 159 N.C. 123, 74 S.E. 888 (1912); *In re* Holbrook's Estate, 213 Pa. 93, 62 A. 368 (1905); Schaeffer v. Messersmith, 10 Pa. County Ct. 366 (1890); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1514 (2d ed. 1956).

54. 452 S.W.2d at 154.

55. 6 R. POWELL, REAL PROPERTY ¶ 851 (1970).

56. 452 S.W.2d at 156.

57. RESTATEMENT OF PROPERTY § 424, comment *e* at 2479 (1944).

58. *Id.*

It must be remembered that *Lewis* was a first marriage situation. The court found the intent of the testatrix was to provide support for the niece until marriage, holding valid the provision which in effect was a restraint on marriage.[59] Although neither *Lewis* nor any of the cases cited emphasize the age of the devisee, it is the writer's opinion that this fact must have influenced the court's decision. The court in *In re Dettmer's Will*,[60] in holding a condition restraining remarriage void, placed much emphasis on the fact that the beneficiary was only thirty-four years old when the will was executed. The condition if valid would force her to live in celibacy or adultery for the remainder of her life or forfeit the gift.[61] It is submitted, after a review of cases in Missouri and elsewhere, that if the devisee, especially in the first marriage situation, is very young when the will is probated or a possible motive of the testator could be to cut off issue, the provision will not be given effect. The beneficiary's age, physical ability, and capacity to earn are very persuasive factors when considering the reasonable purpose of the testator.[62] In *Lewis* the plaintiff was fifty-three when the will was probated and ninety-five when this action was brought, and in *Winget* the devisee was a semi-invalid. *Kettler v. Gandy*[63] and *Ramsey v. Holder*[64] held limitations similar to *Lewis* valid, but in both cases the beneficiaries never married and were dead when the cases were decided. It is further submitted that circumstances such as these are found in a majority of the cases giving effect to the provision in first marriage situations. Cases holding the provision invalid rarely mention the surrounding circumstances, but the inference may be drawn that no unusual facts exist to support holding the provision valid.[65] In the final analysis such circum-

59. 452 S.W.2d at 156.

60. 176 Misc. 512, 27 N.Y.S.2d 609 (Sur. Ct.), *aff'd*, 262 App. Div. 1032, 30 N.Y.S.2d 333, *appeal denied*, 263 App. Div. 721, 31 N.Y.S.2d 302 (1941), *aff'd*, 43 N.E.2d 830, 289 N.Y. 597 (1942). Here the devisee married when sixteen years old and her husband died when she was twenty-one. The testator, a friend, knew she was of limited means and made several gifts to her during his life. When she was thirty-four the testator executed a will devising property to her "upon condition that she shall not remarry . . ." In 176 Misc. at 516, 27 N.Y.S.2d at 613, the court states in holding the provision invalid:

> The present beneficiary was only twenty-one years of age when she became a widow. Can it be asserted that merely by reason of the fact that she had attained this status, she was less eligible to become a successful wife and mother than other girls of her own age, many of whom do not marry until several years later? At the date of the will she was but thirty-four, an age at, or subsequent to, which many successful marriages are consummated. Had the testator died then, his condition against marriage, if validated, would have compelled her, though still a young woman, to live for a probable period of thirty-two and a half years, almost equal to the previous years of her life, in celibacy or adultery, or else forfeit the gift.

61. 176 Misc. at 516, 27 N.Y.S.2d at 613.

62. *Id. Cf.* Winget v. Gay, 325 Mo. 368, 28 S.W.2d 999 (1930).

63. 270 Ala. 494, 119 So. 2d 913 (1960).

64. 291 S.W.2d 556 (Ky. 1956). The validity question retains little significance after death of a beneficiary before marriage, and a court can hold the provision valid with no practical effect on the parties. *See* Eller v. Wages, 220 Ga. 58, 136 S.E.2d 730 (1964); Rhodus v. Proctor, 433 S.W.2d 625 (Ky. 1968).

65. The following cases all involved wills devising property to unmarried daughters with provisions reducing the devise upon marriage: Sullivan v. Garesche,

stances may determine the effect given the provision regardless of how explicit the intent of a testator to support or accomplish another "reasonable purpose" may be stated in the will. The *Lewis* court reaffirms the position in Missouri that a provision in total restraint of marriage will be valid, even in the first marriage situation, if the intent of the testator is to provide support or promote some other reasonable purpose. Although the court finds this intent in the wording of the will itself, the circumstances surrounding the devise were extremely conducive to holding the provision valid.

JOHN R. LONGLETT

COMMUNITY-WIDE ARCHITECTURAL CONTROLS IN MISSOURI

State ex rel. Stoyanoff v. Berkeley[1]

Dimiter Stoyanoff and his wife applied for a permit to build a home in Ladue. The Ladue Architectural Board of Review disapproved of the Stoyanoffs' plans for a pyramid-shaped residence with a flat top and triangular windows or doors at one or more corners. Consequently, the Ladue Building Commissioner denied the permit and the Stoyanoffs petitioned for a peremptory writ of mandamus.[2] The Circuit Court of St. Louis County issued the writ upon its finding that the ordinances establishing and governing the architectural board[3] violated the Missouri Constitution by depriving the Stoyanoffs of their property without due process of law.[4]

The Missouri Supreme Court was faced with three main questions on appeal: (1) Whether Ladue's regulation and restriction of the exterior design of a building is a valid and constitutional exercise of the police power; (2) whether the creation of an architectural board to promote style conformity is authorized by state enabling statutes; and (3) whether the decision-making power can be delegated to an administrative board without specific standards to guide it. The court answered all questions in the affirmative, thereby overruling the virtually identical 1961 case of *State ex rel. Magidson v. Henze*[5] and lifting the aesthetic factor another rung up the ladder of legitimacy among the accepted purposes of governmental regulation of private property.

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229 Mo. 496, 129 S.W.2d 949 (1910); Knost v. Knost, 229 Mo. 170, 129 S.W. 665 (1910); Williams v. Cowden, 13 Mo. 211 (1850).

1. 458 S.W.2d 305 (Mo. 1970).
2. *Id.* at 306.
3. Ladue, Mo., Ordinance 131, March 18, 1940, *as amended,* Ladue, Mo., Ordinance 281, June 14, 1948. The substance of the ordinance is summarized by the *Stoyanoff* court, 458 S.W.2d at 310-11.
4. 458 S.W.2d at 306.
5. 342 S.W.2d 261 (St. L. Mo. App. 1961) (did not consider the effect of § 89.040, RSMo 1969).

Reversing the lower court, the Missouri Supreme Court concluded that architectural controls in residential neighborhoods preserve property values, and, therefore, promote the general welfare.[6] The court was thus able to attach the aesthetic considerations to a valid use of the police power under section 89.020, RSMo 1969. But it was section 89.040, RSMo 1969, which served as the foundation for upholding the Ladue ordinance, despite the *Magidson* case and the weight of authority in the United States.[7] That statute provides, in part, that zoning regulations "be made with reasonable consideration . . . to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings . . . ."[8] Section 89.040 had not been argued in *Magidson* and the court ruled that section 89.020 alone would not support an architectural board in University City.[9] The *Stoyanoff* court also distinguished the University City ordinance from the Ladue scheme; the Ladue ordinance calls for a public hearing, with notice to the applicant and for appeal to both the board and the city council. Such a procedural scheme provides a check on possible abuses of discretion by the administrative body. It also helps overcome a lack-of-sufficient-standards argument, inherent in most aesthetic-linked zoning regulations. The gist of the Ladue standard for approval of a building is that the proposed design conform to both proper architectural standards and to surrounding structures. Disapproval is authorized if the structure would be "unsightly, grotesque or unsuitable."[10] Relying on *State ex rel. Ludlow v. Guffey*,[11] the court stated that general standards are sufficient to guide the board in determining the suitability of any proposed structure with reference to the character of the surrounding neighborhood, the adverse effect on the general welfare, and the preservation of property values in the community.[12] The court reasoned that the rationale behind the requirement of definite standards for the exercise of delegated power is to prevent arbitary actions by the administrative body. Therefore, when the delineation of a definite rule or standard is impracticable or impossible, or enforcement of the police regulation requires prompt exercise of judgment,[13] public hearings, with notice to the applicant and the right to appeal to the city council, are adequate protections against such arbitrariness.

Having carved out statutory authorization for regulation of exterior building design and having found general standards sufficient to regulate

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6. 458 S.W.2d at 309.

7. *See* Hershman, *Beauty as the Subject of Legislative Control*, 15 PRAC. LAW., Feb., 1969, at 20, 25. Typical of the majority view cases is City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So. 2d 491 (1947).

8. § 89.040, RSMo 1969.

9. State *ex rel.* Magidson v. Henze, 342 S.W.2d 261, 265 (St. L. Mo. App. 1961).

10. Ladue, Mo., Ordinance 131, §§ 6, 9, March 18, 1940. If the board cannot decide if the design falls within either category, the plans are returned to the building commissioner who may issue the permit. *Id.* at §§ 10, 11.

11. 306 S.W.2d 552 (Mo. En Banc 1957). For the general rule requiring definite standards *see* Lux v. Milwaukee Mechanics' Ins. Co., 322 Mo. 342, 346, 15 S.W.2d 343, 345 (En Banc 1929); Olympic Drive-In Theatre, Inc. v. City of Pagedale, 441 S.W.2d 5, 8 (Mo. 1969).

12. 458 S.W.2d at 312.

13. *Id.* at 311.

the use of that power by an administrative body, the court was confronted with the question of whether the application of the regulation to the Stoyanoffs was so unreasonable or arbitrary as to overcome the presumption of validity of the legislative act. The court stated that the denial of a building permit for the highly modernistic residence, in an area where the traditional Colonial, French Provincial and English Tudor styles of architecture predominated, was not unreasonable and arbitrary "when the basic purpose to be served is that of the general welfare of persons in the entire community."[14]

The *Stoyanoff* case joins *State ex rel. Saveland Park Holding Corp. v. Wieland*[15] and *Reid v. Architectural Board of Review*[16] as one of the major decisions in the nation in support of architectural controls. It is quite unlikely, however, that aesthetics will soon become a significant factor in other related areas of the law concerned with control of property use in Missouri,[17] since *Stoyanoff* and a subsequent case, *State ex rel. Wilkerson v. Murray*,[18] have emphasized strongly that mere aesthetic considerations in themselves are not sufficient to sustain the restrictions under general zoning ordinances.[19] But there can be little doubt that the overruling of *Magidson* typifies the present judicial mood which premiered in 1969 in *Deimeke v. State Highway Commission*,[20] when the Missouri Supreme Court upheld an aesthetic-based state statute requiring the licensing of all junkyards along the primary highways of the state. The shift in judicial attitude has been dramatic. Less than a half century ago, the court had said that "regulations based on aesthetic considerations are not in accord with the spirit of our democratic institutions."[21] By 1948 the court had decided that aesthetic considerations would not invalidate an ordinance that had an otherwise

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14. *Id.* at 310.

15. 269 Wis. 262, 69 N.W.2d 217 (1955), *cert. denied*, 350 U.S. 841 (1955).

16. 119 Ohio App. 67, 192 N.E.2d 74 (1963). In addition to Ohio, Wisconsin, and now, Missouri, the only other jurisdiction seemingly upholding such ordinances is New Hampshire. *See, e.g.*, Town of Deering *ex rel.* Bittenbender v. Tibbets, 105 N.H. 481, 202 A.2d 232 (1964). However, that case comes close to supporting the preservation of a historic district, a more traditionally accepted goal.

17. *See* Snadon, *Aesthetic Regulation and the Police Power*, 35 Mo. L. REV. 445 (1970); Steinbach, *Aesthetic Zoning: Property Values and the Judicial Process*, 35 Mo. L. REV. 176 (1970).

18. No. 55,340 (Mo., filed Feb. 8, 1971). This case was reported in the South Western Reporter Advance Sheets as: 463 S.W.2d 821, 824 (Mo. 1971); however, the case does not appear under this citation in the South Western Reporter because one of the parties petitioned to have the reporting of the case withheld pending appeal to the United States Supreme Court on writ of certiorari. In this case, the Missouri Supreme Court accepts the majority view and upholds the ordinance which, in effect, banned mobile homes in certain residential districts of St. Louis County.

19. 458 S.W.2d at 310; State *ex rel.* Wilkerson v. Murray, No. 55,340 (Mo., filed Feb. 8, 1971), *see* note 18 *supra*.

20. 444 S.W.2d 480 (Mo. 1969). *Stoyanoff* answered the main question raised after the decision in *Deimeke:* Whether Missouri municipalities could also use the police power to regulate developments or situations which are not as patently offensive as vehicle graveyards.

21. City of St. Louis v. Evraiff, 301 Mo. 231, 249, 256 S.W. 489, 495 (1923).

traditional purpose under the police power.[22] The *Deimeke* case, which quoted Justice Douglas' famous dicta in *Berman v. Parker*,[23] indicated that aesthetics could be a major, not just incidental, factor in a valid regulation. *Stoyanoff* takes aesthetics to the threshhold of full recognition.

Most courts have had little trouble upholding setback, height, lot area and floor space restrictions[24] which add to a community's appearance. The same has been true with regulations against patently offensive conditions such as junkyards and billboards, and with regulations preserving historic districts.[25] For example, the Missouri court early upheld billboard regulation in St. Louis by denying their connection with aesthetic considerations (which at that time would have invalidated the ordinance automatically), stating that the signs were a threat to health, safety, and public morals.[26] When these latter three terms had been stretched to their limits, attorneys looked to the final term in the usual police power enabling statute, "general welfare." A growing number of cases recognize an expansion of the scope of that term.[27] The court in *Stoyanoff* construed the term "general welfare" to include the preservation of property values through municipal regulation of a non-patently offensive condition, *i.e.*, the design and appearance of residential homes.[28] The ambit of the term "general welfare" seems at times almost limitless, since the essence of the police power *is* that it may only be used to control private property for the public or general welfare; otherwise, there is an unconstitutional taking of private property without due process of law.[29] To give "general welfare" too broad a meaning would seemingly make the three preceding terms of "health, safety, and public morals" superfluous. But the Missouri court recently made it clear that it has not abandoned the use of these terms[30] and in many cases the specific term would seem more accurate than the general.

Judicial recognition that municipalities may regulate exterior building

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22. City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948).

23. 348 U.S. 26, 33 (1954):

> The concept of public welfare is broad and inclusive . . . [t]he values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean. . . .

24. Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26, 37-42 (1960).

25. City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964).

26. St. Louis Gunning Advertisement Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (En Banc 1911), *appeal dismissed*, 231 U.S. 761 (1913).

27. *See* State v. Diamond Motors, 429 P.2d 825 (Hawaii 1967); State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305, 309 (Mo. 1970); Deimeke v. State Highway Comm'n, 444 S.W.2d 480, 484 (Mo. 1969); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

28. 458 S.W.2d at 309.

29. *See, e.g.*, Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

30. *See* State *ex rel.* Wilkerson v. Murray, No. 55,340 (Mo., filed Feb. 8, 1971), note 18 *supra*.

design opens a Pandora's box of problems with which the courts are likely to be faced as architectural control boards spread:

(1) Can a permit be denied even if the owners of the adjoining property give permission for the construction of the type house submitted to the architectural board? The answer would seem to be "yes" if the preservation of property values is for the general welfare and not just that of the adjoining landowners.[31]

(2) What degree of unsightliness is required for disapproval? In *Stoyanoff* the city described (and the court did not disagree) the proposed structure as a "monstrosity of grotesque design."[32] The unsuitability of a proposed structure may not always be so clear cut. The chairman of the Ladue architectural board has said the board has disapproved few of the applications since the board is only "trying to meet basic standards, and not make every building a work of art."[33] Nevertheless, the potential for abuse is great under an ordinance such as Ladue's.

(3) How much of a potential decrease in property values must be found? The lower tax base resulting from decreased property values evidently is a major link in connecting regulation of building permits to the general welfare.[34] The extent of the decrease in property values necessary for disapproval introduces another arbitrary fact issue. The Wisconsin Supreme Court in *Wieland* appeared to demand a substantial diminution,[35] but the opinion in *Stoyanoff* is unclear. A realtor did testify, however, that the Stoyanoff design would have a substantial adverse effect on surrounding property values.[36]

(4) Through whose eyes is the administrative body to look in determining if property values would decrease? The neighbors', who may actually like the proposed design? Or is it the subsequent purchaser of adjoining property who should be considered since the real proof of the effect on property values would come only upon resale? Under the Ladue scheme, a majority of the three-man board of architects may *approve* a design without considering property values. Property values only enter the decision-making process when the board initially disapproves a design, as in the *Stoyanoff* case. What constitutes "proper architectural standards" under the Ladue ordinance depends on the views of the three board members, each of whom must be an architect. Dimiter Stoyanoff was a member of

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31. The Texas Supreme Court in 1921 used this reasoning to invalidate an ordinance requiring the consent of at least three-fourths of the residents in a certain residential district before allowing construction of a business house. In the decision, Chief Justice Phillips delivered a scathing indictment against the consideration of aesthetics in zoning. Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921).

32. 458 S.W.2d at 307.

33. Letter from Rex L. Becker, Chairman of the Architectural Board of Review, to Ronald R. McMillin, March 3, 1971 [hereinafter cited as Letter from Rex L. Becker.]

34. 458 S.W.2d at 309; Deimeke v. State Highway Comm'n, 444 S.W.2d 480, 484 (Mo. 1969).

35. State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217, 219, *cert. denied,* 350 U.S. 841 (1955).

36. 458 S.W.2d at 307.

the Missouri Association of Registered Architects at the time his design was disapproved (a fact the court failed to mention) and the chairman of the Ladue board concedes that "qualified architects do have differences of opinion."[37] This highlights the traditional argument against aesthetic zoning, that such regulation places an individual at the mercy of the whims and sentiments of the decision-maker guided by his own sense of "beauty."[38]

(5) What remedy is available to an adjoining landowner if the architectural board approves a design which he, nevertheless, feels will lower his property values? Although it apparently took 30 years for a home-builder's challenge of the Ladue ordinances to reach the appellate level,[39] *Stoyanoff* shows that an applicant with enough money and determination can have his "day in court." But had the design been approved, Stoyanoff's future neighbor might have found it much more difficult to contest the decision. The Ladue ordinance does not give all aggrieved persons the right to appeal to the city council, only the applicant. The availability of judicial review in this context is unclear.[40] The most feasible—and probably the most effective—weapon would be widespread publicity to arouse the citizenry to "persuade" the city officials to reconsider their decision.[41]

(6) What degree of uniformity must be present in the neighborhood before the proposed design is found not to be in conformity? Ladue has enjoyed much success in the courts in protecting its status. It is one of the finest suburban residential areas of St. Louis, with homes costing an average of $60,000 to $85,000. It is developed primarily in private subdivisions and with a minimum of commercial zoning among its 5,000 acres.[42] Most cities have not been as fortunate in their development. For a design to be unsuitable for an area, a certain degree of uniformity must already exist. An ap-

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37. Letter from Rex L. Becker. The board members also may change their opinions once the building is constructed, but, according to Mr. Becker, when they have had second thoughts, "they generally are that we should have been more restrictive."

38. *See* Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (dissenting opinion); People v. Stover, 12 N.Y.2d 462, 470, 191 N.E.2d 272, 277, 240 N.Y.S.2d 734, 740 (dissenting opinion), *appeal dismissed,* 375 U.S. 42 (1963).

39. *See* note 3 *supra.*

40. Section 536.150, RSMo 1969 sets out possible remedies, including a suit for injunction, certiorari, mandamus or prohibition in connection with the administrative decision. The neighbor could also seek an injunction against and damages for a private nuisance. *See generally* W. PROSSER, LAW OF TORTS 611-13 (3d ed. 1964).

The complexities of bringing such actions are beyond the scope of this casenote. Once it is determined that a party has standing and a remedy is available, the plaintiff's burden of proof would be overwhelming, especially since the board's approval is evidence that the design meets proper architectural standards and conforms to the surrounding property. In fact, § 536.150, RSMo 1969 states "the court shall not substitute its discretion for discretion legally vested in such administrative officer or body. . . ."

41. *See* St. Louis Post Dispatch, March 7, 1971, § A, at 3, col. 3 (junk car lot). For an example of how public reaction can result in the retention of "architecture" abhorred by the neighbors *see* St. Louis Globe-Democrat, March 23, 1971, § A, at 2, col. 3 (a Clayton, Mo. outhouse).

42. *See* Wrigley Properties, Inc. v. City of Ladue, 36 S.W.2d 397 (Mo. 1963); Deacon v. City of Ladue, 294 S.W.2d 616, 622 (St. L. Mo. App. 1956).

plicant whose design has been disapproved should look to this fact issue as one line of offense.

(7) Can the board presently deny a permit application on the ground that *future* property values will be preserved? This situation would arise, for instance, if the proposed structure is to be built on recently annexed land which is undeveloped in part, but which will support much residential housing in the near future.

The seven aforementioned questions by no means exhaust the problem areas opened up by the new prominence of aesthetics in zoning. But many of those problems may be avoided (or at least camouflaged) by the careful drafting of both the enabling statute and city ordinance. The ordinance should include, *inter alia,* a statement of purpose spelling out the relationship between design control and the public welfare; an effective and expeditious procedure for notice and appeal to the city council by the applicant[43] and, possibly, by any other aggrieved party; and the articulation of standards which, although general enough to allow flexibility, are sufficiently concrete so as to minimize arbitrariness under the circumstances.[44] Despite the approval of the Ladue ordinance, it may be desirable to include provisions to require unanimity in design disapproval[45] and to exclude any mention of "appropriate standards of beauty" or "happiness of the community" because both phrases smack of aesthetics' ephemerality.[46] A connection between the control and a comprehensive building plan also cuts against the lack-of-standards argument in a jurisdiction not as obliging as Missouri in *Stoyanoff.*[47] A draftsman should also include a provision for the prevention of *excessive similarity* to guard against the one-design subdivisions which can have as detrimental an effect on adjoining property values as dissimilarity.[48]

The power to adopt such an ordinance must, of course, be found in the enabling statute; but *Stoyanoff, Reid* and *Wieland* suggest that the statute's language need not be specific and an imaginative attorney probably can find at least an arguable statutory basis in any jurisdiction.

The continued expansion of aesthetic considerations in zoning, especially in community-wide zoning controls, depends largely on the courts. The semantical gymnastics in judicial construction of the phrases in the traditional police power statute have been mentioned. The Missouri Supreme Court seemingly overlooked the fact that the Ladue ordinance had a bootstrapping effect, *i.e.,* aesthetics is a valid goal only if property value is preserved, yet the property value is measured in terms of aesthetic displeasure. These techniques and the court's language in *Stoyanoff* leave little

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43. *See* 2 R. ANDERSON, AMERICAN LAW OF ZONING §§ 8.58-.60 (1968).

44. As noted above, conformity with "proper architectural standards" was the basic guideline for the architectural board under the Ladue ordinance. However, determining what is "proper" is no less subjective than defining the term "beauty."

45. 2 R. ANDERSON, *supra* note 43.

46. Both of these phrases were contained in the Ladue ordinance but were not discussed by the court.

47. *See* 2 R. ANDERSON, *supra* note 43.

48. The Ladue scheme has no provisions expressly restricting excessive similarity.

doubt that the court finds aesthetic considerations both necessary and desirable.[49] Yet the prevailing test in Missouri for judicial review of legislative zoning decisions was developed and rigidified long before aesthetics (and the accompanying potential for abuse) began playing such an active part in the controversy between private property rights and public welfare.[50] As long as the aesthetic factor is valid only in conjunction with a traditional purpose, this same test of reasonableness and arbitrariness, which is weighted heavily in favor of legislative actions, will apply. Should this scope of review permit too many abuses, the progress of the aesthetic factor toward legitimacy would likely be halted.[51] Recognition of aesthetics as a *sui generis* purpose for zoning would appear to be a wiser course. The courts would then be unshackled from precedent and free to formulate a new test or to create for themselves a greater role in reviewing aesthetic zoning cases.[52] The latter course seems to be the most workable and would put city governing bodies on notice that a rubber-stamp approval of the architectural board's decision will not automatically raise a shield against close judicial scrutiny.

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49. The court stated:
> In this time of burgeoning urban areas, congested with people and structures, it is certainly in keeping with the ultimate ideal of general welfare that the Architectural Board, in its function, preserve and protect existing areas in which structures of a general conformity of architecture have been erected. 458 S.W.2d at 310.

50. *See* Tofle, *Criteria for Determining the Constitutionality of Zoning Ordinances in Missouri*, 35 Mo. L. REV. 572 (1970).

51. Arguably, the recognition of aesthetics as a valid purpose for control stifles architectural creativity by over-emphasizing conformity. But according to the Ladue architectural board chairman, "The practical result in Ladue has been a general upgrading of architectural design . . . and general acceptance by the citizens . . . that [the board has] had a beneficial effect on the community." Letter from Rex L. Becker.

52. The concept of expanding the court's review role depending on the possibilities of abuse of the police power is not new to the Missouri Supreme Court, which extends the depth of its inquiry when the police power is wielded by a municipality and not the state. Olympic Drive-In Theater, Inc. v. City of Pagedale, 441 S.W.2d 5, 8 (Mo. 1969).

THE INNKEEPER'S LIEN IN MISSOURI

Jackson v. Engert[1]

Plaintiff Genevieve Jackson rented a one room furnished apartment from defendant Robert Engert for seven dollars a week. Plaintiff paid her rent by leaving cash on her dresser where the defendant would pick it up. Claiming that plaintiff's rent was fifty-six dollars in arrears, defendant changed the lock on plaintiff's room and refused to allow her to remove her personal belongings. Plaintiff then brought an action for the conversion of her personal property, valued at $1500, and for $1000 punitive damages, interest and attorney's fees.[2] Defendant raised as a defense section 419.060, RSMo 1969,[3] which gives to the keeper of an inn, hotel or boardinghouse a lien on the property of his guests or boarders for charges they have incurred. Defendant sought to bring himself within the purview of this statute by reference to certain ordinances of the City of St. Louis relating to licensing, inspection, safety and health requirements of hotels, boarding houses and rooming houses.[4] He contended that because he obtained a license for a rooming house, he was considered by the City of St. Louis to be in the same general category as owners of hotels or boardinghouses and was, therefore, entitled to the lien provided for in section 419.060. The case, originating in magistrate court, was tried before a jury in circuit court, and a verdict was directed in favor of the defendant at the close of the plaintiff's case.[5] The St. Louis Court of Appeals reversed the finding of the trial court and remanded the case for a new trial,[6] holding that the plaintiff presented a prima facie case in her action for conversion and that she was entitled to submit the matter to the jury for determination.[7] The court pointed out that the defendant had presented no evidence concerning either his status or that of the plaintiff under section 419.060 and that once such evidence had been presented at a new trial, it would be for the jury to decide whether the defendant's rooming house was covered by section 419.060 of the statute.[8] In reaching this decision, the court paused to discuss the scope of the

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1. 453 S.W.2d 615 (St. L. Mo. App. 1970).
2. *Id.* at 616.
3. § 419.060, RSMo 1969 (in part):

> 1. The keeper of any inn, hotel or boardinghouse, whether individual, partnership or corporation, shall have a lien on the baggage and other property in and about such inn brought to the same by or under the control of his guests or boarders, and upon the wages of such guests or boarders for the proper charges due him from such guests, or boarders, for the accommodation, board and lodging, and for all money paid for or advanced to them not to exceed the sum of two hundred dollars, and for such other extras as are furnished at the request of such guests, and said innkeeper or hotel keeper shall have the right to detain such baggage and other property until the amount of such charges are paid and such baggage and other property shall be exempt from attachment or execution until such innkeeper's lien and the cost of satisfying it are paid. . . .

4. *See* ST. LOUIS, MO., REV. CODE ch. 402 (1969).
5. 453 S.W.2d at 616.
6. *Id.* at 615.
7. *Id.* at 619.
8. *Id.* at 618.

Missouri innkeeper's lien as well as the categories of persons covered by the statute.

The innkeeper's lien was originally derived from his liability to his guests. At common law an innkeeper was required to receive all unobjectionable persons who offered themselves as guests as long as he had accommodations and they were willing to pay the reasonable charges incurred.[9] In order that guests would be assured of a safe place to rest during their travels, extraordinary liability was imposed on innkeepers for loss or injury to their guests' property. An innkeeper at common law was liable for any loss or injury to the property of his guests caused by his own tortious conduct or that of his servants or by others for whose presence in the inn he was responsible.[10] He was prima facie liable for loss by fire but could excuse himself by showing he was free from negligence.[11] However, the innkeeper was not liable for losses due to acts of God or the public enemy, or the companions or servants of the guest, or for losses from causes inherent in the property or due to the negligence of the guest.[12] The prevailing view at common law was that the innkeeper was liable as an insurer for all personal property brought by the guest to the inn and lost in the inn.[13] This extraordinary liability could be limited by contract or reasonable rules and was in some cases limited by statute. Many statutes now mitigate the liability imposed by common law.[14] These statutes tend to limit both the amount of liability and the type of property covered. Section 419.010, RSMo 1969 limits liability for loss of money, jewelry, wearing apparel, baggage or other property of the guest to $200.[15] It also provides that there will be no liability for loss of money, jewelry, or baggage unless actually delivered to the innkeeper by the guest, provided that notice of the section is posted in the office and every guest room of the hotel. Section 419.030, RSMo 1969 provides

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9. Odom v. East Ave. Corp., 178 Misc. 363, 34 N.Y.S.2d 312 (Sup. Ct.), *aff'd mem.*, 264 App. Div. 985, 37 N.Y.S.2d 491 (1942).

10. *See* Stoll v. Almon C. Judd Co., 106 Conn. 551, 138 A. 479 (1927); Burton v. Drake Hotel Co., 237 Ill. App. 76 (1925); Cumberland Hotel Operating Co. v. Hartman, 264 Ky. 300, 94 S.W.2d 637 (1936); Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 206 Ky. 494, 267 S.W. 555 (1925); Babin v. Thormander, 167 So. 241 (La. 1936); Todd v. Natches-Eola Hotels Co., 171 Miss. 577, 157 So. 703 (1934).

11. R. BROWN, THE LAW OF PERSONAL PROPERTY 485 (2d ed. 1955).

12. *See* Johnson v. Mobile Hotel Co., 27 Ala. App. 145, 167 So. 595, *cert. denied*, 232 Ala. 175, 167 So. 596 (1936); Stoll v. Almon C. Judd Co., 106 Conn. 551, 138 A. 479 (1927); National Malted Food Corp. v. Crawford, 254 Ill. App. 415 (1929); Goodyear Tire & Rubber Co. v. Altamont Springs Hotel Co., 206 Ky. 494, 277 S.W. 555 (1925); Robbins v. Ponchartrain Apart., 175 La. 278, 143 So. 263 (1932); Davidson v. Madison Corp., 231 App. Div. 421, 247 N.Y.S. 789, *aff'd*, 257 N.Y. 120, 177 N.E. 393 (1931); Busby Hotel & Theatre Co. v. Thom, 125 Okla. 239, 257 P. 314 (1927); Andrew Jackson Hotel v. Platt, 19 Tenn. App. 360, 89 S.W.2d 179 (1927).

13. L.E. Lines Music Co. v. Holt, 332 Mo. 749, 60 S.W.2d 32 (1933).

14. *See* § 419.010, RSMo 1969. *See also* CAL. CIV. CODE § 1859 (West 1954); CONN. GEN. STAT. ANN § 44-1 (1958); ILL. REV. STAT. ch. 71, § 1 (1969); KAN. STAT. ANN. § 36-402 (1964); MASS. ANN. LAWS ch. 140, § 10 (1958); MICH. COMP. LAWS § 427.101 (1967); MINN. STAT. ANN. § 327.01 (1966); N.J. STAT. ANN. § 29:2-4 (1964); OHIO REV. CODE ANN. § 4721.02 (Page 1954); TEX. REV. CIV. STAT. art. 4592 (1960).

15. § 419.010, RSMo 1969.

that an innkeper will not be liable for losses caused by fire unless started intentionally by the innkeeper or his servants.[16]

Both at common law and under modern statutes, an innkeeper is entitled to a lien on the property of his guests for the reasonable charges they have incurred. This lien was created by law and not by contract. The innkeeper, being required by law to receive the guest and impressed with extraordinary liability for the safety of his property, was given the lien by law as a sort of equalizing device. The connection, at common law, between the innkeeper's liability and the innkeeper's lien was discussed in *Broadwood v. Granara.*[17] Judge Parke stated:

> The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. . . . The lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive.[18]

In *Threfall v. Borwick,*[19] Justice Mellor stated that:

> When, having accommodation, he has received the guest with his goods and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And under such circumstances the lien must be held to extend to goods which he might possibly have refused to receive.[20]

In a subsequent appeal from *Threfall,* the court said that it was immaterial whether the innkeeper was *obligated* to receive the property of the guest; if he received the goods, and thereby became liable, he was entitled to a lien.[21]

At common law, in order for the innkeeper's lien to be valid the claimed goods had to have been brought to the inn by a person coming in the character of a guest. It was not necessary, however, that the guest in all cases be the owner of the goods.[22] The lien generally extended to all property brought by the guest to the inn, including property not belonging to the guest when the innkeeper was either ignorant of the true ownership or knew that the guest had lawful possession of it.[23] Some modern statutes, including Missouri's,[24] have extended this lien to cover the wages of the guest as well.

Some statutory liens have been held to apply only to the property of the guest and not to the property of third persons, even if brought to the inn by the guest as his own property. In the Missouri case of *Wyckoff*

16. § 419.030, RSMo 1969.
17. 156 Eng. Rep. 499 (Ex. 1854).
18. *Id.* at 502.
19. L.R. 7 Q.B. 711 (1872).
20. *Id.* at 713-14.
21. Threfall v. Borwick, L.R. 10 Q.B. 210 (1875).
22. Wall v. Garrison, 11 Colo. 515, 19 P. 469 (1888).
23. *Id. See also* RESTATEMENT OF SECURITY § 63 (1941).
24. § 419.060, RSMo 1969.

v. Southern Hotel Co.,[25] the court said that since the statute (as it then existed) both enlarged and restricted the common law in certain respects, it had repealed the common law. The words of the statute, as interpreted by the court, applied only to the property of the guest himself.[26] However, in the later Missouri case of *L.E. Lines Music Co. v. Holt*,[27] the court said that revisions of the statute, which had extended the lien to all property brought to the hotel by the guest either "in his possession or under his control," would include the property of third persons which was lawfully in his possession.[28] The *Lines Music* case also upheld the constitutionality of the statute.[29]

At common law an innkeeper had an inchoate right to a lien from the time board and lodging were furnished. The lien did not become fixed and certain, however, until the indebtedness was established.[30] Once the lien had been established it continued until the innkeeper voluntarily surrendered the goods to the guest or the debt was satisfied.[31] An innkeeper could not sell or pledge property held by him under a lien; he could, however, bring a bill in equity to foreclose it.[32] Now, under the statutes, various methods of enforcing the lien have been provided. In *Coates v. Acheson*,[33] the court said that if an adequate remedy is provided by statute, a bill in equity does not lie.

The keeper of a boardinghouse or lodging house had no lien at common law. He was required to resort to a normal civil action to recover for charges due.[34] Many modern statutes, however, extend the lien to one or both of the above. The Missouri statute extends it to boardinghouses but not to lodging houses.[35] In the present case, the important question was whether or not the defendant was given a lien by section 419.060, which gives a lien only to keepers of inns, hotels, and boardinghouses. The distinctions between guests, boarders, lodgers, and tenants, as discussed by the court, therefore deserve serious consideration.

The distinctive features of an inn or hotel are that transient guests are received and furnished with lodging.[36] Formerly, to qualify for inn

25. 24 Mo. App. 382 (St. L. Ct. App. 1887).
26. *Id.* at 388.
27. 332 Mo. 749, 60 S.W.2d 32 (1933).
28. *Id.* at 754, 60 S.W.2d at 34.
29. *Id.* The Missouri Supreme Court held in this case that § 13090, RSMo 1929, which the court interpreted as applying the statutory lien to the property of third persons brought to the inn by the guest and lawfully in his possession, was constitutional. The court said that the statute did not deny due process of law under Mo. CONST. art. 2, § 30 (1875), nor did the statute impair the obligation of contracts under U.S. CONST. art. I, § 10. The court also stated that the effect of the statute was to re-establish the common law right of a lien to hotel and innkeepers. Commissioner Westhues said that the common law is the law of our land unless abrogated by statute or constitution. Section 13090 is no broader than the common law; therefore, it is not unconstitutional.
30. Coates v. Acheson, 23 Mo. App. 255 (K.C. Ct. App. 1886).
31. *Id.*
32. Case v. Fogg, 46 Mo. 44 (1870).
33. 23 Mo. App. 255, 261 (K.C. Ct. App. 1886).
34. Turner v. Priest, 48 Ga. App. 109, 171 S.E. 881 (1933).
35. *See* § 419.060, RSMo 1969, quoted note 3 *supra*.
36. Juengel v. City of Glendale, 164 S.W.2d 610 (St. L. Mo. App. 1942).

status, the establishment was required to furnish not only lodging, but also food and drink for the guests.[37] This early definition has been narrowed and modified because of changes in the modes of travel and customs of people. Facilities for supplying guests with food and drink are no longer essential requirements for an inn or hotel.[38]

Today, the hotel or inn generally furnishes accommodations to all persons who are in a condition fit to be received, without regard to any prior or express agreement as to the duration of their stay. In contrast, a boardinghouse or lodging house furnishes accommodations to such persons as the proprietor chooses to receive under express contract, for a certain period of time, and at a certain rate. The crucial distinction between a guest and a boarder or lodger is that the guest is essentially a transient.[39] The court in *Shoecraft v. Bailey,*[40] quoting from 1 *Parson's Contracts,* page 628, states:

> The guest comes without any bargain *for time,* remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; and it is not enough to make [him] a boarder, and not a guest, that he has staid [sic] a long time in the inn in this way.[41]

The fact that there has been some negotiated deduction from the regular charge does not change the rule stated above.[42] It should also be mentioned that a tenant is distinguishable from guests and lodgers or boarders in that a tenant acquires an interest in the realty and a right to the exclusive legal possession of the premises occupied.[43]

A guest at an inn may terminate the existing relationship by abandoning his transient character. This may be effected merely by forming an intention to remain indefinitely or permanently.[44] However, a special contract with an innkeeper, such as one for a weekly rate, made by a person who has been received as a guest, does not operate to terminate the relation if the party retains his character as a transient.[45]

A lodging or rooming house is defined as a house where lodgings are let;[46] where bedrooms are furnished; and where there are one or more bedrooms which the proprietor can spare for the purpose of giving lodging to such persons as he chooses to receive.[47] It is also a house containing furnished apartments which are let out by the week or by the month without meals.[48]

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37. Nelson v. Johnson, 104 Minn. 440, 116 N.W. 828 (1908).
38. Juengel v. City of Glendale, 164 S.W.2d 610, 613 (St. L. Mo. App. 1942).
39. City of Independence v. Richardson, 117 Kan. 656, 232 P. 1044 (1925).
40. 25 Iowa 553 (1868).
41. *Id.* at 555.
42. *Id.*
43. Marden v. Radford, 229 Mo. App. 789, 800, 84 S.W.2d 947, 955 (K.C. Ct. App. 1935).
44. Polk v. Melenbacker, 136 Mich. 611, 99 N.W. 867 (1904).
45. Holstein v. Phillips, 146 N.C. 366, 59 S.E. 1037 (1907).
46. Shoecraft v. Bailey, 25 Iowa 553 (1868).
47. City of Independence v. Richardson, 117 Kan. 656, 232 P. 1044 (1925).
48. Shoecraft v. Bailey, 25 Iowa 553 (1868).

On the other hand, a boardinghouse is kept principally for the residence of permanent boarders; it is a house where the business of keeping boarders is generally carried on, and which is held out by the owner or keeper as a place where boarders are kept.[49] The principal difference between a boardinghouse and a lodging house is that the former furnishes both food and lodging while the latter furnishes only lodging.[50] Neither the boarder nor the lodger acquires an interest entitling him to exclusive possession of the premises, as does the tenant.[51]

Section 419.060 applies the innkeeper's lien only to "the keeper of any inn, hotel or boardinghouse" and does not mention lodging or rooming houses.[52] The exclusion of lodging houses is consistent with the early common law requirement that meals be served by an inn or hotel. Under this early view, if a person did not provide food and drink as well as lodging he would not qualify as an innkeeper and would not be subject to the extraordinary liability of innkeepers.[53] Conversely, if he did not rise to innkeeper status and avoided such liability, he was not entitled to the innkeeper's lien. Under the modern view, inns and hotels are not required to serve meals,[54] but the statute, by including boardinghouses, which by definition must serve meals, seem to have incorporated the common law requirement of serving meals. Lodging houses, which, by definition, do not serve meals, have been excluded from coverage. Since section 419.060 includes boardinghouses, its provisions are broader than the common law lien of innkeepers and are, therefore, in derogation of the common law.[55] Because of this, the court in *Jackson* found that the provisions must be strictly construed so that the availability of the lien is limited to those specifically named in the statute.[56] The court said that if the plaintiff was found to be a lodger, and not a boarder or guest, a strict construction of the statute would prevent her from coming within the scope of the statutory lien. She could not be a boarder if she received only lodging without meals and could not be a guest unless she could be shown to possess the necessary transient characteristics of a guest.[57] The court ruled that the licensing and inspection ordinance of the City of St. Louis which placed lodging houses in the same category as hotels and boardinghouses could in no way affect the scope of coverage under the state statute.[58] If the two were in conflict, the state statute would prevail.

Only keepers of inns, hotels or boardinghouses are entitled to the statutory lien. There is no common law lien covering lodging houses. If it is determined by a jury in a subsequent trial of the present case that the defendant was not the keeper of an inn, hotel or boardinghouse vis-a-vis the

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49. *Id.*
50. *Id.*
51. *Id.*
52. *See* § 419.060, RSMo 1969, quoted note 3 *supra.*
53. Metzler v. Terminal Hotel Co., 135 Mo. App. 410, 115 S.W. 1037 (St. L. Ct. App. 1909).
54. Juengel v. City of Glendale, 164 S.W.2d 610, 613 (St. L. Mo. App. 1942).
55. Hursh v. Byers, 29 Mo. 469 (1860).
56. 453 S.W.2d at 619.
57. *Id.* at 618.
58. *Id.*

plaintiff, he would have no right to a lien on the property plaintiff kept in defendant's lodging house. If the jury finds plaintiff was in fact a lodger, defendant's act of refusing to allow plaintiff to remove her goods would support an action for wrongful conversion of property. The distinctions between boarders, lodgers, and guests should be kept in mind when the existence of the statutory lien under section 419.060, RSMo 1969 is in question, in order to avoid the sort of problem which arose in this case.

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TAXATION—ADOPTION OF "STRICT NET EFFECT" TEST UNDER SECTION 302(b)(1)

United States v. Davis[1]

In 1945, Macklin P. Davis and E. B. Bradley organized a corporation. Bradley received 500 shares of common stock for his capital contribution to the corporation, and Davis and his wife each received 250 shares for their contributions. Shortly after the organization had been completed, Davis contributed another $25,000 to the corporation in order to increase the corporation's working capital to a level sufficient to qualify it for a loan from the Reconstruction Finance Corporation. In exchange for his investment, Davis was issued 1,000 shares of non-voting, preferred stock with a par value of $25 per share, which was to be redeemed by the corporation when the RFC loan was repaid.[2] Subsequently, Davis bought Bradley's 500 shares and divided them among his son and daughter. By 1963, the corporation had completed repaying the RFC loan and, in accordance with the original understanding, redeemed Davis' preferred shares for $25,000.

In his personal income tax return for 1963, Davis treated the redemption of his stock as a capital transaction under section 302 of the Internal Revenue Code of 1954. As a result of this treatment, Davis paid no tax on the transaction because he received the same amount from the redemption as he had previously invested. The Commissioner of Internal Revenue, however, determined that the redemption was "essentially equivalent to a dividend" and thus taxable as a dividend. Accordingly, Davis paid the tax and sued for a refund. The federal district court held for Davis.[3] The Court of Appeals for the Sixth Circuit affirmed on the ground that the redemption was not essentially equivalent to a dividend under section 302(b)(1) because it was made for legitimate business reasons and not as part of a tax avoidance scheme.[4] On writ of certiorari, the Supreme Court reversed.[5] The Court decided that the corporate distribution to Davis should be

1. 397 U.S. 301 (1970).
2. United States v. Davis, 408 F.2d 1139, 1141 (6th Cir. 1969).
3. Davis v. United States, 274 F. Supp. 466 (M.D. Tenn. 1967).
4. United States v. Davis, 408 F.2d 1139 (6th Cir. 1969).
5. United States v. Davis, 397 U.S. 301 (1970).

treated as a dividend under sections 301 and 316 of the Internal Revenue Code of 1954, unless the transaction came within one of the exceptions set out in section 302 and thus qualified for the preferential tax treatment afforded capital gains transactions. Of the four exceptions to the ordinary income treatment of distributions by a corporation to its shareholders contained in section 302, the Court held only one, section 302 (b) (1), to be applicable in this case.[6] After attributing to Davis the stock owned by his wife and children pursuant to the rules of constructive ownership in section 318,[7] the Court determined that the redemption was a pro rata distribution by the corporation, and therefore "essentially equivalent to a dividend" within the meaning of section 302 (b) (1). In reaching this result the Court adopted a "strict net effect" test for the construction of section 302 (b) (1) and rejected the "flexible net effect" test approved by some of the lower courts which permits the court to consider the taxpayer's purpose for the redemption.

An initial question dealt with was the application of the "constructive ownership rules" to section 302 (b) (1) redemptions. Under section 318 a shareholder is deemed to be the owner, for some purposes, of shares of stock owned by members of his family and certain others.[8] Section 302 (c) makes the constructive ownership rules of section 318 applicable to redemptions under section 302.[9] Although several courts of appeals[10] and the Treasury Regulations[11] had taken the view that rules of constructive owner-

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6. § 302 (b) (1) states that capital gains treatment is available where the distribution is "not essentially equivalent to a dividend." § 302 (b) (2) allows capital gains treatment where the taxpayer's interest is substantially diminished by the redemption. § 302 (b) (3) allows capital gains treatment in cases where the taxpayer has his interest in the corporation completely terminated by the redemption. § 302 (b) (4) is concerned with redemptions of certain types of railroad stock. INT. REV. CODE of 1954, § 302.

7. INT. REV. CODE of 1954, § 318 (a) (1) (A) provides:

> (a) General Rule
> For purposes of those provisions of this subchapter to which the rules contained in this section are expressly made applicable—
> (1) Members of Family—
> (A) In general—an individual shall be considered as owning the stock owned, directly or indirectly, by or for—
> (i) his spouse (other than a spouse who is legally separated from the individual under a decree of divorce or separate maintenance) and
> (ii) his children, grandchildren, and parents.

8. INT. REV. CODE of 1954, § 318.

9. § 302 (c) (1) provides that, with a few exceptions which are not applicable in this case, the rules of § 318 (a) apply "in determining the ownership of stock for the purpose of this section." INT. REV. CODE of 1954, § 302 (c) (1).

10. United States v. Davis, 408 F.2d 1139, 1142 (6th Cir. 1969); Levin v. Commissioner, 385 F.2d 521, 526 (2d Cir. 1967); Commissioner v. Berenbaum, 369 F.2d 337, 342 (10th Cir. 1966); Ballenger v. United States, 301 F.2d 192, 199 (4th Cir. 1962); Bradbury v. Commissioner, 298 F.2d 111, 116 (1st Cir. 1962).

11. Treas. Reg. § 1.302 (b) (1956) states:

> The question of whether a distribution in redemption of stock of a shareholder is not essentially equivalent to a dividend under § 302 (b) (1) de-

ship apply to cases under section 302 (b) (1), Davis argued that section 318 (a) did not apply. Davis contended that section 318 (a) applies only to those provisions of section 302 that refer expressly to stock ownership, and that since section 302 (b) (1), unlike sections 302 (b) (2) and 302 (b) (3), does not refer expressly to stock ownership, the attribution rules do not apply to it. In holding that the rules of constructive ownership are applicable under section 302 (b) (1), the Court pointed out that to hold otherwise would be to nullify the effects of sections 302 (b) (2) and 302 (b) (3) since a transaction that did not qualify for capital treatment under these tightly worded provisions might still qualify under section 302 (b) (1).

A reasonable interpretation of the sections in question leads to the conclusion that the Court was correct in its application of the rules of constructive ownership in *Davis*. From the premise that "the rules of 318 (a) are 'expressly made applicable in determining the ownership of stock' under section 302 and consequently it is reasonable to apply them whenever ownership is relevant whether by statutory discretion or otherwise,"[12] the conclusion is reached that the rules of constructive ownership generally apply in all cases under section 302 (b) (1) where ownership of stock is to be determined. This is the same as the Court determination in *Davis* that the rules of section 318 (a) apply to all cases under 302 (b) (1) where stock ownership is to be determined.[13]

The more basic issue in *Davis* was what effect, if any, should be accorded the taxpayer's legitimate business purpose for the redemption in determining dividend equivalence under section 302 (b) (1). At the time the Court handed down this opinion, the federal circuit courts of appeals were split as to whether the purpose underlying the redemption should be given any weight in determining if the redemption was "essentially equivalent to a dividend." Several of the courts of appeals, applying a "flexible net effect" approach, gave at least some weight to the underlying purpose of the redemption.[14] These courts basically took the view that evidence of a legitimate business purpose should be considered with the other facts of

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pends upon the facts and circumstances of each case. One of the facts to be considered in making the determination is the constructive stock ownership of such shareholders under § 318 (a).

12. B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 292 n.32 (2d ed. 1966).

13. Perhaps a more just rule of law would have resulted if the Court had stated that the constructive rules of ownership apply to all cases under section 302 (b) (1) except those instances involving family estrangement situations where the shareholder has broken all ties with the members of his family who own the stock under consideration. This was the rule that the Court of Appeals for the Second Circuit reached for the application of § 318 to cases under § 302 (b) (1). Levin v. Commissioner, 385 F.2d 521, 527 (2d Cir. 1967). However, in *Davis* the Court made no mention of any such possible exceptions. Thus, as a result of *Davis*, the rules of constructive ownership of § 318 apply to all redemptions under § 302 (b) (1).

14. United States v. Davis, 408 F.2d 1139, 1143 (8th Cir. 1969); Coyle v. United States, 415 F.2d 488, 491 (4th Cir. 1968); Commissioner v. Berenbaum, 369 F.2d 337, 340-41 (10th Cir. 1966); Sullivan v. United States, 363 F.2d 724, 728 (8th Cir. 1966); Kerr v. Commissioner, 326 F.2d 225, 230 (9th Cir. 1964); United States v. Fewell, 255 F.2d 496, 500-01 (5th Cir. 1958).

the case in reaching the final judgment. Prior to the enactment of the Internal Revenue Code of 1954, a long line of decisions under section 115 (g) (1) of the 1939 Code had considered the underlying business purpose of a redemption in the dividend equivalence test.[15] Because there was no specific rule stating what constituted a business purpose sufficiently strong to warrant a capital gains treatment under section 115 (g), the courts decided each case on its own particular facts.[16] Those courts which adopted the so-called "flexible net effect" test in applying section 302 (b) (1) of the 1954 Code followed the basic premise that

> in enacting section 302 (b) (1) Congress had intended that the test for determining whether a redemption was "essentially equivalent to a dividend" should be the same as the test utilized in interpreting and applying the same words in section 115 (g) (1) of the 1939 Code. . . .[17]

Thus, the courts adhering to the "flexible net effect" test to determine the possible dividend equivalence of a redemption under section 302 (b) (1) of the 1954 Code considered all the facts of each case, including whether or not the motivating purpose behind the redemption was a legitimate business purpose.[18]

On the other hand, in *Levin v. Commissioner*[19] the Court of Appeals for the Second Circuit, applying a "strict net effect"[20] approach, had taken the position that the purpose motivating the redemption was irrelevant to the determination of whether the distribution constituted a dividend.[21] Instead, the court held in *Levin* that the determinative factor was whether

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15. United States v. Fewell, 255 F.2d 496, 500 (5th Cir. 1958); Ferro v. Commissioner, 242 F.2d 838, 841 (3d Cir. 1957); Commissioner v. Sullivan, 210 F.2d 607, 610 (5th Cir. 1954); Tucker v. Commissioner, 226 F.2d 177, 179 (8th Cir. 1955); Smith v. United States, 121 F.2d 692, 695 (3d Cir. 1941). *See also* Bitker, *The Taxation of Stock Redemptions and Partial Liquidations,* 44 CORNELL L.Q. 299, 301-02 (1959).

16. United States v. Fewell, 255 F.2d 496, 500-01 (5th Cir. 1958); Woodworth v. Commissioner, 218 F.2d 719, 723 (6th Cir. 1955).

17. Kerr v. Commissioner, 326 F.2d 255, 230 (9th Cir. 1964); *see also* Tabery v. Commissioner, 354 F.2d 422, 427 (9th Cir. 1965).

18. *See* cases cited note 14 *supra.*

19. 385 F.2d 521 (2d Cir. 1967).

20. *See* Kerr v. Commissioner, 326 F.2d 225, 230 (9th Cir. 1964) for a definition of the phrase "strict net effect."

21. Levin v. Commissioner, 385 F.2d 521, 525 (2d Cir. 1967). Also, the Court of Appeals for the First Circuit seemed to be close to adopting the view held by the second circuit. Although never overruled, the test used by that court in Bradbury v. Commissioner, 298 F.2d 111, 117 (1st Cir. 1962) (evidence of whether or not there has been a pro rata distribution is given the most weight in determining dividend equivalence but other criteria are considered) had undergone a change during the 1960's. *See* Wiseman v. United States, 371 F.2d 816 (1st Cir. 1967), in which the court stated:

> That the transaction was motivated by a legitimate business purpose is not disputed. But where, as here, the taxpayer is the sole or dominant stockholder of the distributing corporation, motive is irrelevant. For motive to have any meaningful significance at least the line between shareholder and the corporation must be more sharply drawn than it is in this case. *Id.* at 818.

there had been a substantial reduction in the shareholder's proportionate interest in the corporation as a result of the distribution.[22] By adopting the "strict net effect" test in *Levin,* the Court of Appeals for the Second Circuit took a very limited view of what Congress intended to accomplish by section 302 (b) (1). Instead of concluding that Congress, by passing section 302 of the 1954 Code, merely intended to re-enact the law as it had been interpreted under section 115 (g) of the 1939 Code (as did the courts which adopted the "flexible net effect" test), the court in *Levin* stated that Congress only intended section 302 (b) (1) to apply to those limited cases which rightfully deserve capital gains treatment and would not qualify under the exact tests within sections 302 (b) (2) and 302 (b) (3). Thus the court found the "business purpose" cases were not covered under 302 (b) (1).[23] In reaching its decision in *Davis,* the Supreme Court adopted the "strict net effect" test for basically the same reasons set forth by the Court of Appeals for the Second Circuit. The Court stated that Congress did not intend for section 302 (b) (1) to have a broad meaning.

A study of the legislative history of the section leads to the conclusion that *Levin* and *Davis* were correct interpretations of Congressional intent. The report from the House of Representatives on section 302 made no mention of the phrase "essentially equivalent to a dividend."[24] The only situations the House Report stated as warranting capital gains treatment are those now covered by sections 302 (b) (2) and (3); that is, where the redemption resulted in an 80% reduction in the shareholder's prior holdings or where the redemption terminated the shareholder's interest completely.[25]

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22. When a taxpayer's (constructive) ownership decreases by a significant amount, we are justified in concluding that a substantial reduction in the taxpayer's interest in the corporation has occurred warranting capital gains treatment as a sale or exchange. But when only a small reduction in control occurs, the distribution is held to be essentially equivalent to a dividend. . . .

Levin v. Commissioner, 385 F.2d 521, 527-28 (2d Cir. 1967). *See also* Himmel v. Commissioner, 338 F.2d 815, 817 (2d Cir. 1964).

23. Levin v. Commissioner, 385 F.2d 521, 525 (2d Cir. 1967), in which the court stated:

The Code draftsmen hopefully expected that the preciseness of the tests set out in the new provisions, § 302 (b) (2) and § 302 (b) (3), would serve to relieve the pressure on the "not essentially equivalent to a dividend" test re-enacted as § 302 (b) (1). The new requirements, if carefully observed, provided safe harbors for taxpayers seeking capital gain treatment. As a result, their enactment permitted more accurate and long-range planning. The legislative history of § 302 (b) (1) supports the view that it was designed to play a modest role. . . . *Id.* at 525.

See also B. BITTKER & J. EUSTICE, *supra* note 12, at 291, which was cited in this opinion.

24. H.R. REP. No. 1337, 83d Cong., 2d Sess. 35-37 (1954).

25. After stating that under the old Code it was not clear when a redemption constituted dividend tax liability, and that, therefore, the report would set out definite conditions which would warrant capital gains treatment, the report continued:

[Y]our committee has defined when a substantially disproportionate redemption of a shareholder's stock will qualify so as not to be taxable as a dividend; namely, that a particular shareholder's holdings of participat-

It is in the Senate Report that the first mention appears of including the phrase "essentially equivalent to a dividend." It is also in this same report that it becomes fairly apparent that the Senate did not intend to reenact a rule as expansive as the one which had become the law under section 115(g) of the 1939 Code. Noting that under the 1939 Code the law was unclear and that no definite test had developed to determine when a redemption constituted a capital transaction as opposed to a dividend, the report stated:

> While the House bill sets forth definite conditions under which stock may be redeemed at capital gain rates, the rules appeared unnecessarily restrictive, particularly in the case of redemptions of preferred stock which might be called by the corporation without the shareholder having any control over when the redemption may take place. Accordingly, your committee follows the existing law by reinserting the general language indicating that a redemption shall be treated as a distribution in part for full payment in exchange for stock if the redemption is not essentially equivalent to a dividend.[26]

Referring to this source of legislative history in their treatise, Bittker and Eustice said:

> It is not easy to give section 302(b)(1) an expansive construction in view of this indication that its major function was the narrow one of immunizing redemptions of minority holdings of preferred stock.[27]

By adopting the "strict net effect" test in *Davis,* the Court refused to give section 302(b)(1) a construction so expansive that it could be supported by neither leading commentators[28] nor the language of the legislative history of the Internal Revenue Code of 1954.[29]

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ing stock after the distribution be less than 80% of his holdings before the distribution. A distribution in complete redemption of a shareholder's stock will also result in capital gain.

H.R. REP. No. 1337, 83d Cong., 2d Sess. 35, 36 (1954).

26. S. REP. No. 1622, 83d Cong., 2d. Sess. 44, 45 (1954).

27. B. BITTKER & J. EUSTICE, *supra* note 12, at 291.

28. *Id.* at 292-93. Here the authors note that in the light of the legislative history of § 302 and Treas. Reg. § 1.302(b), redemptions which are not pro rata or disproportionate enough to meet the exact standards of § 302(b)(2) might qualify for capital gains treatment under § 302(b)(1) in two possible cases:

> (1) a redemption of part of the stock of a minority shareholder, where the redemption is not "substantially disproportionate" but his remaining stake in the corporation is quite limited; . . .[and]
>
> (2) a redemption that is pro rata only because of the constructive ownership rules of § 318, especially if the stock is being attributed from one member of a family to an independent or hostile adult. *Id.*

The authors then state that Congressional intent suggests:

> "the business purpose" cases of the pre-1954 law are not applicable under § 302(b)(1), except to the extent that a business reason for the reduction may add strength to the taxpayer's case when the redemption is not pro rata. *Id.*

29. H.R. REP. No. 1337, *supra* note 25; S. REP. No. 1622, *supra* note 26. In a more detailed explanation of § 302(b)(1), the Senate Report stated:

> The test intended to be incorporated in the interpretation of paragraph

With its decision in *Davis,* the Court has clearly resolved the split of opinion that had existed among the circuit courts of appeals since the enactment of the 1954 Code as to what constitutes dividend equivalence under section 302 (b) (1). No longer should any court apply the "flexible net effect" test and thus consider all the facts of each case to determine whether or not a redemption is "essentially equivalent to a dividend." Now, under the "strict net effect" test adopted in *Davis,* there is ample authority for holding that a corporate redemption must result in a *meaningful reduction in the shareholder's proportionate interest in the corporation* for it to be "not essentially equivalent to a dividend" within the meaning of section 302 (b) (1). The effect of *Davis* is to make less likely the chance that a shareholder can avoid dividend treatment for a redemption of his stock. In light of this decision, closely owned corporations would be wise to consider increasing their working capital by borrowing from the owners rather than by issuing preferred stock to the owners and later redeeming it. Had Davis held corporate instruments of debt rather than equity, he would have received his $25,000 as a repayment of a loan and been afforded favorable tax treatment, completely avoiding treatment of the return as a dividend for tax purposes.[30]

EDWIN J. SPIEGEL III

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(1) is in general that currently employed under § 115 (g) (1) of the 1939 Code. Your committee further intends that in applying this test for the future that an inquiry will be devoted solely to the question of whether or not the transaction by its nature may be characterized as a sale of stock by the redeeming shareholder to the corporation.

For this purpose the presence or absence of earnings and profits is not material. S. REP. No. 1622, *supra* note 26, at 234.

From this report the Court in *Davis* inferred that Congress did not intend for evidence of business purpose to be considered under § 302 (b) (1). The Court reasoned that if, in a redemption situation where there were no corporate earnings or profits, § 302 (b) (1) was not applicable, then the fact that the redemption was for legitimate business purposes would be irrelevant because "there would not likely be a tax avoidance purpose in a situation where there were no earnings or profits." United States v. Davis, 397 U.S. 301, 311-12 (1970).

30. The Court has previously stated that economic gain to the taxpayer is the determinative factor in deciding whether or not a payment to the taxpayer is taxable income. James v. United States, 366 U.S. 213, 219 (1960). Following this reasoning, receipt of a repayment of a loan would not be taxable income because the taxpayer has received no "economic gain;" all he has received is the return of what he had previously. *See also* United States v. Rochelle, 384 F.2d 748, 751 (5th Cir. 1967).

CONTESTED CASE IN MISSOURI LIQUOR LICENSING

Kopper Kettle Restaurants, Inc. v. City of St. Robert[1]

Kopper Kettle operates a restaurant in the Ramada Inn in the City of St. Robert, Missouri. After obtaining a state liquor license for liquor by the drink, Kopper Kettle applied for a city liquor license as required by city ordinance.[2] (Such "dual" licensing is a typical feature of the system of liquor regulation in Missouri.) Kopper Kettle's application for a city license was refused on the ground that there were already ten licenses outstanding, the maximum number allowed by the city ordinance in the absence of a population increase of 250 persons. Kopper Kettle then filed suit for a writ of mandamus to compel the city to issue the license. In its petition, Kopper Kettle alleged that it had met all requirements for a city license because there had been a population increase of 250 persons, which would allow one license in addition to the ten already outstanding. The city filed a motion to quash on the ground that the allegations were insufficient to warrant the issuance of the writ, and the motion was granted. The Springfield Court of Appeals reversed and remanded, stating that if the allegations were taken as true, they were sufficient.[3]

A writ of mandamus did not issue on remand because the trial judge was of the opinion that a suit for "Review of Administrative Action" under the Missouri Administrative Procedure Act was an adequate remedy which precluded suit for writ of mandamus under Missouri decisions governing the availability of that remedy. Kopper Kettle then appeared at a meeting of the Board of Aldermen and requested a reconsideration of its application, or a finding of facts setting forth reasons for its refusal. The Board tabled the request, apparently on the ground that the application had already been

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1. 439 S.W.2d 1 (Spr. Mo. App. 1969).

2. The state gives cities the authority to grant liquor licenses under § 311.220(2), RSMo 1969:

> The board of Aldermen, city council or other proper authorities of incorporated cities, may . . . make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, . . . where not inconsistent with the provisions of this law.

Although it was not argued in this case, some contend that the Administrative Procedure Act does not apply to municipal corporations. The supreme court, interpreting § 4904, RSMo 1939 [now § 311.220, RSMo 1969], held in *State ex rel. Hewlett v. Womach*, 355 Mo. 486, 196 S.W.2d 809 (En Banc 1946), that a municipal ordinance on liquor must be in harmony with the Liquor Control Act, but that regulation of the number of licenses within a city was not inconsistent with the state law. The court agreed that a city could not prohibit the sale of liquor in contravention of state law (in the absence of local option) but that an ordinance limiting the number of licenses was regulatory, not prohibitive. *Id.* at 493, 196 S.W.2d at 814. The *Hewlett* decision was followed in State *ex rel.* Kopper Kettle Rest., Inc. v. City of St. Robert, 424 S.W.2d 73 (Spr. Mo. App. 1968), when the Springfield Court of Appeals reiterated this interpretation. Thus, in liquor control, the Missouri Administrative Procedure Act applies to municipal corporations which derive their authority to regulate the sale of liquor from the legislature, and are, therefore, "agencies" under the act.

3. State *ex rel.* Kopper Kettle Rest., Inc. v. City of St. Robert, 424 S.W.2d 73 (Spr. Mo. App. 1968).

denied.[4] Kopper Kettle then filed suit in circuit court for "Review of Administrative Action" under the Missouri Administrative Procedure Act. The city moved to dismiss for lack of jurisdiction over the subject matter. When this motion was denied, the city sought a writ of prohibition, which the Springfield Court of Appeals declined to issue.[5] The circuit court then decided the case on the merits, holding that it could properly review the administrative decision because it was a "contested case" within the meaning of the Missouri Administrative Procedure Act, and found in favor of Kopper Kettle. The city appealed this decision to the Springfield Court of Appeals. Anticlimactically (this being the third time the case came before that court), the Springfield Court of Appeals reversed, holding that the proceeding, after all, was not a "contested case" within the meaning of the Missouri Administrative Procedure Act.[6]

Kopper Kettle had alleged, on appeal, that the issuance of the license *was* a "contested case" under section 536.010 (2), RSMo 1959, which defines a "contested case" as

> a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.[7]

Kopper Kettle submitted that a hearing is "required by law" when such a hearing is necessary in order to meet the due process requirements of the fourteenth amendment of the U.S. Constitution. Under this criterion a hearing was required in this case. Kopper Kettle further emphasized, in the alternative, that even if the controversy was not a "contested case," the appellate court had power to review the decision under section 536.150, RSMo 1959 [now section 536.150, RSMo 1969], which restates the common law non-statutory review procedure for *non-contested cases.*

Relying on Missouri decisions which had interpreted "required by law" to mean "required by statute,"[8] the court rejected Kopper Kettle's position and held that this proceeding was *not* a "contested case." Since the proceeding was not a "contested case" within the meaning of the Missouri Administrative Procedure Act, the appellate court ruled that the circuit court had erred in granting review in the first instance. The court further stated that since Kopper Kettle had treated the entire proceeding as a "contested case," it could not, for the purpose of the appeal, seek review as if it were a non-contested case.[9] The court thus avoided the question of what minimum administrative procedural safeguards apply to non-contested cases.

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4. In the interim the city had changed its ordinance to reduce the number of licenses allowed from 10 to 9.

5. *See* 439 S.W.2d at 3.

6. *Id.* at 4.

7. § 536.010 (2), RSMo 1959 [now § 536.010 (2), RSMo 1969].

8. *See* Wilson v. Morris, 369 S.W.2d 402 (Mo. 1963); Pinzino v. Supervisor of Liquor Control, 334 S.W.2d 20 (Mo. 1960); State *ex rel.* Leggett v. Jensen, 318 S.W.2d 353 (Mo. En Banc 1958); Scism v. Long, 280 S.W.2d 481 (St. L. Mo. App. 1955).

9. 439 S.W.2d at 4.

Article V, section 22 of the Missouri Constitution states that any decision by an administrative body is subject to direct review by the courts. It further states that review will be limited to cases where the agency is required by law to give a hearing of record, and to cases questioning whether the findings are supported by competent and substantial evidence.[10] The Missouri Administrative Procedure Act establishes parallel, but not congruent, requirements for proceedings known as "contested cases." In 1953 the act was amended so as to restate common law non-statutory review procedures appropriate for non-contested cases, *i.e.,* those cases where a hearing is *not* required by law.[11]

The amended act allows the courts, on appeal, to receive evidence in the same manner as does an administrative agency in "contested cases" which do not involve so-called "discretionary functions."[12] The scope of review is different, nevertheless, depending upon whether the case is contested or non-contested. The legislature has apparently adopted, at least in part, the view taken by the Missouri Supreme Court in *Wood v. Wagner Electric Corp.*[13] The court in that case implied that the scope of review depends on whether the statutes require a hearing before the agency. If a hearing is not required (non-contested case), the court may only determine if the finding was authorized by law. If a hearing is required ("contested case"), the findings must be supported by "competent and substantial evidence,"[14] although the reviewing court may only decide whether the agency could *reasonably* find as it did from the evidence.[15] A technical analysis

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10. Mo. CONST. art. V, § 22 provides:
> All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

11. § 536.105, RSMo 1949 [now § 536.150, RSMo 1969].

12. State *ex rel.* State Tax Comm'n v. Walsh, 315 S.W.2d 830, 834-35 (Mo. En Banc 1958), contains a discussion of the legislative history and intent of § 536.150. The court quoted from a committee comment contained in a report to the Administrative Law Committee of the Board of Governors of the Missouri Bar:
> This bill . . . provides for the making in court, in a certiorari proceeding, for example, of the same kind of record that would be made before the agency in a case reviewable under Section 22 of Article V of the Constitution. *Id.* at 834.

See also Report of Administrative Law Comm'n of the Mo. Bar, 9 J. Mo. B. 189, 190-91 (1944).

13. 355 Mo. 670, 197 S.W.2d 647 (En Banc 1946). The court stated that the words "shall be subject to direct review by the courts as provided by law" referred to the type of review, *i.e.,* certiorari, appeal, etc., and not to the scope of review. *Id.* at 674, 197 S.W.2d at 649.

14. *Id.*

15. In Ellis v. State Dep't of Pub. Health & Welfare, 365 Mo. 614, 285 S.W.2d 634 (En Banc 1955), the supreme court again addressed itself to art. V, § 22 when it determined that removal from aid to dependent children rolls did not fall under its provisions. The court held that its provisions did not apply because the aid was a gratuity, and that previous court decisions indicated a narrower review in

suggests, therefore, that since the court in a "contested case" must decide whether the decision is supported by "competent and substantial evidence on the whole record," the scope of review is broader than in a non-contested case, where no such requirement is imposed. However, since in a non-contested case the court may, upon an allegation of unreasonableness (to take one example) "hear such evidence on such question as may be properly adduced," the court can, in effect, grant de novo review in a non-contested case.

The court has great latitude in determining what hearings are "required by law." As stated above, Kopper Kettle argued that the phrase "required by law" comprehends constitutional due process. At this point the doctrine of "privilege" becomes important. This doctrine, when applied, dispenses with a hearing requirement and other procedural safeguards of the due process clause of the fourteenth amendment. The argument runs that when a "vested right" is involved, due process requires a hearing, but when there is no right, but only a "privilege," there is no violation of due process if a hearing is not granted.[16] There are exceptions to the "privilege" doctrine which courts have developed in order to give protection to certain types of "privileges." These exceptions generally fall into four classes:

> (1) that constitutional principles of substantive and procedural fairness apply even when only a privilege is at stake and even when the privilege itself is not directly entitled to legal protection; (2) that privileges as well as rights are entitled to legal protection; and (3) that when a privilege is combined with another interest the combination may be a right and accordingly entitled to legal protection. . . . The remaining method is (4) to provide legal protection to a privilege without mentioning the problem of privilege.[17]

Despite a federal trend in the opposite direction, the "privilege" doctrine has been applied to liquor cases in Missouri.[18] In *State v. Parker Distilling Co.*[19] the court stated that the liquor business was not on the same plane as other businesses and, unless otherwise provided by statute, a denial of protections applicable to other businesses is not necessarily a denial of due process.[20] Some authors believe that the "privilege" doctrine is a label

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these cases than art. V., § 22 provided. *Id.* at 618, 285 S.W.2d at 637. *See* Collins v. Division of Welfare, 364 Mo. 1032, 270 S.W.2d 817 (En Banc 1954); Howlett v. State Social Security Comm'n, 347 Mo. 784, 149 S.W.2d 806 (En Banc 1941). However, the court stated in *Ellis* that if a hearing was required the Director of Public Health and Welfare must make his decision on all the competent evidence produced.

16. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11 (1958).

17. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.12, at 455 (1958).

18. *See* State v. Parker Distilling Co., 237 Mo. 103, 139 S.W. 453 (En Banc 1911); State v. Bixman, 162 Mo. 1, 62 S.W. 828 (En Banc 1901).

19. 237 Mo. 103, 139 S.W. 453 (En Banc 1911).

20. *See* Higgins v. Talty, 157 Mo. 280, 57 S.W. 724 (En Banc 1900) (denial of a jury trial); State *ex rel.* Carman v. Ross, 177 Mo. App. 223, 162 S.W. 702 (Spr. Ct. App. 1914) (revocation of liquor license is not a trial but an investigation by county court and only five days notice as provided by statute is required);

attached after the decision is made.[21] Others believe it is an objective factor logically influential to the court's decision.[22] In any event, the doctrine is relevant only when the procedural protections of due process are denied to an existing or would-be licensee. If due process safeguards are present, the doctrine does not come into play.

The narrow interpretation that the statutory term "hearing required by law" means "hearing required by statute" for the purpose of identifying what is a "contested case" can be traced to a decision of the Missouri Supreme Court in *State ex rel. Leggett v. Jensen.*[23] *Leggett* held that there was a "contested case" only when a state constitutional provision, a statute, or a municipal charter or ordinance required that an administrative agency hold a hearing, and that even though the due process clause of the fourteenth amendment might require a hearing at some stage before the proceedings become final,[24] this was not enough to bring a case within the definition of "contested case" in section 536.010.[25]

Under this test, whenever an administrative decision is judicially challenged the reviewing court must examine the applicable statutes and ordinances to determine whether a hearing is required. Only when a statute or ordinance specifically requires such a hearing may the court characterize the proceeding as a "contested case."[26] If the proceeding is not a "contested case" under this test the courts tend to treat the interest as a "privilge," although they do not always use that exact term. Following his criterion, the Missouri courts have held that the dismissal of police officers by the Board of Police Commissioners is a "contested case,"[27] but that the suspension of a driver's license is not.[28]

Since the statute which requires licensing for the sale of intoxicating liquor has been held not to require a hearing, it would appear, under the rule in *Leggett,* that denial of an application for a liquor license is not a "contested case."[29] The leading decision in the area of liquor control is

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and State *ex rel.* Smith v. Dykeman, 153 Mo. App. 416, 134 S.W. 120 (Spr. Ct. App. 1911).

21. *See, e.g.,* Byse, *Opportunity to Be Heard in License Issuance,* 101 U. PA. L. REV. 57 (1952).

22. *See, e.g.,* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11 (1958).

23. 318 S.W. 2d 353 (Mo. En Banc 1958).

24. *See* Henry v. Manzella, 356 Mo. 305, 201 S.W.2d 457 (En Banc 1947).

25. The court stated:

> The trouble with plaintiffs' contention . . . is that they can point to no law requiring a hearing on their claim before the Superintendent such as is required to make it *a contested case before him* within the meaning of the Act.

State *ex rel.* Leggett v. Jensen, 318 S.W.2d 353, 358 (Mo. En Banc 1958).

26. The pertinent statute for liquor control is § 311.680, RSMo 1969, which provides that the Supervisor of Liquor Control must hold a hearing to suspend or revoke a license for the sale of intoxicating liquor. The requirement of a hearing for the revocation or suspension of a license for the sale of non-intoxicating beer is imposed by § 312.370, RSMo 1969.

27. Scism v. Long, 280 S.W.2d 481 (St. L. Mo. App. 1955).

28. Wilson v. Morris, 369 S.W.2d 402 (Mo. 1963).

29. *See* § 311.210, RSMo 1969. The statute does provide for the Supervisor to give written reasons for the disapproval of any application.

State ex rel. Renner v. Noel,[30] decided prior to the effective date of the Administrative Procedure Act. In *Noel,* the Missouri Supreme Court held that the decision of the Supervisor of Liquor Control was final, and that the statutes did not provide for appeal on writ of error.[31] The more recent case of *Pinzino v. Supervisor of Liquor Control*[32] relied upon the *Noel* decision in holding that no hearing was "required by law" when the *renewal* of a liquor license was denied.[33] The supreme court in *Pinzino* examined the statutes and concluded that the legislature had drawn a distinction between the revocation and suspension of licenses, and the issuance and renewal of licenses. The court reasoned that since the legislature had required a hearing in revocation and suspension cases, and had not required a hearing in cases involving the denial of issuance or renewal, a hearing was not essential when the Supervisor refused to issue a license.[34] Thus, denial of either renewal or issuance of a liquor license is not a "contested case" under the narrow reasoning of the Missouri Supreme Court.

In opposition to this approach Kopper Kettle cited *Hornsby v. Allen,*[35] a federal court of appeals decision by the fifth circuit. In *Hornsby* the City of Atlanta had failed to give reasons for denying a liquor license application. The applicant alleged that the city violated 42 U.S.C. § 1983 (1964), which allows civil tort relief for the deprivation of any right, privilege, or immunity secured by the "Constitution and laws."[36] The applicant alleged that she was denied equal protection and due process under the fourteenth amendment in that she was not granted a hearing or given a reason for the denial of her application. The court held that the fundamental principles of due process were applicable to the issuance of liquor licenses, and that those principles required a hearing to be held. The court found no difference between the issuance of a license, and the revocation or suspension of a license. The court stated that the lower court should not decide whether the Board of Aldermen should issue the license but should only insure that considera-

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30. 346 Mo. 286, 140 S.W.2d 57 (En Banc 1940).

31. The Supervisor in *Noel* had refused a license on the ground that the applicant was not of good moral character. The applicant filed for a writ of mandamus against the Supervisor. The court held that mandamus normally would not lie, unless the Supervisor refused to issue the license after he had resolved all discretionary decisions in favor of the applicant and the issuance of the license was therefore only a ministerial duty.

32. 334 S.W.2d 20 (Mo. 1960).

33. Chapter 312, RSMo 1969, regulates non-intoxicating beer, while ch. 311, RSMo 1969 regulates non-intoxicating liquor. *Pinzino* was decided under §§ 312.120 and 312.370, RSMo 1959 [now §§ 312.120 and 312.370, RSMo 1969]. However, these sections are identical to §§ 311.210 and 311.680, RSMo 1969.

34. *Pinzino,* apparently, was not brought under ch. 536, RSMo 1959 [now ch. 536, RSMo 1969]. The court never addressed itself to the definition of a "contested case."

35. 326 F.2d 605 (5th Cir. 1964).

36. 42 U.S.C. § 1983 (1964):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

tions of due process control disposition of the application.[37] Thus, *Hornsby* might be applied to the Missouri definition of "contested case" because the *Hornsby* court inferred that "required by law" includes required by due process, and that due process requires a hearing in cases where issuance of a liquor license is denied.

Since the denial of a liquor license involves the denial of substantial rights to the applicant, there is logically no basis for the distinction between issuance, renewal, revocation and suspension which the Missouri Supreme Court made in *Pinzino*. In *Kopper Kettle*, however, the Springfield Court of Appeals rejected *Hornsby* and relied on *Pinzino*. The court also relied on *Wilson v. Morris*[38] in which the Missouri Supreme Court held that in non-contested cases only a summary opportunity to be heard, rather than an evidentiary hearing, is required by due process. The court stated that, so long as there has been such an opportunity *sometime* before proceedings become final, due process is not violated.[39] Section 536.150, RSMo 1969, seems to provide this opportunity.[40] In conjunction with this, it was held in *State ex rel. Leggett v. Jensen*[41] that section 536.105, RSMo 1949, [now section 536.150, RSMo 1969], which provides for the taking of evidence in circuit court in non-contested cases, clearly satisfies this requirement.[42] This position is supported by the decision of the United States Supreme Court in *Bourjois, Inc. v. Chapman*.[43]

Viewed in this light, Kopper Kettle suffered the fate formerly reserved for litigants operating within systems of strict common law pleading, under which the election of the wrong remedy was fatal to the plaintiff's cause. Thus, Kopper Kettle was required, at its peril, to submit to a circuit court determination on the merits in accordance with the circuit court's view that

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37. The applicant further alleged that her application was denied because the alderman for her ward did not approve. If this were true it would have made the denial arbitrary, capricious, unreasonable and discriminatory. Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964), held that there was no counterpart to § 1983 in state courts; therefore, any action relying on *Hornsby* must be brought in federal court.

38. 369 S.W.2d 402 (Mo. 1963).

39. *See* Henry v. Manzella, 356 Mo. 305, 201 S.W.2d 457 (En Banc 1947).

40. It has been argued that § 536.150 gives too narrow a scope of review to insure due process and, therefore, "required by law" should be expanded to include due process cases, using the rationale in *Hornsby*. It is the author's opinion that this section is not too narrow. § 536.150 provides (in part):

> [T]he court may determine whether [the] decision . . . is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion. . . .

See Morell v. Harris, 418 S.W.2d 20 (Mo. 1967); Blydenberg v. David, 413 S.W.2d 284 (Mo. En Banc 1967). *See also* Mo. CONST. art. V., § 22, quoted note 10 *supra*.

41. 318 S.W.2d 353 (Mo. En Banc 1958).

42. In State *ex rel.* State Tax Comm'n v. Walsh, 315 S.W.2d 830 (Mo. En Banc 1958), the court cited the Administrative Law Committee of the Missouri Bar Association in showing the legislative intent in passing § 536.150, RSMo 1969. These comments indicate that the legislature was seeking to prevent the denial of due process by setting up a procedure for review of non-contested cases.

43. 301 U.S. 183 (1937). The Court held that a Maine statutory provision for judicial appeal from the agency decision was an ample safeguard of due process, even though there was no hearing before the agency.

the proceeding was a "contested case" and governed by the Missouri Administrative Procedure Act's provisions applicable thereto, *or* to challenge the circuit court's characterization of the proceeding as a "contested case," which, in retrospect, would have succeeded, but which would have had the effect of delaying, once again, an adjudication on the merits of Kopper Kettle's license eligibility.

Taking the foregoing into account, and considering that the city had amended its ordinances (following the initial mandamus victory) to provide for only *nine* licenses instead of *ten,* the federal remedy would seem conspicuously appropriate. The circumstance of the reduction in the number of authorized licenses would permit an inference of discrimination against Kopper Kettle. This, in turn, under the authority of *Hornsby,* clearly suggests an action in federal court for relief under 42 U.S.C. § 1983.

WARREN D. WEINSTEIN

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