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Recent Cases

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FIRE INSURANCE—MULTIPLE INSUREDS, THE EFFECT OF FRAUD BY ONE INSURED ON THE RIGHT OF RECOVERY OF A SECOND INSURED

Mercantile Trust Company v. New York Underwriters Insurance Company[1]

Mercantile Trust Company was the trustee and one Edward Luer the beneficiary of an inter vivos trust agreement. The trust property included a residential dwelling. Under the terms of the trust Luer was required to purchase fire insurance on the dwelling. Luer obtained a Homeowner's policy from the defendant, New York Underwriters Insurance Company.

The policy provided coverage of $20,000 on the dwelling and $8,000 on its contents. Both Luer and Mercantile were named insureds, Luer as occupant and Mercantile by endorsement. The endorsement limited Mercantile's interest in the policy to the dwelling and appurtenant structures.

On February 1, 1963, Luer had 75% of the contents of the house removed and placed in storage. Luer traveled to Colorado on March 18, 1963, and two days later an explosion and fire destroyed the dwelling. Following the fire Luer stated to the defendant's investigator that only a single bed had been removed and the value of the destroyed property exceeded $32,000. Luer repeated these statements in a deposition taken by the defendant.

Upon the defendant's refusal to pay its claim, Mercantile brought suit in Federal District Court. New York Underwriters based its defense on the two following policy provisions:

> This entire policy shall be void if whether before or after the loss, . . . in case of any fraud or false swearing relating thereto.[2]
> The unqualified word 'insured' wherever used in this policy also includes the person or organization named above (Mercantile). . . .[3]

The defendant asserted that the inclusion of Mercantile in the term insured when coupled with the word "entire" in the first provision made the obligation not to commit fraud a single joint obligation for both Mercantile and Luer. In other words if either of the insureds acted fraudulently this fraud would bar any recovery by the other insured. Mercantile countered by arguing that its obligation not to commit fraud was separate from Luer's and therefore as an innocent insured it was entitled to recover the $20,000 coverage on the dwelling.

The District Court accepted the defendant's position that the fraud obligation

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1. Mercantile Trust Co. v. New York Underwriters Ins. Co., 376 F.2d 502 (7th Cir. 1967).
2. *Id.* at 503.
3. *Id.* at 503.

of the policy was joint but ruled that Luer had not acted fraudulently, thereby allowing Mercantile to recover. New York Underwriters appealed.

The Court of Appeals first determined that Luer had acted fraudulently. It then adopted the controlling Illinois rule that an innocent insured may recover upon a fire insurance policy even though a second insured has acted fraudulently.[4] The court affirmed the District Court on this basis and Mercantile recovered.

The fact situation of the case is rather unique. There are no Missouri cases which deal with the rights of multiple insureds and only a small number of cases may be found in other jurisdictions. The reported cases generally fall within two types of fact patterns.

The first pattern is the security interest area where the insured property is used as security to support a financial obligation running from one party to another. The most common case is the mortgage situation in which the mortgagee is not an insured but is a payee under a loss payable clause. Missouri law is well settled in this area. The general rule is that one looks to the provisions of the insurance contract to determine the rights of the payee.[5] Following this rule the Missouri courts have held the type of mortgage clause to be determinative. Under a "Union" clause, defined as a clause which stipulates, in substance, that in case of loss the policy is payable to the mortgagee and that his interest as payee shall not be invalidated by any act of the mortgagor,[6] a separate contract of insurance is formed between the mortgagee and the insurer. This separate contract of insurance allows the mortgagee to recover despite any fraud by the mortgagor.[7] The "Open" clause, defined as a clause which provides that the loss will be payable to the mortgagee as his interest may appear,[8] forms no separate contract of insurance, and the mortgagee's rights are derived from those of the mortgagor.[9]

Two contradicting lines of authority have developed in those cases where the holder of the security interest is also a named insured. The line allowing recovery by the innocent insured is headed by *Westchester Fire Insurance Company v. Thomas J. Foster*,[10] cited as controlling in *Mercantile*. In *Westchester* a mortgagee purchased a fire insurance policy which named both the mortgagee and mortgagor as insureds. The covered property burned and the insurer refused payment on the grounds of fraud by the mortgagor. The court held that the fraud of one insured did not affect the right of recovery of a second innocent insured and thus by implication, that the fraud obligations were not joint but severable.

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4. Westchester Fire Ins. Co. v. Foster, 90 Ill. 121 (1878).
5. Senor v. Western Millers' Mut. Fire Ins. Co., 181 Mo. 104, 79 S.W. 687 (1904).
6. Prudential Ins. Co. v. German Mut. Fire Ins. Ass'n., 228 Mo. App. 139, 60 S.W. 1008 (K.C. Ct. App. 1933).
7. Trust Co. of St. Louis County v. Phoenix Ins. Co., 201 Mo. App. 223, 210 S.W. 98 (St. L. Ct. App. 1919).
8. Prudential Ins. Co. v. German Mut. Ins. Assn., 228 Mo. App. 139, 60 S.W. 1008 (St. L. Ct. App. 1933).
9. Ford v. Iowa State Ins. Co., 317 Mo. 1144, 298 S.W. 741 (1927).
10. 90 Ill. 121 (1878).

Mechanics' Ins. Co. et. al. v. Inter-Southern Life Ins. Co.[11] allowed a landlord, who had advanced money to his sharecropper tenant in return for an interest in the harvested crop, to recover for the loss of the crop even though its destruction was caused by the arson of the second insured, the tenant. In *Richardson v. Providence Washington Ins. Co.*[12] a land contract vendor was allowed to recover on a fire insurance policy naming both the vendor and vendee as insureds in spite of the vendee's arson. The case of *Rent-A-Car Co. v. Globe and Rutgers Fire Ins. Co.*,[13] involving the sale of a business by a small down payment with the remaining purchase price secured by a chattel mortgage, allowed the seller-mortgagee to recover on a policy which named both the purchaser and seller-mortgagee as insureds. The policy contained provisions voiding it entirely in case of fraud. The court distinguished the case from the "Open" loss payable mortgage clause situation on the grounds the mortgagee was a named insured.

Those cases which do not allow the innocent insured to recover follow the reasoning of *Bowers Company v. London Assur. Corp.*[14] This Pennsylvania case holds that the fraud obligations of the insureds are joint and not severable. Therefore fraud by one insured bars recovery by the other insured.

In the second multiple insured fact pattern, the insured property is held in either a joint or common tenancy and often a family relationship exists between the insureds. *Hoyt et. al. v. New Hampshire Fire Ins. Co.*[15] is the leading decision in this area. Two brothers were allowed to recover on a fire insurance policy even though a third brother had burned the property. All three brothers were joint tenants and each was a named insured. The court, in answer to the Company's argument that the fraud obligations were joint, stated:

> Whether the rights of obligees are joint or several is a question of construction and in construing an insurance contract the test is not what the insurance company intended the words of the policy to mean but what a reasonable person in the position of the insured would have understood them to mean. . . . The ordinary person owning an undivided interest in property, not versed in the nice distinctions of insurance law would naturally suppose that his individual interest in the property was covered by a policy which named him without qualifications as one of the persons insured.[16]

The early Arkansas case of *Fireman's Ins. Co. v. Larey*[17] allowed recovery by one tenant in common despite the sale by the other tenant in common of his

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11. Mechanics' Ins. Co. v. Inter-Southern Life Ins. Co., 184 Ark. 625, 43 S.W.2d, 81 (1931).
12. Richardson v. Providence Washington Ins. Co., 38 Misc. 2d. 593, 237 N.Y.S.2d 893 (1963).
13. Rent-A-Car Co. v. Globe and Rutgers Fire Ins. Co., 158 Md. 169, 148 Atl. 252 (1930).
14. Bowers Company v. London Assur. Corp., 90 Pa. Super. 121 (1927).
15. Hoyt et. al. v. New Hampshire Fire Ins. Co., 92 N.H. 242, 29 A.2d 121 (1942).
16. *Id.* at 243, 122.
17. Fireman's Ins. Co. v. Larey, 125 Ark. 93, 188 S.W. 7 (1916).

interest in the land. Such a sale was in direct violation of a policy provision but the court found the obligations of the policy to be severable.

Monaghan v. Agricultural Fire Ins. Co.[18] is the leading case denying recovery in this area. The insurance contract in *Monaghan* named a mother and her three minor children as insureds and covered a house which they owned as tenants in common. The policy obligations were held to be joint and therefore the mother's fraud in filing a false proof of loss precluded recovery by the children in a suit brought in their names. The court also stated that since the minor children could elect to avoid the contract the mother was the only insured bound by the fraud provisions and therefore her conduct should be determinative.

The logic that the fraud provisions of a fire insurance policy are joint obligations serves as the basis of a number of cases involving a husband and wife as multiple insureds in which courts hold that the innocent insured can not recover when the other insured commits fraud. *Kosior v. Continental Ins. Co.*[19] denied recovery when the husband committed arson and the wife sued separately. In *Lomartira v. American Automobile Ins. Co.*[20] the husband's false testimony in the wife's suit barred recovery. A Texas decision, *Jones v. Fidelity and Guaranty Ins. Corp.*,[21] refused recovery to a wife who had divorced her husband prior to his act of arson. The case held the divorce did not alter the rights or obligations of the parties under the policy. The husband's purchase of additional insurance on the covered property barred recovery by the wife in *Graham v. American Eagle Fire Ins. Co.*[22] even though the husband was the only named insured in the additional insurance policy.

In *Bellman et. al. v. Home Ins. Co.*[23] and *Federal Ins. Co. v. Wong*[24] a partner and a joint adventurer were not allowed to recover on a fire insurance policy even though they were innocent insureds. The courts relied on the standard argument that fraud provisions of the policies were joint obligations. No cases allowing the partner or joint adventurer to recover when they were an innocent insured were found. Cases where the multiple insureds are partners usually involve arguments that the partnership or members of it should not benefit from the fraudulent acts of a partner and that the fraud of one partner is imputable to the other partners.

The results in *Mercantile,* the noted case, is based solely upon the case of *Westchester Fire Ins. Co. v. Foster.*[25] In *Westchester,* discussed previously, a mortgagee procured a fire insurance policy on the mortgaged property. The mortgagor and mortgagee were both named insureds. The mortgagor, who had no

18. Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N.W. 797 (1884).
19. Kosior v. Continental Ins. Co., 299 Mass. 601, 13 N.E.2d. 423 (1938).
20. Lomartira v. American Automobile Ins. Co., 245 F. Supp. 124 (D. Conn. 1965).
21. Jones v. Fidelity and Guaranty Ins. Corp., 250 S.W.2d 281 (Tex. 1952).
22. Graham v. American Eagle Fire Ins. Co., 182 F.2d. 500 (4th Cir. 1950).
23. Bellman v. Home Ins. Co., 178 Wisc. 349, 189 N.W. 1028 (1922).
24. Federal Ins. Co. v. Wong, 137 F. Supp. 232 (S.D. Cal. 1956).
25. 90 Ill. 121 (1878).

knowledge of the policy, burned the property. The case, without discussing whether the fraud provision of the policy was joint or severable, allowed the innocent insured to recover. The court in *Mercantile* interprets the *Westchester* decision as holding that recovery may be allowed on a fire insurance policy when there are multiple insureds and the insured seeking recovery is innocent of any fraud. The logical extension of this interpretation, although not stated by the Court of Appeals, is that when there are multiple insureds the fraud provisions of a fire insurance policy are always severable. The importance of the multiple insured requirement is emphasized when the court distinguishes *Westchester* and *Mercantile* from *Capps v. National Union Fire Ins. Co.*, [26] which sets forth the rule that insurance policies are divisible in Illinois only when the property is so situated that the risk to one item can be changed without affecting the risk to other items. The distinction drawn is that Capps involves only a single insured while *Westchester* and *Mercantile* involve multiple insureds. Having satisfied the requirement of multiple insureds and the requirement that the insured seeking recovery is innocent of any fraud the court may allow Mercantile to recover on its claim.

The Court of Appeals by citing *Hoyt et. al. v. New Hampshire Fire Ins. Co.*[27] indicated its general approval of results which allow the innocent insured to recover on fire insurance policies. Additionally *Hoyt* states a flexible rule for determining if the fraud obligations are joint or severable if one is unwilling to adopt the hard, fast rule of severability, discussed above, which follows from the *Westchester* result. *Hoyt* applies a "reasonable layman" approach to the construction of the fraud provisions. Under this approach if a layman, in the place of the insured, reasonably believed his obligation not to commit fraud was severable (the usual result), the obligation would be severable and therefore the insured could recover despite fraud by a second insured.

In evaluating the *Mercantile* opinion it should be noted that three cases cited as supporting are factual situations which vary considerably from the one at hand. *Phoenix Assur. Co. of New York v. General Motors Acceptance Corp.*[28] involved a loss payee and a single insured. The loss payee was allowed to recover under Texas law because his rights became fixed at the time of loss[29] and the insured's fraud occurred after the loss. The policy in *Home Ins. Co. v. Cohen*[30] named a husband and wife as insureds. The store covered in the policy was managed by the insureds' son. The court held that the son's arson was not imputable to the parents and allowed recovery. *Fidelity-Phoenix Fire Ins. Co. of New York v. Queen City Bus and Transfer Co.*[31] dealt with the right of a corporation as the sole insured to recover on a fire insurance policy when its president burned the covered assets. The president owned one-fourth of the corporation's stock and held a mortgage on

26. Capps v. National Union Fire Ins. Co., 318 Ill. 350, 149 N.E. 247 (1925).
27. 92 N.H. 242, 29 A.2d 121 (1942).
28. Phoenix Assur. Co. of New York v. General Motors Acceptance Corp., 369 S.W.2d 528 (Tex. 1963).
29. Minniefield v. Consolidated Lloyds, 316 S.W.2d 428 (Tex. 1958).
30. Home Insurance Co. v. Cohen, 357 S.W.2d. 674 (Ky. 1962).
31. Fidelity-Phoenix Fire Ins. Co. of New York v. Queen City Bus and Transfer Co., 3 F.2d. 784 (4th Cir. 1925).

the covered assets. The mortgage required that any insurance awards which the corporation might receive be paid to the president as the mortgagee. The decision stated the corporation was not barred from recovery by the president's fraud although the recovery was disallowed on other grounds. The Court of Appeals may have cited these cases to indicate its approval of any rule of law which would allow any innocent party to a fire insurance contract to recover if a loss occurs.

A final consideration which undoubtedly aided Mercantile's case was the clarity with which the respective interests in the policy were defined. Mercantile was limited to recovery for the destruction of the dwelling only and Luer was limited to recovery for the destruction of the dwelling's contents. If the interests of the insureds are not well defined, a result allowing the innocent insured to recover may be more difficult to reach.

When presented with the problem of determining the rights of multiple insureds under a fire insurance policy, Missouri may choose to follow either of two approaches. One would be the adoption of the rule that any innocent insured may recover despite the fraud of a second insured, a clear, simple, and easily administered test. The alternate approach would allow the courts to determine in each individual case if the insureds' obligation not to commit fraud was joint or severable. Under this approach the courts would have the option of either strictly interpreting the fraud provisions, usually resulting in a determination the obligation is joint, or applying the reasonable layman test of the *Hoyt* case, usually resulting in a determination the obligation is severable.

A sense of equity and fair play requires that Missouri adopt a rule allowing an innocent insured to recover on a fire insurance policy whenever possible. This result would be reached most frequently by the adoption of the rule that an innocent insured may recover on a fire insurance policy despite the fraud of a second insured. If Missouri should choose to adopt the approach of determining the jointness or severability of the fraud provisions of each policy, the application of the reasonable layman test of *Hoyt* would allow the innocent insured to recover more frequently than would application of the strict interpretation test.

DONALD HECK

CHILD CUSTODY—CONFLICT OF JURISDICTION

State ex rel Dubinsky v. Weinstein[1]

Relator filed a timely motion for a new trial in the divorce action in which her husband had been granted a divorce. She had been granted custody of their infant daughter and child support, but denied separate maintenance. While this motion was pending, the juvenile officer of St. Louis County filed a petition in the Juvenile Division of the Circuit Court upon a complaint filed by relator's husband.[2] The petition alleged that the daughter was "without proper care, custody and treatment" and that "her welfare required that her custody be immediately assumed by the court." Relator's motion was sustained in the divorce action. She was then awarded a decree of divorce, custody of the daughter, and child support. Relator challenged the juvenile court's jurisdiction by motion, which was overruled by respondent, the Judge of the Juvenile Division of the Circuit Court of St. Louis County. She then filed a petition for a writ of prohibition in the supreme court to prevent respondent from taking further action on the juvenile officer's petition. Relator contended that the divorce court obtained exclusive jurisdiction over the matter of the child's custody when it entered the decree of divorce. Consequently, in the prohibition proceeding the supreme court was faced with a direct conflict between two courts with apparent concurrent jurisdiction. The court held that when the juvenile court obtained jurisdiction under the Juvenile Act, such jurisdiction was paramount to and superceded existing jurisdiction of a divorce court over a child's custody.[3]

Only in the case of *State ex rel Dew v. Trimble*[4] had the supreme court been confronted with a direct conflict between the juvenile and divorce courts. The court of appeals had held in *Trimble* that the juvenile court was vested with "exclusive jurisdiction to determine and provide the care and custody" of children who are neglected within the meaning of the juvenile court statute.[5] On appeal the supreme court stated that this holding was not inconsistent with any previous supreme court decision.[6] The court did not decide the question, however, because the case was reversed on other grounds.[7]

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1. 413 S.W.2d 178 (Mo. En Banc 1967).
2. §§ 211.031 and 211.091, RSMo 1959, provide this procedure.
3. State *ex rel* Dubinsky v. Weinstein, 413 S.W.2d 178 (Mo. En Banc 1967).
4. 306 Mo. 657, 269 S.W. 617 (En Banc 1924).
5. *Id.* at 671, 269 S.W. at 621.
6. *Ibid.*
7. State *ex rel* Dew v. Trimble, 306 Mo. 657, 674, 269 S.W. 617, 622 (En Banc 1924). See also, Lewis and Tockman, *The Status of the Missouri Law in the Troubled Area of Child Custody*, 27 MO. L. REV. 406, 460-465 (1962), where the authors concluded that the supreme court's language in *Trimble* was a specific affirmance of the holding of the court of appeals in that case. The authors also predicted accurately that when the question of divorce court versus juvenile court jurisdiction again reached the supreme court for determination, the decision would be in favor of the juvenile court. They further concluded that juvenile court jurisdiction properly invoked would supercede jurisdiction of a court in habeas corpus proceedings or the probate court in guardianship proceedings. The court's language in *Dubinsky* clearly supports such a conclusion.

At common law a law court had no jurisdiction to adjudicate the custody of a child.[8] Today, however, it is possible that child custody might be determined in any of five different forums. Those forums are (1) a habeas corpus proceeding,[9] (2) a circuit court in divorce proceedings;[10] (3) a circuit court sitting as a juvenile court;[11] (4) a probate court in a guardianship proceeding;[12] (5) a circuit court in any other proceeding in which a child is properly before it in the exercise of its inherent powers of equity over the person of an infant.[13] On the surface these

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8. Dowling v. Todd, 26 Mo. 267 (1858).

9. Section 532.370, RSMo 1959, provides that habeas corpus proceedings may be instituted between husband and wife for custody of a child. Habeas corpus may also be used by one with the right to custody to challenge the right of a person having custody. *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936 (En Banc 1920). Another use of habeas corpus may be to challenge the jurisdiction of a court that has awarded custody. Label v. Sullivan, 350 Mo. 286 165 S.W.2d 639 (Mo. En Banc 1942); *Ex parte* Parsons, 232 S.W. 740 (St. L. Mo. App. 1941). In addition, habeas corpus may be used by one to whom an award of custody has been made to free a child from the custody of one to whom it has not been awarded. In re Wakefield, 365 Mo. 415 283 S.W.2d 467 (En Banc 1955), and for a surviving spouse to obtain custody of his child after the death of the other parent to whom custody had been awarded in a divorce action, *In re* Wakefield, *supra.*

10. "When a divorce shall be adjudged, the court shall make such order touching . . . the care, custody and maintenance of the children . . . as from the circumstances of the parties and the nature of the case, shall be reasonable. . . ." § 452.070, RSMo 1959. The courts consider this statute mere codification of inherent powers derived from the chancery and ecclesiastical courts. In re Morgan, 117 Mo. 249, 21 S.W. 1122 (1893); S——— v. G———, 298 S.W.2d 67 (Spr. Mo. App. 1957). Consequently, the divorce court is deemed to have power to make a custody award pending the divorce action. *In re* Morgan, *supra.* However, once a divorce has been denied, the court has no jurisdiction over the custody of the children. Price v. Price, 311 S.W.2d 341 (Spr. Mo. App. 1958).

11. Section 211.031, RSMo 1959, provides that the juvenile court shall have: exclusive, original jurisdiction in proceedings: (1) involving any child within the county who is alleged to be in need of care and treatment because:
(a) The parents or other persons legally responsible for the care and support of the child neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being . . . or
(b) The child is otherwise without proper care, custody or support. . . .
Section 211.051, RSMo 1959, specifically states that juvenile court jurisdiction does not deprive "other courts of the right to determine the legal custody of children upon writs of habeas corpus or to determine the legal custody of guardianship of children when the legal custody or guardianship is incidental to the determination of causes pending in other courts." In the noted case the court said that this section merely preserved existing jurisdiction in other courts, but did not afford such jurisdiction greater exclusiveness than already existed. State *ex rel* Dubinsky v. Weinstein, 413 S.W.2d 178 (Mo. En Banc 1967).

12. Chapter 475, RSMo, 1959.

13. Although there is some disagreement as to the origin of equity jurisdiction over the custody of infants, such jurisdiction has clearly existed since at least 1696. The reason most often given for this jurisdiction is the duty of the courts of equity derived from the state's power and duty of parens patriae to protect those unable to protect themselves. 3 STORY, EQUITY JURISPRUDENCE §§ 1747-1749 (14th ed. 1918); 3 BLACKSTONE, COMMENTARIES Ch. XXVIII 426, 427 (Wend. 1858). *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936 (En Banc 1920). Section 452.150, RSMo 1959, entitles a mother and father living apart to an adjudication of

forums would appear to have concurrent jurisdiction. The same factors are tried in order to decide child custody, regardless of the type of proceeding.[14]

The general rule is that when one of these courts has properly assumed jurisdiction over a cause, another court of concurrent jurisdiction may not interfere by taking jurisdiction of the same cause.[15] The divorce court in the instant case had clearly acquired jurisdiction over the custody of the child. Therefore, if juvenile court jurisdiction were merely concurrent with that of the divorce court, the juvenile court could not subsequently take jurisdiction over custody of the same child. Furthermore, a long line of cases had stated that when a divorce was granted, the court's jurisdiction to award custody of the children vested to the exclusion of all other courts.[16] Such statements were properly considered by the supreme court in the noted case to be no more than dicta.[17] In the broad powers given to the juvenile court by statute the court found a legislative intent that juvenile court jurisdiction be paramount to that of other courts in child custody matters.[18]

The court also pointed out that it was not changing the law, because it had at least tacitly approved the holding by the court of appeals in the *Trimble* case.[19]

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custody of their children. The courts also consider this section to be nothing more than the codification of the inherent power of equity. State v. Ferriss, 369 S.W.2d 244 (Mo. En Banc 1963); I——— v. B.———, 305 S.W.2d 713 (Spr. Mo. App. 1957).

14. The welfare of the child is always considered to be the principle factor to be determined. *In re* Wakefield, 365 Mo. 415, 283 S.W.2d 467 (En Banc 1955); *In re* Shepler, 372 S.W.2d 87 (Mo. En Banc 1963).

15. *Ex parte* Ingenbohs, 173 Mo. App. 261, 158 S.W. 878 (Spr. Ct. App. 1913); State *ex rel* ———— v. Landis, 173 Mo. App. 198, 158 S.W. 883 (Spr. Ct. App. 1913).

16. Salkey v. Salkey, 80 S.W.2d 735 (St. L. Mo. App. 1935); Bell v. Catholic Charities of St. Louis, 170 S.W.2d 697 (St. L. Mo. App. 1943); Welch v. McIntosh, 290 S.W.2d 181 (St. L. Mo. App. 1956); McCoy v. Briegel, 305 S.W.2d 29 (St. L. Mo. App. 1957). Broad exclusiveness has also been attributed to a divorce decree in a support case to prevent the circuit court from taking jurisdiction under the Uniform Support of Dependents Law. Jurisdiction under the USDL was construed to be in addition to rather than instead of existing jurisdiction. Welch v. McIntosh, *supra.*

17. Cases stating that divorce court jurisdiction to award custody of children is "to the exclusion of all others" have most frequently arisen out of a motion to modify a divorce decree awarding custody. Salkey v. Salkey, *supra,* note 16; McCoy v. Briegel, *supra,* note 16. Some have been habeas corpus proceedings, such as Bell v. Catholic Charities of St. Louis, *supra,* note 16. They presented no conflict between the divorce and juvenile courts. Therefore, the supreme court felt that these cases merely stated a general rule without consideration of juvenile court jurisdiction. State *ex rel* Dubinsky v. Weinstein, 413 S.W.2d 178, 183 (Mo. En Banc 1967). The rule of these cases would be accurate, if paraphrased to state "to the exclusion of all other courts *of concurrent jurisdiction.*"

18. State *ex rel* Dubinsky v. Weinstein, *supra,* note 17 at 182.

19. Other dicta strongly supporting the court's holding in *Dubinsky* is found in State *ex rel* Butrum v. Smith, 357 Mo. 134, 206 S.W.2d 558 (En Banc 1947), State *ex rel* Grimstead v. Mueller, 361 Mo. 92, 233 S.W.2d 700 (En Banc 1950) and Hayes v. Hayes, 363 Mo. 583, 252 S.W.2d 323 (1952). In the *Grimstead* case the court stated that jurisdiction of the juvenile court "supercedes that of any and all other courts touching the same subject matter." State *ex rel* Grimstead v.

Although this is undoubtedly true, *Dubinsky* further clarified juvenile court jurisdiction over the custody of a neglected child.[20]

WENDELL E. KOERNER, JR.

BANKRUPTCY—CHAPTER XIII WAGE EARNER'S PLANS—DUTY OF UNITED STATES AS EMPLOYER TO PAY WAGES INTO COURT

United States v. Krakover[1]

A debtor wage earner entered a Chapter XIII Bankruptcy proceeding.[2] At the time of the confirmation of his plan the debtor was an employee of the State of Colorado and thereafter he became an employee of the United States mint at Denver. Section 658(2) in Chapter XIII of the Bankruptcy Act provides:

> During the period of extension the court . . . (2) may issue such orders as may be requisite to effectuate the provisions of the plan, including orders directed to any employer of the debtor. An order directed to such employer may be enforced in the manner provided for the enforcement of judgments.[3]

The United States District Court for the District of Colorado sitting in bankruptcy, and relying on this section, ordered the United States, as employer of the debtor, to deduct $30.00 from each of the debtor's semi-monthly paychecks and pay this sum to the trustee. There were two issues presented to the Tenth Circuit Court of Appeals. The first was whether this order, directed to the United States, constituted a suit against the United States thus violating sovereign immunity. The second issue was whether the words "any employer" could be construed to in-

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Mueller, *supra* at 702. The question involved there, however, was whether jurisdiction by a juvenile court in one county over an adoption proceeding superceded jurisdiction of a juvenile court in another county, which had made a previous award of custody based on a finding that the child was neglected.

20. There was a lone dissent in *Dubinsky*. The dissenting judge stated, however, that he would concur in the holding that juvenile court jurisdiction was paramount, but for the circumstances of the case. He felt that the record disclosed an attempt by the father to relitigate the custody issue, which had just been decided in the divorce action. The majority opinion admonished juvenile courts not to authorize the filing of a petition where it appeared that one parent was merely trying to relitigate a custody issue previously determined in a divorce action. The dissent felt that this was exactly what had happened. State *ex rel* Dubinsky v. Weinstein, 413 S.W.2d 178, 183-185 (Mo. En Banc 1967) (dissenting opinion).

1. 377 F.2d 104 (10th Cir. 1967).

2. Chapter XIII (11 U.S.C. §§ 1001-1086) provides for composition and/or extension of a wage earner's debts upon: (1) voluntary petition of a wage earner, (2) acceptance of the plan by a majority of the creditors, and (3) confirmation of the plan by the bankruptcy court. The plan is then carried out under the protection and supervision of the court.

3. 11 U.S.C. § 1058(2).

clude the United States and thereby operate as a waiver of sovereign immunity. The court concluded that the order violated sovereign immunity, since it would have an effect on the United States.[4] The court also decided that the words "any employer" did not include the United States, and therefore there was no waiver of sovereign immunity.[5]

The doctrine of sovereign immunity had its origin in England, although England never had sovereign immunity as we know it. In England there was always a remedy against the crown, although in certain cases it was necessary to acquire the King's consent through the somewhat cumbersome petition of right. In the United States the only method of obtaining consent in those suits requiring consent is through legislative enactment.[6] Sovereign immunity exists when a suit requires consent of the sovereign and consent has not been given. In England the distinction between suits requiring consent and those not requiring consent was significant only in the choice of remedies. But in the United States the distinction means the difference between a remedy and no remedy. Various justifications have been offered for the doctrine of sovereign immunity, but the courts tend to apply the doctrine mechanically without considering the underlying policies. The only justification with any validity is a policy to prevent undue interference with government functions.[7]

There has been considerable confusion in determining what suits require consent and what suits do not require consent. Generally policy and history have de-

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4. It is well established that an action seeking a court order controlling an executive officer of the United States Government, such as the one in the principal case, is a "suit" against the United States. Consequently, a court order can violate sovereign immunity. See Updegraff v. Talbott, 221 F.2d 342 (4th Cir. 1955).

5. The court left open the question of whether the Federal Anti-Assignment Act, 31 U.S.C. § 203 (1964) is applicable to a wage earner plan. This Act makes any assignment of a claim against the United States void unless the assignment is made in writing before two witnesses after a warrant is issued. Transfers by operation of law including transfers to bankruptcy trustees have been held not to be within the evil contemplated and therefore not voided by the Act. Since this exception has been applied to voluntary bankruptcy it would seem to apply to Chapter XIII proceedings. See: United States v. Borcherling, 185 U.S. 223(1902); Goodman v. Niblack, 102 U.S. 556 (1881); Bray v. United States Fidelity and Guaranty Co., 267 F. 533 (4th Cir. 1920); *Re* Pottasch Bros. Co., 79 F.2d 613, 101 A.L.R. 1182 (2nd Cir. 1935). Aside from the Anti-Assignment Act there is a common law rule against the assignment of wages of a public official. See: Schwenk v. Wyckoff, 46 N.J. Eq. 560, 20 Atl. 259 (1890); 3 WILLISTON, CONTRACTS, § 417, (3rd ed. 1960). But it seems that the public policy behind this rule would be overcome by the public policy behind Chapter XIII or an exception would be made for transfers by operation of law.

6. For a historical summary of the doctrine of sovereign immunity see: JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 197 (1965).

7. In United States v. Lee, 106 U.S. 196, 207 (1882) the Supreme Court speaking of sovereign immunity said; "The principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." See: Byse, *Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus,* 75 HARV. L. REV. 1479 (1962). For a historical summary and critical analysis of sovereign immunity see: DAVIS, ADMINISTRATIVE LAW TREATIES, Chap. 27 (1958).

termined whether a particular type of suit requires consent.[8] For purposes of the present discussion it will suffice to refer to two specific types of suits. Specific performance of contracts has always fallen into the category of suits requiring consent.[9] Mandamus or a writ in the nature of mandamus to compel an official to perform "a purely ministerial act" has always been included in that category of suits not requiring consent.[10] Mandamus has been granted in numerous cases to compel a government officer to pay over a salary to an employee.[11]

The Supreme Court, in the landmark case of *Larson v. Domestic and Foreign Commerce Corp.*,[12] held that the United States could not be sued unless the statute under which the officer was acting was unconstitutional, or the officer was acting beyond his scope of authority. The court made no mention of the mandamus actions. The Supreme Court's words taken literally would indicate that consent of Congress is required in all cases against the United States or an officer of the United States except in the two exceptions mentioned. This interpretation would include the mandamus cases in those requiring consent and thus reverse the whole line of mandamus cases.[13] Recent lower federal court decisions however, have indicated that the *Larson* case did not reverse the mandamus cases.[14]

The order in the principal case sought to compel the disbursing officer to pay the debtor's salary to the trustee as assignee. It could be argued that this is analogous to the *Larson* case where specific performance of a contract was denied. The order could be construed as a court order directing the United States to specifically perform an employment contract by paying wages as they become due to the trustee who is an assignee of the debtor. Viewed in this manner *Larson* and all the specific performance cases are authority for the applicability of sovereign immunity. Although the court did not cite these cases they are consistent with the court's decision. It could, however, be argued that this order is analogous to a writ of mandamus. The order directs that the disbursing officer "shall hereafter,

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8. JAFFE, *op. cit. supra* at 200.
9. JAFFE, *op. cit. supra* at 221.
10. Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876); Garfield v. United States, 211 U.S. 249 (1908); United States v. Guthrie, 58 U.S. 284 (1854); Brashear v. Mason, 47 U.S. 92 (1848); Kendall v. United States, 37 U.S. 524 (1838).
11. 76 Stat. 744 (1962), 28 U.S.C. § 1361 gave all district courts "original jurisdiction . . . in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Smith v. Jackson, 246 U.S. 388 (1918) held a judge could compel the auditor of Canal Zone to pay his salary. These cases are mostly state cases since before the above statute the only lower federal court where a writ in the nature of mandamus could be brought in the United States was the District of Columbia. In the federal courts there is a writ in the nature of mandamus but no writ of mandamus.
12. 337 U.S. 682 (1947).
13. The court had occasion to consider sovereign immunity again in Malone v. Bowdoin, 369 U.S. 643 (1962). The court did not shed any light on the mandamus cases however.
14. Clackamus County, Oregon v. McKay, 219 F.2d 479 (D.C. Cir. 1955); Udall v. States of Wisconsin, Colorado and Minnesota, 306 F.2d 790 (D.C. Cir. 1962).

. . . pay $30.00 semi-monthly to said trustee . . ."[15] If the order is interpreted as a writ of mandamus, the mandamus cases would be authority for holding sovereign immunity inapplicable.

To qualify as a mandamus case to which sovereign immunity will not apply, the duty sought to be enforced must be a purely ministerial duty involving no discretion in the officer.[16] If the assignment to the trustee is valid[17] it would be the disbursing officer's duty to pay to the trustee. There is a group of cases holding that the payment of salary to a public officer is a ministerial duty that may be compelled by mandamus.[18] The fact that this is a suit by the trustee as assignee of the employee instead of the employee himself should not make any difference. Although there are no cases involving the assignment of wages there are cases allowing mandamus to compel payment of other funds to an assignee.[19] So a payment to the trustee would arguably be a purely ministerial duty which could be compelled without regard to the doctrine of sovereign immunity.

The only case cited in the principal case as authority for holding sovereign immunity applicable is the 1846 Supreme Court case of *Buchannan v. Alexander*.[20] This case held that wages of a seaman in the hands of a purser could not be attached. Although the case has been cited as authority for the principle of sovereign immunity[21] the court did not mention sovereign immunity. Justice McLean in the *Buchannan v. Alexander* opinion reasoned that if funds in the hands of the government could be attached in this manner the functions of the government could be suspended and it would be detrimental to the public service.[22] A long line of cases often citing *Buchannan v. Alexander* hold that the United States is not subject to attachment or garnishment.[23] Two reasons are usually given for this rule. One is Justice McLean's reasoning that such suits will interfere with government functions and destroy the incentive of government employees. The other is that garnishment is essentially an action by the plaintiff in the name of the defendant against the state as garnishee,[24] and therefore sovereign immunity should apply. Since the underlying policy behind the doctrine of sovereign immunity is the prevention of undue interference with governmental functions[25] this reason is essentially the same as the first.

Although the court in the principal case cited a garnishment case as authority, there are important distinctions between a garnishment and an order under Chap-

15. United States v. Krakover, 377 F.2d 104 (10th Cir. 1967).
16. Cases cited in note 9 *supra*.
17. See note 3 *supra*.
18. See note 10 *supra*.
19. See: Roberts v. United States, 176 U.S. 221 (1900); Houston v. Ormes, 252 U.S. 469 (1920).
20. 45 U.S. 20 (1846).
21. See for example: Applegate v. Applegate, 39 F.Supp. 887 (E.D.Va. 1941).
22. Buchannan v. Alexander, 45 U.S. 20, 20 (1846).
23. Re Garnishment of Pay, 1 Porto Rico Fed. Rep. 405 (1903); United States v. Miller, 229 F.2d 839 (3rd Cir. 1956); United States v. Newhard, 128 F.Supp. 805 (W.D.Pa. 1955). See also: 6 AM JUR 2d § 180.
24. Keene v. Smith, 44 Or. 525, 75 P. 1065 (1904). For a collection of cases see: Annot. 114 A.L.R. 261.
25. JAFFE, *op. cit. supra*.

ter XIII. First of all a garnishment is involuntary whereas the submission of salary to the court under Chapter XIII is voluntary. Secondly a Chapter XIII plan involves payments deliberately made small enough so that the debtor has enough left over to live on. Under garnishment laws there is often an exemption for a head of the household, but there is no general exemption for necessary living expenses. It is apparent that an employee will lose his incentive if a large part or all of his wages are involuntarily garnished. But it is improbable that an employee will lose any incentive when under Chapter XIII he voluntarily agrees to a small deduction from his wages to pay his debts. So although a garnishment is similar to the order involved in the principal case, the reasons for applying sovereign immunity to garnishments are not present in the case of an order under Chapter XIII.

Having decided however, that sovereign immunity did apply to the order involved, the court was then faced with the contention that even if sovereign immunity did apply, section 658(2) of the Bankruptcy Act constituted a waiver of sovereign immunity. The respondent argued that the words "any employer" includes the United States, thus permitting an order against the United States. And since a court order is a "suit against the United States" this statute allowing an order against the United States constitutes a waiver of sovereign immunity. The court rejected this argument.[26]

Although the federal government has consented to being sued for money judgments in certain cases,[27] it has long been established that the United States has not consented to suits for specific performance or other equitable relief.[28] This is the rule in the Bankruptcy Act unless some section can be construed as a waiver of sovereign immunity. The court in the principal case relied on the earlier Tenth Circuit case of *United States v. Mel's Locker*.[29] The question there was whether the Small Business Administration could be enjoined from proceeding to foreclose a mortgage under section 314 of the Bankruptcy Act.[30] Section 314 authorized the bankruptcy court to enjoin actions of creditors "in proper cases." The court held that the word "creditors" could not be construed to include the United States relying on a statutory section allowing the Small Business Administrator to sue and be sued, but providing specifically that no injunction would issue against the administrator or his property. This case is readily distinguishable from the principal case, since the principal case does not involve conflicting statutes.

Since there is no controlling authority as to the interpretation of this section of the statute, the ordinary rules of statutory interpretation should apply. And generally the same rules of interpretation apply to the Bankruptcy Act as any other statute.[31] The United States is obviously an employer. No reason appears why the United States should not be included within the words "any employer."

26. United States v. Krakover, 377 F.2d 104, 106 (10th Cir. 1967).
27. As to money judgments see: Tucker Act 28 U.S.C. § 1346(a), 1491 (1952).
28. United States v. Jones, 131 U.S. 1 (1888).
29. 346 F.2d 168 (10th Cir. 1965).
30. 11 U.S.C. § 714 (1961).
31. 9 Am. Jur. 2d, *Bankruptcy* § 14 (1963).

These words are not limited in this statute or in any other relevant statute. So the word "employer" should be taken to include the United States since this would be taking the words in their ordinary meaning.

The court in the principal case bolsters its conclusion by stating that this decision would not deprive federal employees of the benefits of Chapter XIII, since the employee could be ordered to endorse and turn his paychecks over to the trustee. This case would have little significance if the court were correct in this assumption. But it is questionable whether this would be an adequate alternative. Referees with experience in applying the predecessors to Chapter XIII[32] found that the debtor could not always be trusted to bring in his periodic payments. This is logical, since the reason the debtor becomes insolvent in the first place is often because he is a poor manager. Another problem with the court's alternative solution is that a majority of the debtor's unsecured creditors, in number and amount, affected by the plan and all secured creditors whose claims are dealt with must approve the debtor's plan before it can be confirmed by the court.[33] It is improbable that these creditors will approve a plan unless the court has some control over the debtor's salary. Without complete control over the debtor's salary a Chapter XIII plan is just another promise by the debtor to pay his creditors. For these reasons the authority to order an employer to pay wages directly into court was included in Chapter XIII.[34] The necessity of such a section is apparent from the fact that all state plans similar to Chapter XIII contained provisions for payment of the debtor's salary directly into court.[35] Thus the decision in this case if followed, may deny government employees the benefits of Chapter XIII because of the creditor's reluctance to accept the plan and those plans accepted may have limited success.

The effect of this decision is contrary to the strong public policy behind Chapter XIII which the Supreme Court has recognized in recent opinions.[36] Chapter XIII allows debtors to pay their debts in full, avoiding the stigma of bankruptcy. It allows debtors to pay their debts gradually without the harassment and possible loss of employment due to garnishments, and at the same time provides creditors with full or nearly full payment of debts as opposed to the small percentage payments characteristic of straight bankruptcies.

So even if there is some slight interference with governmental functions due to orders such as the one in the principal case, it is submitted that the public

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32. A procedure similar to Chapter XIII was developed in Alabama prior to the adoption of Chapter XIII. See: Allgood, *Chapter XIII: Wage Earner's Plans,* 15 REF. J. 20 (1941); Bundshu, *Administration of Wage Earner's Plans in The Bankruptcy Court,* 18 REF. J. 55 (1944).

33. Bankruptcy Act § 652, 11 U.S.C. § 1052 (1964).

34. See: Maulitz, *Operations Under Chapter XIII,* 27 REF. J. 68 (1953); Allgood, *Chapter XIII: Wage Earner's Plans,* 15 REF. J. 20 (1941); Brown, *A Primer on Wage Earner Plans Under Chapter XIII of The Bankruptcy Act,* 17 BUS. LAW 682, 688 (1962); Note, *The Wage Earner Plan, A Superior Alternative to Bankruptcy,* 9 UTAH L. REV. 130, 141 (1965).

35. 8 CODE OF VIRGINIA 55.161 (1959); 20 WIS. STAT. ANN. 128.21(4) (1957); 22 MICH. STAT. ANN. 27A5301; PAGES OHIO REV. CODE ANN. 2329.70 (1966).

36. Perry v. Commerce Loan Company, 383 U.S. 392 (1966).

policy behind Chapter XIII outweighs the burden on the government. The court could have refused to apply sovereign immunity because the reasons for sovereign immunity do not exist in this case. The court could have drawn an analogy to the mandamus cases where sovereign immunity is not applied for this reason, or the court could have held the mandamus cases to be authority for not applying sovereign immunity. And even if sovereign immunity was found to apply the court could have construed the language of the Bankruptcy Act as a waiver of sovereign immunity. The Supreme Court, in *Perry v. Commerce Loan Company*,[37] interpreted much more unambiguous language to reach a result favorable to application of Chapter XIII. Since the principal case did not explore these possible alternatives or deal extensively with the precedents on sovereign immunity it should not be followed without a more thorough examination of the policies involved. And if the courts find they must follow this decision, there should be an amendment to the Bankruptcy Act specifically allowing these orders directed to the United States.

C. PATRICK MCLARNEY

COURT ENFORCEABILITY OF FINES BY UNIONS UPON THEIR MEMBERS FOR CROSSING PICKET LINES

NLRB v. Allis-Chalmers Manufacturing Co.[1]

Employees at two plants of Allis-Chalmers Manufacturing Company were represented by locals of the United Automobile Workers. After a vote by members of the local unions and approval by the international union lawful economic strikes were conducted at both plants in support of new contract demands. Some members of both unions crossed the picket lines and worked during the strike. The local unions charged these members with violations of the U.A.W. International Constitution and By-Laws and, after appropriate proceedings, imposed fines of from $20.00 to $100.00. Some of the members involved did not pay their fines and one of the locals obtained a judgment in state court against one of them. No effort was made to change the employment status of any of the fined members or to terminate their union membership.

Allis-Chalmers filed unfair labor practice charges against the locals alleging that the imposition of fines on members for working during the strikes, demanding payment of such fines, and threatening to and instituting court proceedings to collect such fines violated section 8(b)(1)(A) of the Taft-Hartley Act.[2] The

37. 383 U.S. 392 (1966).

1. 388 U.S. 175 (1967).

2. Labor Management Relations Act (Taft-Hartley Act) § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964). "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

trial examiner recommended dismissal of the complaint and the NLRB agreed.[3] The Board held that such fines did not violate section 8(b)(1)(A), citing the proviso to that section which states: ". . . this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."[4] This proviso, the Board reasoned, allows unions to prescribe and enforce rules with respect to the acquisition or retention of membership in situations involving the status of a member as a member rather than an employee. Fines imposed on union members for crossing a picket line were held to involve the loyalty of members during a time of crisis and to constitute a proper subject of internal union discipline.[5]

In a vigorous dissent, member Leedom argued that the fines imposed for crossing picket lines contravened the right guaranteed union members by section 7[6] to refrain from engaging in concerted union activities. He also contended that the proviso of section 8(b)(1)(A) does not protect such activity. To enforce a rule against crossing picket lines has a great impact on the employment relationship by precluding entirely the gainful employment of members who are willing to work.

Allis-Chalmers petitioned for reveiw and a panel of the Court of Appeals for the Seventh Circuit unaminously upheld the Board's decision. Upon rehearing en banc, the Seventh Circuit reversed[7] and adopted a literal construction of sections 7 and 8(b)(1)(A) on the ground that they contained no ambiguities and did not require recourse to legislative history for clarification. Such a literal reading allows union members to cross their own picket lines in exercise of their section 7 right to refrain from engaging in a particular concerted activity. Union discipline in the form of fines for such protected activity would therefore "restrain or coerce" the employee in violation of section 8(b)(1)(A). The proviso of that section was held not to sanction this form of discipline as such fines did not relate to the internal affairs of the union. Three separate dissenting opinions were filed.

The Supreme Court granted certiorari and in a 4-1-4 decision reversed the Seventh Circuit.[8] Mr. Justice Brennan, writing for the majority, concluded that the legislative history of section 8(b)(1)(A) must be examined to determine the meaning of the words "restrain or coerce" as used therein. He viewed that section as only one of many interwoven sections in a complex act which was itself the product of legislative compromise. The opinion then observed that if the section

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3. Local 248, United Automobile Workers, 149 N.L.R.B. 67 (1964).

4. Labor Management Relations Act (Taft-Hartley Act) § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

5. Member Jenkins, concurring, argued that the Act did not seek to regulate the right of a union to fine its members for crossing lawful picket lines. Section 7 does not protect an employee from duties and obligations undertaken as a consequence of acquisition or retention of union membership.

6. Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964). "Employees shall have the right to . . . engage in . . . concerted activities . . . , and shall also have the right to refrain from any or all of such activities . . . ."

7. Allis-Chalmers Manufacturing Co. v. NLRB, 358 F.2d 656 (7th Cir. 1966).

8. NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967).

were literally applied the economic strike would be impaired, thereby affecting the union's discharge of its role as exclusive statutory bargaining agent and its power to protect its status from erosion through reasonable discipline of members who violate rules and regulations governing membership. The proviso, preserving the union's power to expel offending members, would not prevent impairment of the power and usefulness of the economic strike. If the union is strong and membership valuable expulsion would be a far more severe penalty than a reasonable fine, whereas if the union were weak and membership of little value it would be forced to condone disobedience or face further depletion of its ranks.

The Court concluded that legislative history[9] indicated that Congress did not intend for section 8(b)(1)(A) to interfere with the internal affairs or organization of unions. Accordingly, it was unnecessary to reach the question of whether or not the proviso to 8(b)(1)(A) authorized court enforcement of fines.[10]

A union security clause, requiring employees to become union members only to the extent of paying dues in accordance with section 8(a)(3),[11] was part of the collective bargaining agreement. Since the evidence indicated that the fined members had elected to enjoy full union membership, they were not involuntarily subjected to the union's discipline for breach of its internal rules. The Court expressly declined to indicate if a different result would be warranted if fines had been imposed on employees whose membership was involuntary.

Mr. Justice White, concurring, felt that the majority's view was more persuasive than the dissenters.' He was careful, however, to state that not "every conceivable internal union rule which impinges upon section 7 rights is valid and enforceable by explusion and court action. There may be some internal union rules which are on their face wholly invalid and unenforceable."[12]

Mr. Justice Black, speaking for the four dissenters, stated that the majority decision was in reality a policy judgment that unions—especially weak ones—need the power to enforce fines in court to prevent depletion of their ranks. He concluded that Congress did not intend for the proviso to 8(b)(1)(A) to leave

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9. The Court pointed out that allowing expulsion but not court enforcement of fines would be contrary to the "contract theory" of union membership, prevailing at the time of passage of this section, under which the court's role is only to enforce the contract. See Machinists v. Gonzales, 356 U.S. 617 (1957). The passage of the 1959 Landrum-Griffin Amendments protecting union members in their relationship to the union, it was asserted, indicated that Congress was of the view that the 1947 Act was not intended to regulate these matters.

10. As fines are admitedly coercive, a literal reading of the statute would find a violation for their imposition if not protected by the proviso. The proviso to § 8(b)(1)(A) excepts from coverage union rules with respect to the acquisition or retention of membership. Taken literally, it would not protect fines imposed for crossing picket lines and their enforcement in state courts. This explains why Mr. Justice Brennan did not rely on the proviso but resorted to legislative history to find that Congress did not intend union fines or their enforcement in court to be prohibited by the words "restrain or coerce."

11. Labor Management Relations Act, § 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964).

12. NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967) (concurring opinion).

unions free to exercise judicial type power to punish members with direct economic sanctions for exercising their right to work. Thus, although a union may expel a member for crossing a picket line, even the threat of a fine enforceable only by expulsion would violate a member's section 7 right to refrain from participating in a strike.

Assuming that the proviso to 8(b)(1)(A) permitted union fines enforced by expulsion, the dissent pointed to the practical difference between court enforced fines and fines enforced by expulsion. Even if a member were willing to be expelled for failure to pay fines, the threat of large fines enforced in court would absolutely restrain him from going to work during a strike. Furthermore, if this union had persuaded the employer to discharge an employee for non-payment of fines or if it had applied the member's dues to satisfy the fines and then extracted an extra dues charge, 8(b)(2) and 8(b)(1)(A) would have been violated.[13] Mr. Justice Black argued that court enforcement of fines is an equally effective outside assistance and is likewise outside the scope of "internal union affairs."[14]

Allis-Chalmers marks the first time the Supreme Court has considered the question of whether a union fine imposed upon a member-employee for refraining from concerted union activity and enforced in court violates section 8(b)(1)(A). The narrow approach taken by the Court, determining the scope of a union unfair labor practice by reliance on legislative history, has been utilized by the Supreme Court previously.[15]

The result in *Allis-Chalmers,* although not always the reasoning, seems consistent with the position which the National Labor Relations Board has taken in such cases. The Board has held that fines imposed upon union members for failure to perform picket duty during a strike are not violations of 8(b)(1)(A) as they are protected by the membership proviso.[16] Similarly, fines for exceeding union production ceilings were permitted as legislative history indicated that such activity was not meant to be reached by 8(b)(1)(A).[17] Fines imposed upon union

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13. See NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953); Bay Counties District Council of Carpenters (Associated Home Builders) 145 N.L.R.B. 1775, *remanded on other grounds,* 352 F.2d 745 (9th Cir. 1965).

14. Mr. Justice Black argued that Congress did not intend the effectiveness of 8(b)(1)(A) to be impaired by the contract theory which until recently had been used by the courts to justify judicial intervention into union affairs to protect employees and not to help unions. Furthermore, Congress intended union security clauses to be used for no other purpose than to compel payment of union dues and fees. Full as opposed to partial membership is immaterial as to whether union imposed fines are collectable in court. Few employees forced to become members under a union security clause will be aware that they must limit their membership to avoid court enforced fines and, even if aware, the possible problem of convincing the labor board that they are not full members will make exercise of section 7 rights dangerous.

15. See NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58 (1964); National Woodwork Manufacturers' Ass'n v. NLRB, 386 U.S. 612 (1967).

16. Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (1954).

17. In Local 283, UAW (Wisconsin Motor Corp.), 145 N.L.R.B. 1097 (1964), the Board, relying on legislative history, held that such disciplinary measures were internal union affairs and Congress did not intend to regulate such affairs under

members for filing unfair labor practice charges have been prohibited by the Board,[18] although later cases have indicated that this was an exception to the general rule that fines for violation of internal union rules are not prohibited by 8(b)(1)(A). These cases permitted fines imposed against members for filing decertification petitions.[19]

The federal courts of appeal have taken a view more in accord with Mr. Justice Black's dissent. These decisions indicated that union fines were not protected by the provisos to section 8(b)(1)(A) as they had a direct impact on the employer-employee relationship.[20]

The decision in *Allis-Chalmers* is a clear pronouncement that even though a union security clause exists, if employees are voluntary union members, fines imposed for crossing picket lines do not violate section 8(b)(1)(A). This language indicates that by electing to take full union membership, an employee waives some of his section 7 rights. To the extent that the union has by-laws or constitutional prohibitions on refraining from participation in concerted activities, it may compel participation with coercion that does not reach beyond expulsion or court

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§ 8(b)(1)(A). In Bay Counties District Council of Carpenters (Associated Home Builders), 145 N.L.R.B. 1775 (1964), similar fines were imposed, but the union attempted to force payment by applying the members dues toward the fine. The Board found a violation of 8(b)(1)(A). A union security agreement was in effect and failure to pay the extra dues then outstanding could have resulted in loss of job. However, Local 283, UAW (Wisconsin Motor Corp.), *supra,* was cited for the proposition that the fines themselves were not in violation of the statute, only the manner in which they were collected. See Labor Management Relations Act (Taft-Hartley Act) § 8(b)(2), 161 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964); § 8(a)(3), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964). These sections allow a union or employer respectively, to cause the discharge of an employee only for failure to pay periodic dues or initiation fees.

18. See H. B. Roberts, 148 N.L.R.B. 674, *enforced sub. nom.,* Roberts v. NLRB, 350 F.2d 427 (D.C. Cir. 1965), and Local 138, International Union of Operating Engineers (Charles S. Skura), 148 N.L.R.B. 679 (1964), decided by the Board on the same day. Wisconsin Motor Corp., *supra* note 17, was distinguished as in that case the internal union rule did not run counter to other recognized public policy as it did in these instances, *i.e.*: the right to file unfair labor practice charges is indispensible to the administration of the Act since the Board can not initiate its own processes.

19. See United Steelworkers of America, Local No. 4028, 154 N.L.R.B. 692 (1965), *citing as controlling* Tawas Tube Products, 151 N.L.R.B. 46 (1965), which involved the same facts. In *Tawas Tube* the Board had distinguished this disciplinary action from that in Local 138, *supra* note 18, in that this situation involved union members who had resorted to the Board for the purpose of attacking the unions' very existence. Their expulsion did not deter them from resorting to the Board to compel the union to abide by the Act which was the major policy consideration that was violated in *Local 138.*

20. See Allen Bradly Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961); Associated Home Builders, Inc. v. NLRB, 352 F.2d 745 (9th Cir. 1965); NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953). See also Leeds & Northrup Co. v. NLRB, 357 F.2d 527 (3rd Cir. 1966), where the court cited *Allis-Chalmers* as decided by the Seventh Circuit's panel as an example of union fines that did not violate the Act, but indicated that fines equated with total wages earned by a non-striking employee would affect the relationship between the employee and his employer in violation of the Act.

enforced fines. The Supreme Court has found such waiver before. In *Mastro Plastic Corp. v. NLRB* [21] the court allowed a statutory bargaining representative to waive employees' right to strike in a collective bargaining agreement. It could be argued, however, that this is consistent with the policy of giving employees the right to strike in order to strengthen their ability to bargain collectively as that objective has been fulfilled. No such reason seems to exist for taking away a union member's section 7 right to refrain from striking when he joins a union.

Allowing court enforced fines could easily result in 8(b)(2) violations by a union.[22] Once the union obtains a judgment against the expelled union member, it could institute garnishment proceedings in enforcement. This could result in the dismissal of the employee as no-garnishment rules are common among employers. Such a situation would seem to violate 8(b)(2), since the union has caused an employer to discriminate against an employee with respect to whom membership has been terminated on grounds other than failure to tender periodic dues or initiation fees. To think that a union would not knowingly and intentionally resort to this action against an expelled member who had crossed picket lines with the above results intended, would require extreme naivete.

It should be noted that the Board has repeatedly found union violations of section 8(b)(1)(A) involving relatively minor economic impairment of incidental employment benefits where the employer-employee relationship is effected by the union action.[23] The Supreme Court has held that the policy of the Act is to insulate employees' jobs from their organizational rights and obligations.[24] The threat of substantial court enforced fines prohibiting an employee who desires to work from doing so would certainly seem to have as much effect on the employee-employer relationship as these prior Board Cases.

The Supreme Court in *Allis-Chalmers* indicated that such fines must be reasonable. Not only does the concept of what is reasonable open the door to controversy, but a recent refusal by the General Counsel to issue a complaint illustrates the great power given to the union in this regard. The evidence for the charging party established that certain employees had resigned from the union after the expiration of a collective bargaining agreement containing a union security clause. After resigning, the employees crossed picket lines and worked, whereupon the union fined them in amounts ranging from $10,000 to $20,000 totaling $94,000. Then General Counsel refused to issue a complaint concluding that *Allis-Chalmers*

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21. 350 U.S. 270 (1956).
22. See cases cited note 17 *supra*.
23. See J. J. Hagerty, Inc., 139 N.L.R.B. 633 (1962) (timing of payment of wages); Local No. 13366, United Mine Workers, 117 N.L.R.B. 648 (1957) (right to a leave of absence); Minneapolis Star and Tribune Co., 109 N.L.R.B. 727 (1954) (reduction of seniority); Bell Aircraft Corp., 101 N.L.R.B. 132 (1952) (right of promotion); Pacific Intermountain Express Company, 107 N.L.R.B. 837 (1954) (standards in establishing seniority); Local 140, Bedding Workers Union, 109 N.L.R.B. 326 (1954) (right to welfare benefits); Bell Aircraft Corp., 105 N.L.R.B. 755 (1953) (protection against demotion).
24. Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

permitted such fines and left the question of their excessiveness to the court in which enforcement was sought.[25]

This clear pronouncement of union power to judically enforce fines is certain to result in more frequent use of such disciplinary measures. Even if a union, considering the expense and time of litigation, would refrain from enforcing all fines, the uncertainty of this possibility in the mind of the fined member could force payment. If the "partial" union member under a union security clause is held not subject to court enforced fines as *Allis-Chalmers* indicates, more members may elect this status if the union indiscriminately imposes unreasonable fines. Such gradual dilution of full membership could eventually result in successful decertification proceedings by the disenchanted partial members. From the above it can be seen that the extent to which *Allis-Chalmers* will be an effective source of power for unions may well depend on whether the power made available by this decision is abused by the unions.

JOHN REYNOLDS MUSGRAVE

NONCLAIM STATUTE—MISSOURI—CLAIMS BARRED AGAINST THE ESTATE CANNOT BE USED AS COUNTERCLAIMS AGAINST ACTIONS BROUGHT BY THE ESTATE

Robinson v. Bench[1]

The administrator of James Egan's estate brought this action on a promissory note. The defendant counterclaimed for breach of lease. Appeal was taken by the defendant from the dismissal of the counterclaim and the rendition of a summary judgment on the note.

On May 6, 1960, James Egan and his wife leased a garage and salvage yard to Larry Bench for a term of five years at a rental of $300 per month with an option to renew. Bench at this time also purchased certain materials and equipment from Egan and executed a $5000 promissory note which carried 6% annual interest and was due in five years. The lease recited that the Missouri State

25. Letter from Martin Sacks, NLRB Regional Director, Seventeenth Region, to James R. Willard, Spencer, Fane, Britt & Browne, Kansas City, Missouri, August 12, 1966; Letter from Arnold Ordman, NLRB General Counsel, to James R. Willard, Spencer, Fane, Britt & Browne, Kansas City, Missouri, June 27, 1967. This case was finally disposed of in the following letter from Arnold Ordman, NLRB General Counsel, to Harry L. Browne, Spencer, Fane, Britt & Browne, Kansas City, Missouri, September 12, 1967: "After careful review of your position in the above matter [Re: AFTRA, Kansas City Local] we have decided to adhere to our original determination. We read *NLRB v. Allis-Chalmers Co.*, 388 U.S. 175, as leaving the question of the excessiveness of a fine to the court in which the suit to collect is brought. In respect to the purported resignations, apart from whether non-members, who owe no duty to the labor organization, could reasonably be coerced by an attempt to impose fines on them, the effectiveness of the resignations in the face of the Union's restrictive provisions raises contract issues also cognizable in the suit to collect the fines."

1. 409 S.W.2d 145 (Mo. 1966).

Highway Commission might condemn the land for highway purposes. In the event the state either purchased or condemned the land, the lease was to be void and a new building was to be constructed by Egan at a new location. It was further agreed that a new lease at the same rental would be entered into on completion of the new building.

On October 25, 1960, Mr. and Mrs. Egan died. Bench filed claims for $20,000 against each estate in the Probate Court of Pulaski County, Missouri on April 4, 1961, alleging breach of the lease contract. Both claims were transferred to the circuit court where they were consolidated. Motions to dismiss were filed, and Bench attempted to amend his claim to state a cause of action, but the claims were dismissed. The Supreme Court of Missouri affirmed the dismissal, holding that the original claim failed to state a cause of action because no facts showing the nature and manner of the breach were alleged, and that the claim could not be amended to show breaches not mentioned or alleged in the original claim after the nonclaim statute had run.[2]

On June 25, 1964, the present suit was filed by the administrator of Egan's estate for collection of the note. The defendant answered alleging that the note was consideration for the agreement as a whole and not just for the materials and equipment. The answer stated that the defendant performed all duties and obligations under the lease, that the land was condemned, and that construction of a new garage had begun when the Egans died. Defendant further alleged that, because of the death of the Egans, construction on the new building was not completed and the defendant was not permitted to enter the new building. Defendant asserted that the note was not collectable because of failure of consideration.

Bench also filed a counterclaim for breach of lease claiming $25,000 damage and alleging the same facts set forth in his answer.

At trial, the plaintiff moved to strike the counterclaim, and the motion was sustained on the ground that the issues presented by the counterclaim had been litigated in connection with the claims filed on April 4, 1961. Plaintiff also moved to strike the answer on the basis of res judicata. This motion also was sustained, and the answer was dismissed. Summary judgment was entered for the plaintiff on the note with interest and attorney's fees in the sum of $7,167.60.

On appeal the supreme court found it unnecessary to determine whether res judicata required dismissal of the counterclaim, holding instead that it was barred by the Missouri nonclaim statute. The court stated that the counterclaim was barred by the nine month period of limitation in the statute since the time had started running on the first publication of notice of letters of administration, which was before April 4, 1961, and the counterclaim was not filed until December 29, 1964.[3] The court further held, however, that res judicata did not prevent the

2. Bench v. Egan's Estate, 363 S.W.2d 547 (Mo. 1963); Maus, *Probate Law and Practice*, 28 Mo. L. Rev. 588, 592 (1963).

3. Section 473.360, RSMo 1959, reads in part as follows: "All claims against the estate of a deceased person, other than costs and expenses of administration and claims of the United States and tax claims of the state of Missouri and sub-

defendant's reliance on failure of consideration in the action on the note since that issue had never been litigated. The summary judgment as to this defense was reversed and remanded.

The nonclaim statute which the supreme court held barred the defendant's counterclaim, provides that all claims against the estate of a deceased person that are not filed within nine months after the first published notice of letters of administration are barred forever.[4] This statute was first enacted as part of the new *Missouri Probate Code* and was based on the previous nonclaim statute[5] and the *Model Probate Code*.[6] The purpose of the nonclaim statute, as construed by the Missouri Supreme Court is to afford protection against delay in the assertion of claims and provide for prompt settlement of estates.[7]

Requirements for establishing claims have been strictly construed for the protection of heirs, creditors, and other interested parties.[8] The defense of failure to comply need not be pleaded because it is nonwaivable and compliance is mandatory.[9] It has been stated that the statute deals only with the claimant's remedy and does not alter or bar any substantive rights.[10] In 1959 the nonclaim statute

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divisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, which are not filed in the probate court within nine months after the first published notice of letters testamentary or of administration, are forever barred against the estate, the executor or administrator, the heirs, devisees and legatees of the decedent."

4. § 473.360, RSMo 1959, *supra* note 3.

5. § 464.020, RSMo 1949, reads as follows: "All demands not thus exhibited in one year shall be forever barred, saving to infants and persons of unsound mind, or imprisoned, one year after the removal of their disability, and said one year shall begin to run . . . from the date of the first insertion of the publication of the said notice."

6. SIMES AND BASYE, PROBLEMS IN PROBATE LAW: MODEL PROBATE CODE 141 (1946), provides: "(a) Statute of nonclaim. Except as provided in section 136, all claims against a decedent's estate, other than expenses of administration and claims of the United States, but including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court within four months after the date of the first published notice to creditors."

7. Minor v. Lillard, 306 S.W.2d 541, 544 (Mo. 1957); Fratcher, *Trusts and Succession In Missouri-1957*, 23 Mo. L. REV. 467, 470 (1958).

8. In Joyce v. Central Sur. & Ins. Corp., 321 S.W.2d 272, 276 (K.C. Mo. App. 1959); Fratcher, *Trusts And Succession In Missouri*, 24 Mo. L. REV. 497, 506 (1959), it was stated that neither the circuit court nor the probate court can acquire jurisdiction over a claim which was not filed in accordance with the nonclaim statute. In Nebraska Hardware Mut. Ins. Co. v. Brown, 355 S.W.2d 395 (K.C. Mo. App. 1962); Fratcher, *Trusts And Succession In Missouri*, 27 Mo. L. REV. 594, 604 (1962), the court held that the claim was barred for failure to serve the administrator pursuant to Section 473.367, RSMo 1959, even though it was impossible to do so because he was out of the state until after the nine month period had expired.

9. Strumberg v. Mercantile Trust Co., 367 S.W.2d 535, 538 (Mo. 1963); Maus, *Probate Law And Practice*, 28 Mo. L. REV. 588, 594 (1963).

10. Darrah v. Foster, 355 S.W.2d 24, 29 (Mo. 1962); Fratcher, *Trusts And Succession In Missouri*, 27 Mo. L. REV. 594, 604 (1962).

was amended[11] and the Missouri Supreme Court held that the amendment allowed a claimant to obtain a judgment against the estate without complying with nonclaim provisions, but that no recovery could be had from the assets of the estate. The purpose of this change was to allow the claimant to bring an action against the decedent's liability insurer once judgment was obtained.[12]

Prior to 1943 a Missouri statute specifically provided for the set-off of debts owed by the decedent in suits brought by the administrator or executor against the claimant.[13] A similar statute had been in force since 1835,[14] and the Missouri Supreme Court approved the statute because it prevented the administrator from waiting until the nonclaim period had run in order to defeat any claims that had not been filed.[15] This set-off statute was repealed when the civil procedure reforms of 1943 were adopted.[16] Whether an unpresented claim can be set-off against a demand by the estate was opened for consideration with the repeal of section 991, RSMo 1939.

The result of the decision in the present case is that a claim against an estate which is barred by the nonclaim statute cannot be used as a set-off or counterclaim against an action by the administrator. A number of other jurisdictions have reached this result in construing similar nonclaim statutes.[17] In *Robison v. Robi-*

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11. Section 473.360, RSMo 1957 Supp., provided as follows:
"2. All actions against the estate of a deceased person, pending or filed under sections 473.363 or 473.367, shall abate or shall be barred unless notice of the revival or institution thereof is filed in the probate court within nine months after the first published notice of letters."

Section 473.360, RSMo 1959, as amended, reads as follows:
"2. Unless written notice of actions instituted or revived under sections 473.363 or 473.367 is filed in the probate court within nine months after first published notice of letters, no recovery may be had in any such action on any judgment therein against the executor or administrator out of any assets being administered upon in the probate court or from any distributee or other person receiving such assets."

12. Rabin v. Krogsdale, 346 S.W.2d 58 (Mo. 1961); Fratcher, *Trusts And Succession In Missouri*, 27 Mo. L. REV. 594, 604 (1962); Vanderbeck v. Watkins, 421 S.W.2d 274 (Mo. En Banc 1967) (Failure to comply with the nonclaim provision does not bar judgment, although the judgment cannot be satisfied from estate assets); Fratcher, *Trusts and Succession In Missouri*, 25 Mo. L. REV. 417, 431 (1960).

13. Section 991, RSMo 1939, provided in part: "In suits brought by administrators and executors, debts existing against their intestate or testator, and belonging to the defendant at the time of their death, may be set off by the defendant, in the same manner as if the action had been brought by and in the name of the deceased. . . ."

14. Section 2, at 579, RSMo 1835.

15. Stiles v. Smith, 55 Mo. 363 (1874); Lay v. Mechanics' Bank, 61 Mo. 72 (1875).

16. Section 991, RSMo 1939, was repealed by Mo. LAWS 1943, at 353, section 73 (now section 509.420, RSMo 1959). This repeal included 173 sections which were superseded by 144 sections, none of which considered the use of a barred claim as a set-off against a suit by the executor or administrator of decedent's estate.

17. Webb v. Webb, 33 So. 2d 909 (Ala. 1948); Floyd v. Towndrow, 51 N.M. 193, 181 P.2d 806 (1947); Robison v. Robison, 63 Utah 68, 222 Pac. 595 (1923).

son,[18] the Utah Supreme Court held that once the time for presentation had expired, the claim was forever barred unless it had been duly filed. The Utah court said that to allow the defendant to offset or reduce the estate's demand, it was necessary to make a finding that the defendant was entitled to an affirmative judgment against the estate and that no affirmative judgment could be obtained without complying with the requirements of the nonclaim statutes. In *Floyd v. Towndrow*[19] the Supreme Court of New Mexico reasoned that the means were available whereby the defendant could have protected himself, and that since he had failed to present his claim in compliance with the nonclaim statute he could not be heard to complain when denied the benefits of it.

Other jurisdictions have interpreted their nonclaim statutes differently.[20] The Supreme Court of Washington has declared that there is an exception to the statutory requirement that all claims must be filed,[21] *viz.*, that failure to file a claim pursuant to the nonclaim statute does not preclude the use of the claim as a set-off against a demand by the estate against the claimant. The use of the claim as a set-off is limited, however, to the extinguishment of the estate's demand.[22] One line of reasoning advanced for allowing the unfiled claim to offset the demand of the estate is based on principles of equity. The estate's claim should not be treated any differently than it would have been had decedent lived and brought the action in his own name. Furthermore, when two outstanding claims or debts exist against each other, equity sets the two off each against the other, and the amount owed is only the difference.[23]

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18. 63 Utah 68, 72, 222 Pac. 595, 596 (1923). Concerning Utah's nonclaim statute, UTAH COMP. LAWS § 7653 (1917), now UTAH CODE ANN. § 75-9-9 (1953), the Supreme Court of Utah said, "[W]e are of the opinion that it not only prevents a judgment in an independant action if instituted after the limitation provided in the statute, but that it prevents the presentation of an offset against a claim prosecuted by the estate."

19. 51 N.M. 193, 194, 181 P.2d 806, 807 (1947).

20. Dash v. Rubey, 144 Colo. 481, 357 P.2d 81 (1960); Ware v. Howley, 68 Iowa 633, 27 N.W. 789 (1886); Browning v. Eiken, 189 Minn. 375, 249 N.W. 573 (1933); Peoples' Nat'l Bank v. National Bank of Commerce, 69 Wash. 2d 682, 420 P.2d 208 (1966).

21. WASH. REV. CODE § 11.40.010 (1965), provides: "Every personal representative shall . . . cause to be published . . . a notice to the creditors of the deceased, requiring all persons having claims against the deceased to serve the same on the personal representative . . . and file with the clerk of the court . . . within four months after the date of the first publication of such notice. . . . If a claim be not filed within the time aforesaid, it shall be barred . . . ."

22. Peoples Nat'l Bank v. National Bank of Commerce, 69 Wash. 2d 682, 691, 420 P.2d 208, 214 (1966). Another limitation to the exception is that the defendant's claim against the estate must have existed at the time of the death of the administrator's decedent.

23. Dash v. Rubey, 144 Colo. 481, 357 P.2d 81 (1960); Ware v. Howley, 68 Iowa 633, 27 N.W. 789 (1886). Both were cases in which the defendant's claim was allowed to offset the estate's demand even though it had not been properly filed. This reasoning is very similar to that of the doctrine of equitable retainer which has been applied in a situation where the heir or legatee claims estate assets, and the administrator seeks to offset a barred debt owed to the estate. In Leach v. Armstrong, 236 Mo. App. 382, 387, 156 S.W.2d 959, 962 (K.C.

Some jurisdictions have statutes that provide specifically that a claim not filed pursuant to the nonclaim provisions may be used to offset any demand of the estate.[24]

Concerning the application of the nonclaim statute to a counterclaim or set-off against the estate's demand, the Missouri Supreme Court has stated that the statute contemplates cases where the creditor sues the estate, and here the claim must be presented or forever barred. In the situation where a person has a claim against the estate and is indebted to the estate, however, it was never intended that the creditor could not wait until he is proceeded against and plead his demand against that of the estate.[25] Nevertheless, the holding in *Robinson v. Bench*[26] makes it clear that claims which have been barred from affirmative action by the nonclaim statute cannot be used as a counterclaim or set-off against an action by an executor or administrator. This decision represents a literal interpretation of the provision that all claims not filed within nine months are forever barred.[27] If this rule is followed in the future, extreme care must be used in determining when a person against whom one holds a claim dies.

The situation avoided in *Stiles v. Smith*[28] is now possible. The administrator can wait until the nonclaim period has run to prosecute the estate's claim and use the nonclaim statute as a bar to any counterclaim regardless of the position of the defendant. This is an undesirable result. Allowing such a set-off or counterclaim would not defeat the purpose of the nonclaim statute, would not disrupt the estate's assets, and would be in keeping with the view that the nonclaim statute bars only the remedy and not the right. Such a result would vindicate a well-founded principal of equity and good conscience.

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Ct. App. 1941), the court held that the estate's assets due to an heir could be retained against a debt he had owed his father even though that debt had been discharged in bankruptcy. The court stated that equitable retainer will enforce a discount of mutual demands although they are not of the same legal right, and therefore could not be set up in discount at law. The doctrine was applied in Johnson v. Johnson, 352 Mo. 787, 179 S.W.2d 605 (1944) to charge the plaintiff's indebtedness to the estate of his father as a set-off against his distributive share of the assets, although his debts were barred by the statute of limitations.

24. Hill v. Barnes, 208 Ark. 432, 186 S.W.2d 675 (1945); Bensine v. Rosine, 76 Ohio App. 439, 64 N.E.2d 845 (1945). In Dallas Dome Wyo. Oil Fields Co. v. Brooder, 55 Wyo. 109, 138-39, 97 P.2d 311, 322 (1939), the Wyoming Court stated that the nonclaim statute applied to the bringing of an affirmative action against the estate only, and that the use of an unpresented claim to offset the demand of the estate was not affirmative action against the estate.

25. Stiles v. Smith, 55 Mo. 363, 367 (1874).

26. 409 S.W.2d 145 (Mo. 1966).

27. § 473.360, RSMo 1959.

28. 55 Mo. 363 (1874).

NEW CRIMINAL PROCEDURE IN MISSOURI[1]

I. DIRECT APPEAL

Effective September 1, 1967 Missouri changed her rules of criminal procedure to provide a more meaningful and effective appeal[2] and post conviction relief[3] for the convicted criminal.

The first rule change concerns direct appeal. The Supreme Court of Missouri repealed rule 28.05 and amended rule 28.02 and 29.01 to require appellant briefs on appeal. The old Missouri practice of the court reviewing the record for all errors preserved by motion for a new trial has been discarded. Under the present rule only those errors preserved by brief will be reviewed with the exception of sufficiency of information or indictment, verdict, judgment and sentence. The result of this change is that appellate counsel, whether appointed or retained, will have to file briefs on appeal. This rule effects both type of counsel, but the main impact will be felt by appointed counsel. There were three major reasons for this change.

First, the court no longer has the time to make an independent search of the record on the basis of a motion for a new trial of all cases that are appealed. As Howard McFadden, head of the Criminal Division in the Missouri Attorney General's Office pointed out, the burden on the court has become too demanding and they can no longer take the time to make this independant investigation.[4]

Another reason for this change is the feeling that a court cannot act as both advocate and impartial judicial body. If the court has to make an independent search of the record it assumes this dual role. In *Powell v. Alabama*[5] the Supreme Court of the United States pointed out that a court could not do both jobs effectively. As Professor Gerard has stated, the court's main function is to be an impartial judicial body, and trying to present arguments in opposition to one side of a question about which it should be impartial is a talent it lacks.[6] This rule change will correct this problem and limit the court to its proper function.

The most important reason for this new rule is based on constitutional grounds. The old Missouri practice did not give the indigent petitioner an equal opportunity for finding hidden errors on appeal. While the old rule did not require retained counsel to brief his case, it was more likely that he would not only brief the case, but also present oral argument to the court.[7] The Supreme Court, in *Douglas v.*

1. SUP. CT. RULE 27.26, 28.02, 28.05, and 29.01; V.A.M.S. (Supp. Feb. 1967); 23 J. MO. BAR 48 (Feb. 1967).
2. SUP. CT. RULE 28.02, 28.05 and 29.01.
3. SUP. CT. RULE 27.26.
4. McFadden, *Criminal Briefs: Rules Changed,* 23 J. Mo. BAR 244 (June, 1967).
5. 287 U.S. 45, 61 (1932).
6. Gerard, *The Right to Counsel on Appeal in Missouri: A Limited Inquiry into the Factual and Theoretical Underpinnings of Douglas v. California,* 1965 WASH. U.L.Q. 463.
7. Gerard, *supra* note 6. Professor Gerard conducted a survey of cases argued before the Missouri Supreme Court from 1962 to 1964. There were 158 cases brought before the court, of these he gathered data on 106. Sixty-three out of 106 were handled by retained counsel and they presented briefs in 39 cases and presented oral argument in 25.

California,[8] stated that the state had to appoint counsel for the indigent for his first appeal as a matter of right. The practice in California struck down in that case was an ex parte examination of a request for counsel on appeal and a determination if such counsel could be helpful to the court or petitioner. If the court concluded that counsel could not be helpful, none was appointed.

After *Douglas*, Missouri changed rule 29.01 to require appointment of counsel on appeal.[9] The appointed counsel however was required to do nothing more than file a notice of appeal. The 1964 rule change did not put Missouri properly within the doctrine of *Douglas*. The resulting procedure was similar to the practice struck down in *Douglas* as violating due process and equal protection. In Missouri there was an ex parte type examination by the court of the merits of the case, while in California there was an ex parte examination of the record to determine the appointment of counsel. The two practices were quite similar. The Supreme Court in *Douglas* said: "[A]ny real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required."[10] This statement has as its basis the conclusion that if counsel were appointed the indigent will receive some benefit, yet in Missouri this was not necessarily the case.[11] The pre-1967 practice simply required the appointment of a counsel who was not required to do anything to designate or interpret the legal arguments that were potentially available on appeal. The bare appointment of counsel did not correct the due process and equal protection violations that were the basis of *Douglas*.[12] As was recently stated in *Anders v. California*: "[T]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client. . . ."[13] It would seem that the filing of an appellate brief would be required in order to consider the attorney an active advocate.

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8. 372 U.S. 353 (1963).
9. 19 J. Mo. BAR 439 (1963).
10. 372 U.S. 353, 356 (1963).
11. But see Gerard, *supra* note 6 at 477. The results of his survey did not show a significant difference in result because a brief was filed. Of 28 cases with briefs presented, 22 or 79 per cent affirmed. Of 81 cases considered on denial of motion for new trial 67 or 83 per cent were affirmed. There was a significant difference when full argument was presented, 47 cases had full argument and 29 or 62 per cent were affirmed. The limited scope of this survey makes it doubtful if any real significance can be drawn from its findings.
12. The pre-1967 practice in Missouri allowed the appeal to be considered on the basis of the denial of the motion for a new trial. The court then reviewed the errors presented in the motion and trial transcript for errors not in the motion. The attorney had to prepare the motion for new trial from memory and had no time to research the questions of law involved because of the pressure of time. With this practice the attorney could do little to present and focus arguments for the benefit of his client. The advantage of filing a brief is that there is time to check the trial transcript for errors and research points of law helpful to the defendant's case. The new procedure in Missouri will correct the due process and equal protection violations that were the basis of *Douglas*.
13. 386 U.S. 738, 744 (1967).

In *Bosler v. Swenson*,[14] the Supreme Court held that the Missouri practice prior to 1964 was not adequate to comply with the *Douglas* doctrine. The language of *Bosler* indicates that the 1964 rule change was also not adequate:

> The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant.[15]

Bosler and *Anders* would indicate that the 1964 rule change did not properly meet the *Douglas* test. Missouri will therefore have to obtain briefs for appeals not final as of March 18, 1963, the date of the *Douglas* case and before the 1966 term of court, after which briefs were required, assuming reversal did not occur in the first place.[16] According to Howard McFadden this will encompass only about seventy-five cases.[17]

The result of this rule change places Missouri criminal appellate procedure squarely within *Douglas* and *Anders* and gives the indigent petitioner an effective appeal. Certainly the main effect of the rule will be on the counsel appointed at the trial level because in most cases he will be appointed for the appeal.[18] It should, however, be noted that since counsel retained at the trial level by an indigent probably will be appointed on his appeal, the initial fee will have to be large enough to compensate for his work on appeal, or he will have to bear that burden without compensation. The appointment of counsel on appeal and as will be discussed later, for post conviction hearings has greatly increased the amount of time an attorney must work without compensation.[19] The limited number of capable criminal attorneys and the time involved for each individual attorney points out the need for some type of public defender program or at least payment of out-of-pocket expenses.[20]

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14. 386 U.S. 258 (1967).

15. 386 U.S. 258, 259 (1967).

16. See also Donnell v. Swenson, 258 F. Supp. 317 (W.D. Mo. 1966) holding that *Douglas* must be applied retroactively. The Court cites Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. U.S. *ex rel* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965); Gideon v. Wainwright,372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); and Minnesota *ex rel.* Holscher v. Tahash, 364 F.2d 922 (8th Cir. 1966). The court used the standards in these cases to determine if *Douglas* must be applied with complete retroactivity. The court concluded that the purpose of the new rule is to protect individual rights and not as in Mapp v. Ohio, 367 U.S. 643 (1961) to stop a particular state practice. The court concluded that *Douglas* must be applied with complete retroactivity. The ruling of this case will effect appeals final before Douglas and will be tested by post conviction proceedings under Supreme Court Rule 27.26 rather than direct appeal. See Oliver, *An Absolute Right to Counsel on Appeal: Rule and Retroactivity in Missouri*, 32 Mo. L. REV. 230 (1967).

17. McFadden, *supra* note 4 at 245.

18. Gerard, *supra* note 6 at 471, showing that appeals were prepared by other than trial attorney in only 12 of 133 cases, or only 9 per cent of the time.

19. Missouri has no form of compensation for appointed counsel.

20. See Simeone and Richardson, *The Indigent and Right to Legal Assistance in Criminal Cases*, 8 ST. LOUIS U.L.J. 15 (1963), a study of problems and presentation of solutions.

It should be noted that *Anders v. California*[21] held that before appointed counsel can withdraw from a case because he considers it without merit, he must file a brief stating any arguable point in support of the appellant's case. Since it is highly improbable that an appeal could be so wholly devoid of any arguable points, the effect of this case is that once the attorney is appointed to a case he must file a brief.

II. Post Conviction Procedure

The change in post conviction procedure is set out in rule 27.26. This change has been called a radical change by the Supreme Court of Missouri[22] and the "best postconviction procedure in the Nation."[23] The major changes in this rule are: 1) the requirement that counsel be appointed after the 27.26 motion has been filed; 2) the questionnaire form set out in the rule is now required when filing the motion; and 3) the court's requirement that an evidentary hearing be held on questions of fact which if true would entitle the petitioner to relief. The operation of the new rule is illustrated by *State v. Stidham*.[24] First, the convict files the motion, then counsel is appointed and he must amend the motion to include all points that could be raised with the prisoner verifying the amended motion. If any questions of fact are presented which if true would entitle the petitioner to relief, an evidentiary hearing must be held.[25]

The reason for the change in evidentiary hearings given in *State v. Stidham*[26] is three 1963 decisions of the United States Supreme Court: *Townsend v. Sain*,[27] *Fay v. Noia*,[28] and *Sanders v. U.S.*[29] The standard set forth in *Townsend* was that an evidentiary hearing must be held in either the state or federal system if a convict has alleged constitutional violations that if true would entitle him to relief. The result of that case is to guarantee the defendant a full and fair hearing either in a state proceeding or by federal habeas corpus.[30] The importance of *Fay v. Noia* in this context is the holding that a procedural forfeit in the state system does not necessarily mean a forfeiture of the right of federal habeas corpus. The fact that res judicata does not apply to habeas corpus motions was restated in *Sanders v.*

21. 386 U.S. 738 (1967).
22. State v. Maxwell, 411 S.W.2d 237, 241 (Mo. 1967).
23. Garton v. Swenson, 266 F. Supp. 726, 731 (W.D. Mo. 1967).
24. 415 S.W.2d 297 (Mo. En Banc 1967).
25. State v. Stidham, *supra* note 24 at 298.
26. 415 S.W.2d 297, 298 (Mo. En Banc 1967).
27. 372 U.S. 293 (1963).
28. 372 U.S. 391 (1963).
29. 373 U.S. 1 (1963).
30. The circumstances set forth in *Townsend* under which the Federal court must grant an evidentiary hearing were: "[I]f (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." Townsend v. Sain, 372 U.S. 293, 313 (1963).

United States.[31] These three cases point out the need for evidentiary hearings by the state court to consider alleged constitutional violations. If the state court does not properly review these questions and gather the necessary evidence, the federal court will be compelled to hold evidentiary hearings of their own. This would result in a shift of criminal law enforcement from the state to the federal system. Under the present Missouri practice the federal court when presented with a habeas corpus motion should have the transcript of a state proceeding that considered the questions presented. This should in most cases free the federal court from any obligation of holding its own evidentiary hearing, assuming the state court made a proper finding as to questions of law that were controlling.[32]

The change requiring appointment of counsel for the 27.26 motion and if necessary for the appeal from a denial of relief, is an important part of the new attitude in Missouri. Counsel will be able to recognize and present constitutional violations that the petitioner might overlook. This is the most advanced change in rule 27.26 because the appointment of counsel for post conviction proceedings has not yet been held to be a constitutional requirement. The ruling in *Douglas v. California* was limited to first appeal as a matter of right. In the recent case of *Long v. District Court of Iowa*[33] the Supreme Court of the United States chose not to consider the issue and reversed on other grounds. The trend of the Supreme Court in recent years has been to provide counsel at the important stages of criminal proceedings and this trend would seem to indicate that counsel for post conviction proceedings could in the future be considered a requirement.[34] The Missouri practice is an effort to give the indigent the same opportunities for relief as one who can afford counsel. The requirement of counsel should do much to protect individual rights in state criminal proceedings.

The immediate result of the new rule might be a large number of rule 27.26

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31. See White v. Swenson, 261 F. Supp. 42 (W.D. Mo. 1966) for an extensive discussion of the effect of these three cases on federal habeas corpus, especially as they apply to Missouri practice and procedure. This case was one of the moving factors bringing about the rule change in Missouri.

32. *Cf.* The federal judge is not absolutely bound by the state finding, he may exercise his discretion and hold an evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 318 (1963). See State v. Garton, 396 S.W.2d 581 (Mo. 1965) as an example of an improper finding of law. In that case the Missouri Supreme Court affirmed a denial of a 27.26 motion without an evidentiary hearing. One issue presented was the failure of the court to appoint counsel for direct appeal. His appeal was decided on September 9, 1963, State v. Garton 371 S.W.2d 283 (Mo. 1963), which was after the *Douglas* case decided on March 18, 1963. The defendant therefore alleged constitutional violations that if true would entitle him to relief and therefore he should have been granted an evidentiary hearing. In Garton v. Swenson, 266 F. Supp. 726 (W.D. Mo. 1967), the federal court remanded the case to the state court to reconsider its denial of Garton's constitutional rights. *Garton v. Swenson* is an excellent example of federal restraint in hearing a habeas corpus motion. The court gave the state system another chance to decide the issues and thereby helped preserve the integrity of state criminal proceedings.

33. 385 U.S. 192 (1966).

34. See Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); and Griffin v. Illinois, 351 U.S. 12 (1956).

motions. The initial burden on the state courts may be extensive, but the end result should be worth the effort. The advantage of this new system is that successive motions will no longer be necessary unless there are unusual circumstances.[35] Once the state court holds the proper hearing the evidence should be recorded and any future motion can be ruled upon by reference to the previous proceedings.[36]

The Missouri system is an advanced approach to guarantee an indigent's rights and may serve as a model for other jurisdictions. The presence of counsel on appeal in post conviction proceedings, and a full hearing on issues of fact were needed steps to insure the proper administration of criminal justice.

GERRY OSTERLAND

COURTS—AVAILABILITY OF DOMESTIC COURTS FOR THE ENFORCEMENT OF A SISTER STATE'S TAX CLAIM

Nelson v. Minnesota Income Tax Division[1]

The state of Minnesota, through its Attorney-General, brought suit in a Wyoming court to collect a state income tax owed by the defendant on income earned while residing in Minnesota. It was not disputed that the tax in question became due and owing to Minnesota when the income was earned by the defendant and that Minnesota law authorizes the Attorney-General of that state to sue for the tax in another state. The judge of the trial court took the position that Wyoming should adopt the policy of enforcing the tax laws of other states on principles of comity and granted Minnesota's motion for a summary judgment in the amount of the tax owed plus accrued penalties.

On appeal to the Supreme Court of Wyoming, defendant argued that since taxation is a legislative function, it is not a proper place for the extension of comity by a court. The court affirmed the trial court in part and reversed it in part. Asserting that there is no valid justification for not permitting a suit in one state for a tax lawfully levied in another, it affirmed the judgment as to the amount of the tax. It reversed the trial court as to the penalty, holding that penal statutes will not be enforced for other states. In rejecting the rule that one state will not enforce the tax claims of another state, the Wyoming court adopted the view taken by the St. Louis Court of Appeals in the case of *State ex rel. Oklahoma Tax Commission v. Rodgers*.[2]

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35. See note 30 *supra*.

36. See note 30 *supra*. If one of those situations prevails, the state court would also be in the position of having to hold a new evidentiary hearing.

1. 429 P.2d 324 (Wyo. 1967).

2. 238 Mo. App. 1115, 193 S.W.2d 919 (St. L. Ct. App. 1946); see Annot., 165 A.L.R. 785 (1946).

The rule that one state will not enforce the tax laws of another seems to have had its origins in three eighteenth century English cases.[3] These cases were contract actions where non-compliance with the revenue laws of another country was interposed as a defense. The English court rejected the defense in all three cases with Lord Mansfield first directly verbalizing the rule as ". . . no country ever takes notice of the revenue laws of another."[4] This rule was followed in several other English cases involving contracts.[5] In none of these cases was a foreign tax sought to be collected.

A similar situation gave rise to the first application of the rule in the United States. In *Ludlow v. Van Rensselar,*[6] the defendant claimed that the lack of French revenue stamps on a note executed in France made it unenforceable in New York as well as in France. The court rejected the defense saying that it would not enforce the revenue laws of another country.[7] In the case of *Henry v. Sargeant,*[8] the doctrine seems to have been enunciated in its present form for the first time. There the plaintiff brought an action in New Hampshire for damages caused by imprisonment in Vermont for failure to pay a tax assessed in that state. The defense was lack of jurisdiction because the revenue laws of another state were involved.[9] The defense was not allowed, the court saying:

> There is no attempt to enforce the penal or revenue laws of Vermont by this action. If there were, it would be held that this was not to be done through the instrumentality of the courts of another state; as, for instance, if the attempt was to collect a tax assessed in Vermont by a suit here.[10]

The doctrine received reinforcement in two New York cases in the 1920's. *State of Colorado v. Harbeck*[11] concerned a domiciliary of Colorado who died while in New York. His will was probated in New York and the estate, made up of personal property, was distributed to the legatees, none of whom was a resident of Colorado. Transfer taxes were paid in New York. Later Colorado began actions to collect its transfer tax. Among its efforts was a suit in New York against the executrix-legatee. The New York Court of Appeals refused to allow the suit on several grounds, one of which was that it would be a violation of the rule which precludes one state from collecting taxes for a sister state.[12]

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3. Planche v. Fletcher, 1 Dougl. 251, 99 Eng. Rep. 164 (K.B. 1779); Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (K.B. 1775); Boucher v. Lawson, Cases Temp. Hardwicke 85, 95 Eng. Rep. 53 (K.B. 1734).
4. Holman v. Johnson, *supra* note 3.
5. Sharp v. Taylor, 2 Phill. 801, 41 Eng. Rep. 1153 (K.B. 1848); James v. Catherwood, 3 Dow. & Ry. 190 (K.B. 1823).
6. 1 Johns.R. 94 (Sup. Ct. N.Y. 1804).
7. *Id.* at 95.
8. 13 N.H. 321, 40 Am. Dec. 146 (1843).
9. The defendant's brief cited Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (K.B. 1775); Ludlow v. van Rensselar, 1 Johns.R. 94 (Sup. Ct. N.Y. 1804); James v. Catherwood, 3 Dow. & Ry. 190 (K.B. 1823).
10. Henry v. Sargeant, 13 N.H. 321, 332 (1843).
11. 232 N.Y. 71, 133 N.E. 357 (1921).
12. *Id.* at 85, 133 N.E. at 360.

A similar decision was handed down by the Second Circuit Court of Appeals in *Moore v. Mitchell.*[13] In a concurring opinion Judge Learned Hand listed the reasons why that rule should be followed. First, when one party tries to enforce a liability that has arisen in one state in the courts of a foreign state, the court in the foreign state will look to see if the action violates its public policy and refuse to enforce it if it does. Second, it would be embarrassing for the courts of one state to examine the relations between a foreign state and its citizens. Third, one state should not look at another state's provisions for public order, and tax laws are very analagous to laws for public order. Fourth, no court should undertake to enforce a cause of action which it cannot uphold without first examining it to see if it violates its own policy. Therefore, one state should not collect taxes for another.[14]

The doctrine was first rejected in *State ex rel. Oklahoma State Tax Commission v. Rodgers.*[15] In this case, which was factually identical to the *Nelson* case, the St. Louis Court of Appeals held that Oklahoma could sue a domicilary of Missouri in Missouri courts for income taxes owed to Oklahoma. After reviewing the history of the doctrine, the court concluded that the courts that had refused to allow similar suits had applied a principle of international law to relations between states where there was no reason for the rule. Revenue laws are not penal laws[16] so the reasons against extraterritorial application of criminal laws are not valid considerations in this type of suit. The foreign state will not be embarrassed by having its laws examined since it is prosecuting the suit. It is better for relations between states for the forum state to allow a foreign state a court and then examine the law sought to be enforced to see if it violated forum policy, than to deny the foreign state a court entirely. In the absence of valid considerations pointing to a different result, comity would seem to require allowing the suit. While the older doctrine might have a place in a world of sovereign nations, it has no place in a union of states where the taxpayer and the state are protected by the safeguards of the United States Constitution. A taxpayer who enjoys the benefits and protection of government should not be able to escape his obligation to pay for that government by crossing statelines. For these reasons the court rejected the rule and allowed the state to recover.

The *Rodgers* court relied upon the case of *J. A. Holhouser Co. v. Gold Hill Copper Co.*[17] In that case a New Jersey corporation with all of its assets in North Carolina went into receivorship in North Carolina. New Jersey was allowed to participate with the other creditors though her claims were for past-due license taxes. North Carolina allowed participation in the receivorship as a matter of

13. 30 F.2d 600 (2d Cir. 1929), *aff'd* on other grounds 281 U.S. 18 (1930); see Annot., 65 A.L.R. 1354 (1929).
14. *Id.* at 604.
15. 238 Mo. App. 1115, 193 S.W.2d 919 (St. L. Ct. App. 1946). North Carolina enforced a tax claim in a receivorship proceeding as early as 1905. J. A. Holshouser Co. v. Gold Hill Copper Co., 138 N.C. 248, 50 S.E. (1905).
16. Milwaukee County v. M. E. White Co., 296 U.S. 268, 271 (1935).
17. 138 N.C. 248, 50 S.E. 650 (1905); see Annot. 70 L.R.A. 183 (1905).

comity even though New Jersey would not have been allowed to bring suit separately for the tax under the North Carolina jurisdictional statute.[18]

The full faith and credit clause of the United States Constitution may eventually require all states adopt the approach of the *Rodgers* case. In the case of *Milwaukee County v. M. E. White Co.* the Supreme Court held that full faith and credit required one state to enforce a judgment of another state, even if the judgment was founded upon a tax claim.[19] That decision specifically left open the question of whether one state must, under full faith and credit, enforce the revenue laws of another state.[20] The later Supreme Court case of *Hughes v. Fetter*[21] held that Wisconsin's statutory policy of excluding a foreign cause of action while permitting similar domestic causes of actions was prohibited by the full faith and credit clause. Close adherence to the philosophy of the *Hughes* case might call for non-discriminatory enforcement of tax claims as well.[22]

The first *Restatement of Conflict of Laws* recognized the rule that no action can be maintained by a foreign state to enforce its claims for taxes.[23] The 1948 *Supplement* to the *Restatement* declined to express an opinion on this question.[24] This was in response to the *Milwaukee County* case where the Supreme Court declined to rule on this point. The *Supplement* indicates that if a position were to be taken, the *Rodgers* case should be followed.[25]

Most state courts that have confronted this question since 1946 have agreed with the *Rodgers* decision and have allowed the foreign state to sue.[26] However, a subsequent Missouri case[27] might restrict the *Rodgers* decision. The case involved a suit in Missouri by California for unpaid inheritance taxes. California tried to use California probate court orders to prove the debt. The St. Louis Court of Appeals refused to allow the suit. It said that while a California judgment would have been enforced, this suit could not be maintained under the theory of the *Rodgers* case because the California statute imposing liability had inextricably

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18. *Id.* at 215-218, 50 S.E. at 651-654.
19. 296 U.S. 268 (1935).
20. *Id.* at 275.
21. 341 U.S. 609 (1951).
22. GOODRICH AND SCHOLES, CONFLICT OF LAW § 66 (4th ed. 1963).
23. RESTATEMENT, CONFLICT OF LAW § 610, comment *c* (1934).
24. RESTATEMENT, CONFLICT OF LAW § 610 (Supp. 1948).
25. *Ibid.*
26. State of Oklahoma *ex rel.* Oklahoma Tax Commission v. Neely, 225 Ark. 230, 282 S.W.2d 150 (1955); City of Detroit v. Gould, 12 Ill.2d 297, 146 N.E.2d 61 (1957); State *ex rel.* Duffy v. Arnett, 314 Ky. 403, 234 S.W.2d 722 (1950); State Tax Commission of Utah v. Cord, 81 Nev. 403, 404 P.2d 422 (1965); Pennhurst State School v. Estate of Goodhartz, 42 N.J. 266, 200 A.2d 112 (1964). Several states have accomplished this result with reciprocal enforcement statutes. ALASKA COMP. LAWS ANN § 43-10-070 (Supp. 1958); CAL. REV. & TAX. CODE § 30, 31. See City of New York v. Shapiro, 129 F. Supp. 149 (D. Mass. 1954) where a final administrative determination of a tax due was enforced by the forum state as if it were a judgment. The following cases are in conflict with the noted case: City of Detroit v. Proctor, 5 Terry 193, 61 A.2d 412 (Del. 1948); Wayne County v. Am. Steel Export Co., 277 App. Div. 585, 101 N.Y.S.2d 522 (1950).
27. State *ex rel* Houser v. St. Louis Union Trust Co., 260 S.W.2d 821 (St. L. Mo. App. 1953).

joined the right with a local remedy. This suit was neither a suit to enforce a judgment nor a suit like that in the *Rodgers* case because liability was dependent upon the orders of the California probate court that had no jurisdiction over the defendant. Missouri courts will not entertain proceedings under a foreign statute that unite the right with a remedy that must be pursued in a designated tribunal with certain specific powers.[28] The case probably would have been decided differently had California been able to prove liability without the use of the probate court orders.

The rule set out in the *Rodgers* and *Nelson* cases is probably the prevailing view in the United States.[29] This use of comity is desirable for two reasons. First, the reasoning of these cases is superior to that of cases that adopt the contrary position. Second, local and state governments are in financial difficulty and need reimbursement for the costs of the governmental services they provide. An individual should not be able to avoid his obligations by crossing a state line. Therefore, the holding and reasoning of these cases should be adopted by courts that consider this question in the future.

GEORGE LANE ROBERTS, JR.

DISCOVERY—SUCCESSIVE PHYSICAL EXAMINATIONS UNDER FEDERAL RULE 35 AND MISSOURI RULE 60.01

Vopelak v. Williams[1]

Plaintiff sustained personal injuries in the summer of 1966. Approximately three months later, and prior to instituting her negligence action, plaintiff, at the request of defendant's insurance carrier, was examined by a doctor and a dentist in New York. When suit was filed in Toledo, Ohio a year later, defendant moved for an order under federal rule 35(a) requiring plaintiff to submit to another examination by a doctor and a dentist in Toledo. *Held,* motion granted.

The problem presented in this case is a familiar one to the personal injury practitioner. The question is not whether a physical examination should be ordered in the first instance in this personal injury action; rather it is whether an examination should be ordered when the defendant has already had the benefit of a previous examination. Many lawyers and insurance carriers no doubt hesitate to request a medical examination until shortly before trial because of the fear that they are only entitled to one. This misconception is unfortunate because settlement negotiations are thereby hindered. The noted case illustrates that under proper circumstances successive physical examinations will be permitted.

28. Mosely v. Empire Gas and Fuel Co., 313 Mo. 225, 245, 281 S.W. 762, 767-768 (1926); See Annot., 145 A.L.R. 1223 (1926).
29. GOODRICH AND SCHOLES, CONFLICT OF LAW § 66 (4th ed. 1964).
1. 42 F.R.D. 387 (N.D. Ohio 1967).

With certain narrow exceptions,[2] the federal courts had initial misgivings about the propriety of compelling pretrial medical examinations.[3] Federal procedure regarding physical examinations did not begin to conform to the practice existing in Missouri and most other states until the Supreme Court promulgated the *Federal Rules of Civil Procedure* in 1938.[4]

At the present time, under both federal rule 35 and Missouri rule 60.01, a party may move for an order requiring an opposing party to submit to a pretrial physical or mental examination. Although the two rules differ slightly, both provide that where the physical or mental condition is in controversy, the motion will be granted if good cause therefor is shown.

Missouri practice regarding physical and mental examinations should be studied in three stages. Prior to 1943, without the benefit of statute or court rule, Missouri courts had the inherent power to order a physical or mental examination;[5] but it was discretionary with the trial court, and if granted, the examiner was appointed as an impartial officer of the court.[6] Section 87 of the 1943 Judicial Code[7] was similiar to the present federal rule 35 and was in effect until 1960 when it was superceded by the present rule 60. Rule 60.01[8] differs from federal rule

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2. 8 WIGMORE, EVIDENCE § 2220 at 184-209 (3d ed. 1940) discusses the common law exceptions to the general rule that a court will not order a pretrial physical examination.

3. Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891); *cf.* Camden & Suburban R. Co. v. Stetson, 177 U.S. 172 (1900). However at least eight state courts have held that they have the power to order such examinations. See, *e.g.*, City of South Bend v. Turner, 156 Ind. 418, 60 N.E. 271 (1901); Krook v. Blomberg, 95 N.H. 170, 59 A.2d 482 (1948); and Carnine v. Tibbetts, 158 Ore. 21, 74 P.2d 974 (1937). *Compare* Witte v. Fullerton, 376 P.2d 244 (Okla. 1962) in which the court found that it had the inherent power to order a pretrial physical examination in absence of a statute or court rule and specifically overruled prior cases to the contrary.

4. In order that a uniform federal procedure be established, Congress in 1934 passed the Rules Enabling Act, 48 Stat. 1064 (1934), as amended 28 U.S.C. § 2072 (1964) authorizing the Supreme Court to establish rules governing procedure in federal district courts. This section specifically provided that "such rules shall not abridge, enlarge or modify any substantive right." The *Federal Rules of Civil Procedure* became effective on September 16, 1938.

5. See, *e.g.*, State ex rel. American Mfg. Co. v. Anderson, 270 Mo. 533, 194 S.W. 268 (1917); Fullerton v. Fordyce, 121 Mo. 1, 25 S.W. 587 (1894).

6. See, *e.g.*, Sidekum v. Wabash, St. L. & P. Ry. Co., 93 Mo. 400, 4 S.W. 701; Shepard v. Missouri Pac. Ry. Co., 85 Mo. 629 (1885).

7. Laws 1943, p. 353, § 87, 510.040, RSMo (1949).

8. The full text of rule 60.01(a) is:

> ORDER FOR EXAMINATION. In an action in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician or to produce for such examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person against whom the order is sought and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

35[9] in that it adopts the amendments proposed by the 1955 Advisory Committee for the federal rules which deal primarily with the persons to whom the rule extends.[10]

Rule 35 withstood a challenge to its constitutionality and an assertion that it violated the Rules Enabling Act by abridging the substantive right of privacy.[11] Rule 60.01 has never been attacked on constitutional grounds, and at this date, such an attack would be futile. Most of the cases under rules 35 and 60.01 have turned on the requirements of "good cause" and "in controversy."[12] Although these requirements certainly overlap, they can best be considered individually.

Both federal rule 35 and Missouri rule 60.01 require a showing of good cause. An order for the physical or mental examination of a party is not granted of right even for the first examination, but rests in the discretion of the trial court.[13] Where, as in a personal injury action, the nature and the extent of the injuries are clearly at the heart of the suit, the granting of the order for the initial examination is usually perfunctory.[14] Motions have been denied, however, for failure to show

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9. The full text of rule 35(a) is:

> ORDER FOR EXAMINATION. In an action in which the physical or mental condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

10. See the textual discussion following rule 60.01 in *Vernon's Annotated Missouri Rules*, pages 230-231 (1960).

11. Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941). This case also held that the Rules Enabling Act was constitutional in that it did not amount to an unconstitutional delegation of legislative authority to the Supreme Court.

12. A number of federal cases also turn on the party requirement. Note the difference in the scope of the two rules quoted above insofar as the persons to whom they extend. Rule 60.01 adopted the proposed amendments of the 1955 Advisory Committee on the federal rules. See footnote 10, *supra*. In a 1967 preliminary report, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended the adoption of the following draft for rule 35(a):

> ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

See the proposed rule and textual discussion at 43 F.R.D. 211, 257 (1968).

13. Benning v. Phelps, 249 F.2d 47 (2d Cir. 1957); Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), *cert. denied* 345 U.S. 997 (1953); Teche Lines v. Boyette, 111 F.2d 579 (5th Cir. 1940); Petition of Trinidad Corp., 238 F. Supp. 928 (E.D. Va. 1965) (construing Admiralty Rule 32A which is identical to federal rule 35).

14. Martin v. Tindell, 98 So.2d 473, 475 (Fla. 1957), *cert. denied* 355 U.S. 959 (1958):

> We realize that motions for compulsory physical examinations in personal injury actions are usually granted as a matter of course by trial judges. . . .

good cause, where plaintiff claimed damages for past injuries now healed,[15] and where defendant had other equally good sources of information.[16]

If in the first examination defendant wishes to have plaintiff examined by doctors in more than one specialty, it is clearly permissible,[17] but because of the good cause requirement there is a greater burden on movant to show that the multiple examinations are necessary, and such necessity should be weighed against the interests of the party to be examined.[18] The good cause requirement should also be more exacting on the movant where the examination will involve medical procedures which are novel[19] or painful.[20]

Missouri has several cases which consider the good cause requirement. Missouri law is clear that in a personal injury action,[21] as in other types of litigation,[22] the examination is not of right even in the first instance, but is discretionary with the trial court. One Missouri case, *Enyart v. Santa Fe Trail Trans. Co.*,[23] held that the denial of an order requiring a second physical examination was not error where movant failed to show how he was prejudiced by not being allowed to make such an examination.

Enyart is not in conflict with the noted case. It in fact indicates that a second examination might have been properly allowed under 60.01 in certain circumstances. In the noted case, where a second examination was permitted under federal rule 35, the court recognized the practical difficulties of forcing the defendant to rely on expert witnesses whose testimony would probably have to be produced in court by deposition. It decided that since the plaintiff had chosen the forum, she should not impede the search for truth by so handicapping the defendant. Other reasons

15. Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres, 255 F.2d 149 (1st Cir. 1958).

16. Martin v. Tindell, 98 So.2d 473 (Fla. 1957), *cert. denied* 355 U.S. 959 (1958); Strasser v. Prudential Ins. Co. of America. 1 F.R.D. 125 (W.D. Ky. 1939).

17. Little v. Howey, 32 F.R.D. 322 (W.D. Mo. 1963); Marshall v. Peters, 31 F.R.D. 238 (S.D. Ohio 1962).

18. Red Top Cab & Baggage Co., Inc., 99 So.2d 871 (Fla. App. 1958).

19. Templin v. Erkekedis, 119 Ind. App. 171, 84 N.E.2d 728 (1949) (reversible error to deny examination of hymen in medical malpractice action for negligent rupture of hymen); Bartolotta v. Delco Appliance Corp., 254 App. Div. 809, 4 N.Y.S.2d 744 (1938) (whether or not to order a barium meal examination is within the discretion of the trial judge); Myers v. Travelers Ins. Co., 353 Pa. 523, 46 A.2d 224 (1946) (electro-cardiograph).

20. Riss & Co., Inc. v. Galloway, 108 Colo. 93, 114 P.2d 550 (1941) (spinal puncture not permitted); Cardinal v. University of Rochester, 188 Misc. 823, 71 N.Y.S.2d 614 (Sup. Ct. 1946), *aff'd as modified* 271 App. Div. 1048, 69 N.Y.S.2d 352 (1947) (removal of part of stomach contents for analysis allowed, whereas the granting of an order for a bone marrow biopsy would be within discretion of trial judge after an opportunity for a hearing).

21. Enyart v. Santa Fe Trial Trans. Co., 241 S.W.2d 268 (Mo. 1951); Hoffman v. Illinois Terminal R. Co., 274 S.W.2d 591 (St. L. Mo. App. 1955).

22. Harriford v. Harriford, 336 S.W.2d 113 (K.C. Mo. App. 1960) was a proceeding by an adjudged incompetent for restoration of mental competency. The denial of defendant's motion to compel plaintiff to submit to psychiatric examination was held not to be an abuse of discretion. There was much other evidence in this case, therefore presumably good cause was not shown.

23. 241 S.W.2d 268 (Mo. 1951).

for permitting a second examination should be an alleged change of physical condition or an unusually long time between the examination and the trial. Several courts have permitted examinations for these reasons,[24] and those which have refused to permit a second examination,[25] like *Enyart,* usually do so on the theory that good cause therefor has not been shown rather than on the theory that the rule does not permit a second examination. The court should attempt to balance the injured litigant's right of privacy against the demands of fairness to all parties.[26] In so doing, the court will require a greater showing of good cause for the second examination than for the first.

The "in controversy" requirement is closely related to the "good cause" requirement. Logically the physical or mental condition of a party must be in controversy before the court can consider whether good cause has been shown for ordering even the first examination. An early federal case[27] took the view that because of the "in controversy" requirement the rule only applied to personal injury cases, but fortunately such a narrow application has not prevailed. Physical condition has been held to be in controversy in divorce proceedings,[28] paternity actions,[29] deportation proceedings[30] and other actions where the physical or mental condition of a party is an issue. A Missouri case[31] has properly held that mental condition is in controversy within the meaning of rule 60.01 in a proceeding to determine competency. Even in a personal injury action, a plaintiff's physical con-

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24. Mayer v. Illinois Northern Ry., 324 F.2d 154 (7th Cir. 1963) (first examination did not cover all of the alleged injuries); Ishler v. Cook, 299 F.2d 507 (7th Cir. 1962) (permitting a limited reexamination in order to verify measurements); City of Valparaiso v. Kinney, 75 Ind. App. 660, 131 N.E. 237 (1921); Roskovics v. Ashtabula Water Works Co., 86 Ohio Law Abs. 251, 174 N.E.2d 295 (Ohio Com. Pl. 1961) (deterioration of plaintiff's condition, subsequent amendment of complaint).

25. Murdaugh v. Queens-Nassau Transit Lines, Inc., 280 App. Div. 826, 113 N.Y.S.2d 804 (1952) (reversible error to permit such an examination absent showing of good cause); Rutherford v. Alben, 1 F.R.D. 277 (S.D. W. Va. 1940).

26. Schlagenhauf v. Holder, 321 F.2d 43, 51 (7th Cir. 1963), *vacated on other grounds* 379 U.S. 104 (1964):

> [T]he number and kind of examinations ordered is subject to the "good cause" requirement. The number of examinations ordered should be held to the minimum necessary considering the party's right to privacy and the need for the court to have accurate information.

27. Wadlow v. Humberd, 27 F. Supp. 210, 212 (W.D. Mo. 1939) refused to order an examination of plaintiff in a libel action where plaintiff alleged that defendant had falsely accused him of being afflicted with various diseases, and truth was asserted as a defense. The court stated:

> How can the "mental or physical condition of a party" be in controversy in a libel suit? Clearly it can not be in controversy. . . . The issues in controversy are: (a) did the defendant publish the article? and (b), is the statement in the article true or false? There are no other matters in controversy.

28. Beach v. Beach, 72 App. D.C. 318, 114 F.2d 479 (1940).

29. *Ibid.*

30. United States *ex rel.* Dong Wing Ott v. Shaughnessy, 220 F.2d 537 (2d Cir. 1955); Lue Chow Kon v. Brownell, 220 F.2d 187 (2d Cir. 1955); Lee Wing Get v. Dulles, 18 F.R.D. 415 (E.D.N.Y. 1955).

31. Harriford v. Harriford, 336 S.W.2d 113 (K.C. Mo. App. 1960) (dictum).

dition is not in controversy if judgment has already been rendered, and defendant wants the examination in regard to his motion for a new trial on the basis of newly discovered evidence.[32] Nor is plaintiff's present physical condition in controversy if the suit is for past injuries now healed.[33]

There is nothing in the "in controversy" requirement which should prevent successive physical examinations, if as in the noted case, the requirement of "good cause" is met. In fact, if the physical or mental condition of the party was in controversy so that the order for the first examination was proper, it will also be in controversy at the time of the second examination. As opposed to the "good cause" requirement, the "in controversy" requirement is precisely the same for the second examination as it was for the first.

In *Schlagenhauf v. Holder*,[34] the United States Supreme Court held that a party's physical or mental condition is in controversy within the meaning of rule 35 if he asserts it in support of or as a defense to a claim, but if he does not, the opposing[35] party must allege facts in support of his motion which clearly place this condition in controversy. For example, in a typical automobile accident case, since the defendant does not assert his eyesight in support of or as a defense to a claim, the plaintiff must show facts which put defendant's eyesight in controversy if he wishes to obtain an order for an examination.[36] Normally affidavits should suffice, but the possibility of an evidentiary hearing is not precluded.[37]

The one Missouri case which has considered the "in controversy" requirement, *Landau v. Laughren*,[38] is an excellent example of the correct application of the rule. In this action for an accounting, movant sought a psychiatric examination of the defendant on the ground that it would enable the court properly to evaluate his testimony as a witness. The supreme court affirmed the trial court's denial of the motion. Since the defendant did not assert his mental condition in support of or as a defense to a claim, and since movant failed to show that defendant's mental condition was material to any fact in issue, the defendant's mental condition was not in controversy and the motion was properly denied.

Although there is little authority concerning successive physical examinations generally, the result in the noted case is sound. Successive physical examinations

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32. Teche Lines, Inc. v. Boyette, 111 F.2d 579 (5th Cir. 1940).

33. Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres, 255 F.2d 149 (1st Cir. 1958).

34. 379 U.S. 104 (1964).

35. The Court clearly held that the party to be examined need only be an opponent vis-a-vis the movant, thus one co-defendant had standing to request a physical examination of the other.

36. See, *e.g.*, Harabedian v. Superior Court, 195 Cal. App.2d 26, 15 Cal. Rptr. 420 (1961); Annot. 89 A.L.R.2d 1001 (1963).

37. Schlagenhauf v. Holder, 379 U.S. 104, 119 (1964):

> This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing.

38. 357 S.W.2d 74 (Mo. 1962).

should be possible in proper cases. When the physical or mental condition of a party is in controversy, and movant shows the requisite good cause for the second examination, the court should, as was done here, balance the inconvenience and hardship to the plaintiff in requiring the second examination against the harm to the defendant and be guided accordingly. Here, the court noted that the defendant's doctors could not be produced for trial at a distant forum. Since the second examination did not apparently involve any painful procedures, and the inconvenience to the plaintiff was relatively slight, the motion was properly granted. Although this exact case has not yet arisen in Missouri, with the great similarity between Missouri rule 60.01 and federal rule 35, the noted case should be useful authority. It is hoped and expected that a Missouri court would reach the same result.

DAVID B. ROGERS

CRIMINAL LAW—CREDIT FOR PRE-SENTENCE CUSTODY

Dunn v. United States[1]

William Dunn was indicted for knowingly transporting a stolen vehicle across a state line in violation of the Dyer Act.[2] Financially unable to furnish the required $10,000.00 bond, he spent 56 days in jail awaiting trial. He was tried and convicted in the United States District Court for the Western District of South Carolina and given the maximum sentence of five years.[3] The Fourth Circuit Court of Appeals affirmed the conviction.[4]

After his unsuccessful appeal, Dunn moved for a credit of 56 days to be applied against his sentence for the time he spent in jail awaiting trial.[5] The district court denied the motion[6] on the ground that, under 18 U.S.C. section 3568 (1964),[7] credit for pre-sentence custody is warranted only when the offense under which sentence was imposed requires a minimum mandatory sentence. Since conviction

1. 376 F.2d 191 (4th Cir. 1967).
2. "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5000 or imprisoned not more than five years or both." The Dyer Act, 18 U.S.C. § 2312 (1964).
3. Dunn v. United States, 38 F.R.D. 182 (W.D.S.C. 1965).
4. United States v. Luciano, 343 F.2d 172 (4th Cir. 1965).
5. The motion was made pursuant to FED. R. CRIM. P. 35, "The court may reduce a sentence . . . within 60 dayas after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal . . . ."
6. Dunn v. United States, 38 F.R.D. 182 (W.D.S.C. 1965).
7. ". . . the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence." 18 U.S.C. § 3568 (1964).

under the Dyer Act[8] does not require a minimum mandatory sentence, the court concluded that Dunn was not entitled to the credit requested.

Dunn appealed the district court ruling. The Fourth Circuit Court of Appeals reversed and remanded with directions to correct the sentence and expedite appellant's release by 56 days.[9] The court concluded that denial of credit to defendant because the statute under which sentence was imposed did not require a mandatory minimum was an unconstitutional discrimination.[10] To avoid declaring section 3568 unconstitutional, it was construed as extending the right to credit for pre-sentence custody to the previously excluded class (minimum term offenders), but not to withdraw it from other defendants to whom it had customarily been given.[11]

The general provisions of section 3568 provide that a defendant's sentence shall commence from the date he is received at the penitentiary.[12] Traditionally federal courts have referred to this general language in holding that no defendant sentenced under a federal statute could receive credit for pre-sentence custody as a matter of right[13] unless he was unconstitutionally denied bail.[14] However, federal courts did allow credit as a matter of course to defendants who were convicted under statutes not requiring the imposition of a minimum sentence.[15] Credit was withheld from the minimum term offender because the courts felt they lacked authority to reduce sentences for offenses that Congress considered serious enough to warrant restricting the sentencing court's discretion by fixing mandatory minima.[16]

Congress recognized that denying credit to minimum term offenders created an unwarranted disparity in the effective sentences of those who made bail and those who did not. To alleviate this inequity, Congress amended section 3568 in September, 1960 by adding a proviso granting automatic credit for pre-sentence custody to minimum term offenders.[17] According to *Dunn* the purpose of this amendment was to expand the right to credit for pre-sentence custody to a previously excluded class of defendants.[18] No provision was made for defendants not subject to statutory minimum sentences because Congress assumed credit would continue to be given to these defendants as in the past.[19]

In *Scott v. United States*[20] the Eighth Circuit Court of Appeals had occasion

8. The Dyer Act, 18 U.S.C. § 2312 (1964).
9. 376 F.2d at 194.
10. 376 F.2d at 194; The court based its constitutional argument on the Due Process Clause under the fifth amendment. U.S. CONST. amend. V.
11. 376 F.2d at 193-194; Prior to the 1960 amendment to § 3568, as a matter of course federal courts uniformly provided defendants with credit against their sentences for time spent in jail for lack of bail, except in the case of minimum term offenders. Stapf v. United States, 367 F.2d 326, 328 (D.C. Cir. 1966).
12. 18 U.S.C. § 3568 (1964).
13. Byers v. United States, 175 F.2d 654, 656 (10th Cir. 1949).
14. Yates v. United States, 356 U.S. 363, 367 (1958); Short v. United States, 344 F.2d 550, 554 (D.C. Cir. 1965).
15. Dunn v. United States, 376 F.2d 191, 193 (4th Cir. 1967).
16. Stapf v. United States, 367 F.2d 326, 328 (D.C. Cir. 1966).
17. See statute quoted note 7 *supra*.
18. 376 F.2d at 194.
19. Stapf v. United States, 367 F.2d 326, 328 (D.C. Cir. 1966).
20. 326 F.2d 343 (8th Cir. 1964).

to construe section 3568 as amended. Carlton Scott was convicted of a Dyer Act[21] violation and was refused credit for the six months that he had been held in custody awaiting trial. The Court held that since the offense did not require a minmum mandatory sentence,[22] the general provisions of section 3568 should be applied, and the sentence should commence from the date on which he was received at the penitentiary.[23] The effect of the *Scott* decision was to limit the class of defendants entitled to credit under section 3568 to those convicted of minimum term offenses. Thus, anomalously, a person convicted of a lesser offense[24] was refused credit, while others convicted of more serious offenses were given credit automatically under the statute.

The inequities created by the *Scott* decision did not withstand a constitutional attack. In *Stapf v. United States*,[25] the United States Court of Appeals for the District of Columbia distinguished *Scott*. The *Stapf* case represented the consolidated appeal of four defendants, all of whom had been denied credit under section 3568 because they were not minimum term offenders. The court held the denial of credit to these defendants, when others guilty of offenses of the same or greater magnitude were automatically given credit, constituted an arbitrary discrimination in violation of the fifth amendment.[26] The *Scott* case was distinguished on the basis that the issue of arbitrary discrimination had not been raised there.[27]

The Fourth Circuit Court of Appeals in the *Dunn* case followed *Stapf* and held that denial of credit to defendant because he was not a minimum term offender was an arbitrary discrimination.[28] The Court held that a defendant must be credited for pre-sentence custody no matter what the range of penalty imposed and regardless of whether a mandatory minimum attaches to the offense of which he is convicted.[29] Congress also confirmed the holding of the *Stapf* case by amending section 3568 in September, 1966 to provide automatic credit for any defendant convicted in a federal court after the effective date of the amendment.[30]

Section 3568 by its own terms is inapplicable to state judicial proceedings.[31] Therefore, within constitutional limitations, the states are free to formulate their

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21. The Dyer Act, 18 U.S.C. § 2312 (1964).
22. Scott v. United States, 326 F.2d 343, 344 (8th Cir. 1964).
23. Scott v. United States, *supra* note 22; 18 U.S.C. § 3568 (1964).
24. The general statutory pattern is that the more serious offenses require minimum mandatory sentences, while the less serious offenses do not. For example, in Missouri first and second degree robbery offenses require five and three year minimum mandatory sentences, while no minimum sentence is required for third degree robbery. § 560.135, RSMo 1959.
25. 367 F.2d 326 (D.C. Cir. 1966).
26. *Id.* at 329.
27. *Id.* at 330.
28. 376 F.2d at 193-94.
29. *Ibid.*
30. The Bail Reform Act of 1966, 18 U.S.C.A. § 3568 (1966 Supp.); The effective date of the amendment was ninety days after June 22, 1966.
31. As used in this section, the term "offense" means any criminal offense, . . . which is in violation of an Act of Congress and is triable in any court established by Act of Congress." The Bail Reform Act of 1966, 18 U.S.C.A. § 3568 (1966 Supp.); Sinclair v. State, 99 So. 2d 238, 240 (Fla. Ct. App. 1957).

own rules for granting credit for pre-sentence custody. In 1959 the Missouri Legislature enacted a statute authorizing credit for pre-sentence custody to anyone convicted of a state offense.[32] This statute authorizes credit for all offenders, including those convicted of minimum term offenses; however, it differs from section 3568 in that credit is not automatically given, but is left to the discretion of the judge.[33]

Although the Missouri statute treats all offenders equally, its discretionary feature coupled with Missouri case law may result in discriminatory practices against the minimum term offender. A series of Missouri cases[34] have held that the court cannot fix the date on which the sentence shall commence. Rather, the sentence by operation of law must commence on the date of sentencing. According to these cases, any part of a judgment which specifies that a sentence is to start at a date prior to the date of sentencing is surplusage.[35] This means the only effective way of granting credit in a Missouri court is by actually reducing the length of the sentence imposed. Any attempt by the court to grant credit by antedating the sentence would be a nullity according to Missouri case law.[36]

A defendant convicted under a Missouri statute that does not require a minimum sentence is not handicapped by the inability of the court to prescribe the effective date of the sentence. A reduction of the length of his sentence to reflect the credit due for pre-sentence custody does not conflict with any statutory minimum. However, the minimum term offender who is sentenced for the minimum period may have difficulty in persuading the court to reduce his sentence below the statutory minimum. Since reduction of the length of sentence is the only permissible method of granting credit in Missouri, the minimum term offender in this situation may be without a remedy.

Prior to 1960 the federal courts systematically denied credit to minimum term offenders because they felt they lacked the authority to reduce sentences below the statutory limits.[37] The discretionary feature of the Missouri statute[38] would allow Missouri courts to follow this same pattern. On the other hand, the development of the federal law on this matter may influence the Missouri courts to use this discretion to achieve uniform sentence reduction.

Only two cases have been decided under the Missouri statute and neither case involved a minimum term offender.[39] However, the Missouri courts must eventually face the same dilemma that confronted the federal courts prior to the

32. § 546.615, RSMo 1959.
33. State v. Thompson, 414 S.W.2d 261, 268 (Mo. 1967).
34. State v. Runyon, 411 S.W.2d 69, 71 (Mo. 1967); State v. Testerman, 408 S.W.2d 90, 92 (Mo. 1966); Higlin v. Kaiser, 352 Mo. 796, 798, 179 S.W.2d 471, 472 (En Banc 1944).
35. *Ibid.*
36. *Ibid.*
37. Stapf v. United States, 367 F.2d 326, 328 (D.C. Cir. 1966).
38. § 546.615, RSMo 1959.
39. State v. Grant, 380 S.W.2d 799 (Mo. 1964); State v. Thompson, 414 S.W.2d 261 (Mo. 1967).

amendment of section 3568.[40] If the minimum term offender is discriminated against, then the solution would seem to lie in amending the statute to provide automatic credit for all offenders as in the federal courts.

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40. The Bail Reform Act of 1966, 18 U.S.C.A. § 3568 (1966 Supp.).