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of the injured spouse. While the marital community is harmed if the injured spouse is kept from contributing earnings or services to the community, the injured spouse is also harmed in a very personal way that does not affect the community. The better approach, which is fully supported by the language of the statute, its legislative history and intent, and the current trend in community property states, is that the recovery for a personal injury should be partially marital property, compensating the marital community for its injuries, and partially the separate property of the injured spouse, in compensation for his separate injuries. In view of the presumption in favor of marital property contained in section 452.330 (3), the spouse suffering injuries would have the burden of establishing what portion of the damages was awarded as personal compensation. However, the courts should not hesitate to make such a finding upon a proper showing and thereby subject only the portion awarded as compensation to the marital community to division as marital property.

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LIMITATION OF ACTIONS – CONTRACTS – THE MISSOURI STATUTES OF LIMITATIONS AS APPLIED TO ACTIONS ON CONTRACTS

Bangert v. Boise Cascade Corp.[1]

In 1965, real estate owned by William Bangert and his wife was leased to the R.C. Can Company. The lease agreement contained a provision prohibiting assignment or transfer of any interest in the lease without the prior written consent of the Bangerts. The lease also included a provision for liquidated damages. R.C. Can Company merged with Boise Cascade Corporation in 1967 without obtaining the Bangerts' consent. The Bangerts claimed that the merger constituted an assignment or transfer of the lease and served notice of breach upon Boise Cascade in 1969. Later the mortgage on the property was foreclosed and Boise Cascade bought the property from the purchaser at the foreclosure sale.

In 1974, seven years after the merger, the Bangerts brought an action against Boise Cascade for damages from the alleged breach of the lease. Boise Cascade asserted the Missouri statute of limitations as a defense. The district court held that the action was barred by the five-year statute of limitations[2] on contract actions. The United States Court of Appeals for the Eighth Circuit affirmed.[3]

In reaching its decision, the court was required to interpret two statutes of limitations. Section 516.120, RSMo 1969, states that actions

1. 527 F.2d 902 (8th Cir. 1976).
2. § 516.120, RSMo 1969.
3. 527 F.2d 902 (8th Cir. 1976).

based upon contracts, obligations, or liabilities, express or implied, must be commenced within five years unless the action is mentioned in section 516.110, RSMo 1969. Section 516.110 extends the period to ten years if the action is upon any writing for the payment of money or property. The primary issue before the court was whether the action was upon a writing for the payment of money. The court discussed several recent cases construing these two statutes of limitations.[4] The court concluded that these cases stand for the proposition that actions for damages for breach of contract are governed by section 516.120, whereas actions for the enforcement of a contract are governed by section 516.110.[5] The court held that the action was for breach rather than for enforcement of the contract, and thus was barred by section 516.120.

Past Missouri decisions interpreting these two sections have rarely stated the rule in the terms used in *Bangert*. The cases have generally turned on whether the defendant's liability stemmed from a promise—express or implied—in the language of the writing or from an obligation arising from the contract by operation of law. If the action was on a "promise" section 516.110 applied; if on an "obligation" section 516.120 applied.[6]

The broad language of section 516.110 obviously includes express promises such as are found in promissory notes, but it is not limited to express promises. The language also includes implied promises to pay money. Such promises must be fairly implied from the language of the writing in order to come within the section.[7] Unless the payment sued for is promised, either expressly or impliedly, by the terms of the writing, the ten-year statute does not apply.[8]

A distinction must be drawn between a promise implied from the terms of a writing and a "promise" or obligation which is implied by law. An example of an obligation implied by law is a principal's obligation to reimburse his surety after the surety has paid the principal's debt.[9] This obligation arises by operation of law and not from a promise

4. Silton v. Kansas City, 446 S.W.2d 129 (Mo. 1969); Sam Kraus Co. v. State Highway Comm'n., 416 S.W.2d 639 (Mo. 1967); South Side Realty Co. v. Hamblin, 387 S.W.2d 224 (K.C. Mo. App. 1964); Martin v. Potashnick, 217 S.W.2d 379 (Mo. 1949); McIntyre v. Kansas City, 237 Mo. App. 1178, 171 S.W.2d 805 (K.C. Ct. App. 1943); Missouri, K. & T. Ry. v. American Surety Co., 291 Mo. 92, 236 S.W. 657 (En Banc 1921).

5. 527 F.2d at 905.

6. *See* note 12 *infra*.

7. Silton v. Kansas City, 446 S.W.2d 129 (Mo. 1969); South Side Realty Co. v. Hamblin, 387 S.W.2d 224 (K.C. Mo. App. 1964); Lehner v. Roth, 211 Mo. App. 1, 227 S.W. 833 (St. L. Ct. App. 1921). An example of an implied promise is found in Ball v. Pepper Cotton Press Co., 141 Mo. App. 26, 121 S.W. 798 (St. L. Ct. App. 1909). A resolution by corporate directors to pay to shareholders a certain sum accompanied by a credit on the ledger in favor of the plaintiff shareholder was held to constitute an implied promise in writing to pay money within the meaning of § 516.110, RSMo 1969.

8. *See, e.g.*, Quint v. Kingsbury, 289 S.W. 667 (K.C. Mo. App. 1927).

9. This type of action is governed by § 516.120. Krebs v. Bezler, 338 Mo. 365, 89 S.W.2d 935 (1936).

by the principal to reimburse the surety. It is not implied from the language of the writing itself.

This is one area in which the cases have been inconsistent although the problem may be basically one of semantics. For instance, an action against an endorser of a draft who had guaranteed prior endorsements was held to be an action upon a writing for the payment of money governed by the ten-year statute of limitations.[10] The written guarantee was construed to be an implied promise to pay if any of the prior endorsements were not genuine. The court went on to state that "the obligations that the law implies into a written contract are just as much a part of it as the writing itself."[11] The court spoke in terms of a promise implied by law when, in fact, the promise was implied from the language of the writing. This is misleading because several cases have held that if the promise does not arise from the language of the writing, but is rather an obligation implied by law from the transaction or facts alleged, then the action is within the five-year limitations period of section 516.120.[12] Another example may help to clarify this distinction. In *Gregg v. Carroll*[13] two joint obligees of a note endorsed and sold it. The obligor defaulted and one of the obligees paid off the note and brought an action against the other for reimbursement. Although their written endorsements constituted implied promises to pay the note, the court held that the liability of each endorser as to the other was an obligation implied by law and therefore governed by what is now section 516.120.

In order to determine whether the "promise" arises by operation of law or from the writing itself, Missouri courts look to the need to introduce extrinsic evidence to show the existence of the promise. If the promise is found to be express or fairly implied from the writing—*i.e.*, if no extrinsic evidence is necessary to show the existence of the promise—then section 516.110 governs. However, if the existence of the promise arises only upon proof of extrinsic facts, then section 516.120 applies.[14]

Once the promise is found to be express or fairly implied from the writing, section 516.110 applies regardless of whether the promise creates a fixed and absolute liability or whether such liability is contingent upon the occurrence of some future event. It has often been stated that a promise to pay money may come within the ten-year period of limitations, even though the amount of money to be paid is conditional, contingent, or

10. Home Ins. Co. v. Mercantile Trust Co., 219 Mo. App. 645, 284 S.W. 834 (St. L. Ct. App. 1926). *See also* Borserine v. Maryland Cas. Co., 112 F.2d 409 (8th Cir. 1940).

11. 219 Mo. App. at 653, 284 S.W. at 836.

12. Silton v. Kansas City, 446 S.W.2d 129 (Mo. 1969); National Sur. Co. v. Columbia Nat'l Bank 348 Mo. 226, 153 S.W.2d 364 (1941); Lively v. Tabor, 341 Mo. 352, 107 S.W.2d 62 (1937).

13. 201 Mo. App. 473, 211 S.W. 914 (K.C. Ct. App. 1919).

14. *See, e.g.*, Silton v. Kansas City, 446 S.W.2d 129 (Mo. 1969); Sam Kraus Co. v. State Highway Comm'n., 416 S.W.2d 639 (Mo. 1967); Bisesi v. Farm & Home Sav. and Loan Ass'n, 231 Mo. App. 897, 79 S.W.2d 871 (St. L. Ct. App. 1935).

subsequently to be ascertained.[15] In fact, even a promise which is itself conditional comes within section 516.110 once the condition upon which it was made occurs.[16] *Howe v. Mittelberg*[17] involved an action upon a written agreement by the seller of corporate stock to buy back the stock at its cost price upon the demand of the buyer. The promised payment was conditional or contingent upon the demand by the buyer. The Missouri Supreme Court held the action to be upon a writing for the payment of money within the ten-year statute of limitations, regardless of the contingency. The courts require only that the promise be express or implied from the language of the writing. If this requirement is met, it is of no consequence that extrinsic evidence is necessary to show that the promise has ripened into a legal obligation.[18]

In *Bangert* the court concluded that actions for breach of a contract are governed by section 516.120, whereas actions for enforcement of a contract come within the purview of section 516.110.[19] Prior cases appear to justify this conclusion, but it should be pointed out that *Bangert* is the first case to discuss the rule extensively in these terms.[20] For example, in *Curtis v. Sexton*[21] the court talked in terms of showing the performance of the contract on the part of the plaintiff and the breach on the part of the defendant even though this was an action to enforce the contract.

Evidently, courts look at actions to enforce promises in contracts as actions upon conditional promises which have ripened into legal obligations due to the fulfillment of the condition. In other words, a contractual promise is contingent upon performance by the other party. Once that performance is complete the promise is enforceable and an action to enforce it should be governed by section 516.110. The best example of this is *McIntyre v. Kansas City*.[22] An architect entered into a contract with Kansas City whereby he agreed to prepare plans for and supervise the building of a viaduct. His compensation was to be a percentage of the cost of the viaduct. He prepared the plans but the viaduct was never built. The architect then sued for *damages* for breach of contract. The court held that the action was barred by the five-year statute of limitations, but added that if construction had been completed and the city failed to pay as promised, the architect's action would have been on a

15. Martin v. Potashnick, 217 S.W.2d 379 (Mo. 1949); Lorberg v. Jaynes, 298 S.W. 1059 (St. L. Mo. App. 1927).

16. Parker-Washington Co. v. Dennison, 267 Mo. 199, 183 S.W. 1041 (1916).

17. 96 Mo. App. 490, 70 S.W. 396 (St. L. Ct. App. 1902). *See also* Curtis v. Sexton, 201 Mo. 217, 100 S.W. 17 (1907).

18. Brown v. Irving, 269 S.W. 686 (K.C. Mo. App. 1925).

19. This terminology is confusing because suits for breach or enforcement of a contract are generally considered to be the same type of action. Thus, the court appears to have made an artificial distinction for purposes of the statutes of limitations.

20. The court in Silton v. Kansas City, 446 S.W.2d 129 (Mo. 1969), made this distinction between breach and enforcement but did not discuss it at any length.

21. 201 Mo. 217, 100 S.W. 17 (1907).

22. 237 Mo. App. 1178, 171 S.W.2d 805 (K.C. Ct. App. 1943).

writing for the payment of money and the ten-year statute would have applied.[23]

In *Herweck v. Rhodes*[24] the plaintiff paid a sum of money to the defendant who, in exchange, agreed to deliver a deed of trust to the plaintiff. The defendant failed to deliver and the plaintiff brought suit for the value of the deed of trust rather than for its delivery. The court held that the action was essentially one for damages for breach of contract and therefore barred by the five-year statute of limitations. There was no express or implied promise on the part of the defendant to repay the money or to pay any sum of money by way of damages for failure to deliver the deed of trust. It appears that an action to compel delivery would have come within the ten-year statute of limitations.

Under the theory of these cases, the nature of the breach in *Bangert* probably creates a cause of action which should be governed by section 516.120. There was no express or implied promise by the lessee corporation to pay for any damages which might be sustained as a result of its breach. Such an obligation is implied by law from the fact that there was a breach which resulted in damages to the Bangerts.

It may be contended, however, that a different decision should have been reached because of the existence of the liquidated damages provision in the lease. The *Bangert* court stated that this provision did not affect the decision because the plaintiffs were not suing to enforce the contract. It was emphasized that the basis of the obligation created by the provision was a breach of the contract which must be shown by extrinsic evidence, and which was contested by the lessee corporation.[25] However, it has already been noted that a promise may be conditional or contingent and still come within the purview of section 516.110.[26] A liquidated damages clause is nothing more than a promise to pay an amount of money upon the occurrence of certain contingencies. The contingency which activates a liquidated damages provision is a breach of the contract. In actions to enforce contracts, noncompliance by the defendant may be shown by extrinsic evidence. By analogy, the contingency that a breach has occurred may also be shown by the use of extrinsic evidence.[27] The fact that the breach is contested should make no difference as long as a breach is finally established. Although the court was correct in saying that this was an action for breach of contract rather than for the enforcement of a contract, it may have been incorrect in stating that the Bangerts

23. 237 Mo. App. at 1189, 171 S.W.2d at 811.

24. 327 Mo. 29, 34 S.W.2d 32 (1931). *See also* Bisesi v. Farm and Home Sav. & Loan Ass'n, 231 Mo. App. 897, 78 S.W.2d 871 (St. L. Ct. App. 1935), in which the plaintiff paid for stock which the defendant never delivered. The plaintiff sued to have his money returned, rather than to enforce delivery of the stock. The court held the action was barred by the five-year statute of limitations.

25. 527 F.2d at 905.

26. *See* text accompanying note 15 *supra*.

27. *See, e.g.*, Home Ins. Co. v. Mercantile Trust Co., 219 Mo. App. 645, 284 S.W. 834 (St. L. Ct. App. 1926); Brown v. Irving, 269 S.W. 686 (K.C. Mo. App. 1925).