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Continuing Plight of the Farmer: The Need for Reform in Missouri Law Dealing with Growing Crops

*Fletcher v. Stillman*¹

I. INTRODUCTION

“The biggest and finest crop of revolutions you ever saw is sprouting all over this country right now.”² John A. Simpson, president of the National Farmers Union, made that statement to the Senate Committee on Agriculture in 1933.³ Edward A. O’Neal, III, president of the American Farm Bureau Federation, then added that “[u]nless something is done for the American farmer we’ll have revolution in the countryside in less than twelve months.”⁴ Although those statements were made over sixty years ago, they remain true today in an economy that is rife with agricultural difficulties.⁵

The number of farms in the United States has declined steadily since the 1930s.⁶ Now, only approximately 2.06 million farms remain across the country.⁷ Similarly, the number of farms in Missouri has decreased by twenty-one percent in the past forty-five years.⁸ This decrease can be traced to problems originating in the mid-1970s and early 1980s, when increased inflation led to an increase in cash flow for farmers.⁹ Many farmers used their increase in cash flow to purchase additional land, but with money borrowed at long-term, high interest

1. 934 S.W.2d 597 (Mo. Ct. App. 1996).

2. Preston D. Rideout, Jr., *Ownership of Crops on Foreclosed Land, Priority of Crop Liens and After-Acquired Property Clauses in Farm Bankruptcies*, 58 MISS. L.J. 481, 481 (1988). This statement was made in January of 1933 after incidents around the United States sparked the possibility of a revolt by farmers. *Id.* These incidents included: (1) a murdered lawyer who had just foreclosed a farm in Kansas; (2) foreclosure riots in Iowa; and (3) a group of lawyers representing insurance companies in the East who were kidnaped and threatened with the noose until their company agreed to a mortgage moratorium. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 481-82. See *infra* notes 6-12 and the accompanying text for a description of the present agricultural economy.

6. Charles Abbott Reuters, *Glickman Appoints Commission to Aide U.S. Small Farms*, COM. APPEAL, July 17, 1997, at B7.

7. *Id.*

8. Nanci Averett, *Bucking the Trend (and Odds) Against Small Farms*, CHI. TRIB., July 11, 1997, at A8. This statistic was provided by John Ikerd, a University of Missouri professor of agricultural economics. *Id.* Ikerd also stated that “[t]he trend has been to fewer and fewer farms all the time.” *Id.*

9. Rideout, Jr., *supra* note 2, at 482.

rates.¹⁰ The subsequent decrease in inflation, however, led to a corresponding decrease in land value.¹¹ As a result, farmers now are unable to pay off their huge land debts strapped with the original long-term, high interest rates.¹²

With the current decline in the agricultural economy, many farmers lost their land as lending institutions sold their property at foreclosure sales. The holding in *Fletcher v. Stillman* and decisions in many other jurisdictions further plague the farmer and deprive them of much needed cash by distributing their crops to purchasers at foreclosure sales. Because of this grave situation, pro-farmer laws need to be enacted to revitalize the current agricultural economy.

II. FACTS AND HOLDING

On September 28, 1992, Jack R. Fletcher, Patricia A. Fletcher, James L. Fletcher, Sr. and Maxine Fletcher (the Fletchers) purchased a farm located in New Madrid County, Missouri at a foreclosure sale.¹³ A mature, but unharvested, soybean crop remained on the land when the foreclosure sale occurred.¹⁴ A dispute arose following the foreclosure sale when the renter harvested the soybean crop and then placed the landlord's one-third share of the proceeds in a joint account.¹⁵ The Fletchers asserted that they were entitled to the profits from the soybean crop.¹⁶ The Fletchers believed that any crops that had not been harvested at the time of the foreclosure sale passed with the land.¹⁷ However, Nancy Stillman (Stillman), the beneficiary of a management trust that held title to the land until the foreclosure sale, claimed that she was entitled to the proceeds because the soybeans had matured at the date of the foreclosure sale.¹⁸

10. *Id.* at 482-83.

11. *Id.* at 483.

12. *Id.*

13. *Fletcher v. Stillman*, 934 S.W.2d 597, 597 (Mo. Ct. App. 1996).

14. *Id.* An individual renting the land planted the soybean crop. *Id.* No further information appears in the opinion regarding the renter. It appears that the renter had no significance to the outcome of this decision.

15. *Id.* The proceeds from the harvest were put in the joint account pending resolution of this forthcoming dispute. *Id.* Although a suit actually had not been filed at the time of the harvest, it appears that the renter anticipated future litigation over the proceeds.

16. *Id.*

17. *Id.*

18. *Id.* Stillman believed that this was a case of first impression because the previous cases decided in Missouri regarding the distribution of crops had dealt with crops that were still growing at the time of the foreclosure sale. *Id.* at 598. In this instance, the crops were completely mature and ready to harvest. *Id.* at 597.

The Fletchers filed suit in the Circuit Court of Dunklin County claiming entitlement to the proceeds.¹⁹ The trial court entered judgment for the Fletchers and determined that it was bound by existing case law.²⁰ Stillman appealed this judgment, but the Southern District of the Missouri Court of Appeals affirmed the trial court's decision to grant the proceeds to the Fletchers.²¹ Following prior Missouri Supreme Court cases, the court held that purchasers at a foreclosure sale are entitled to harvest the crops and retain the proceeds unless the crops were severed from the land prior to the sale.²² These prior cases rejected the doctrine of constructive severance of the crops.²³ Therefore, the *Fletcher* court held that it was constitutionally bound to follow the previously reached decisions, and likewise rejected the doctrine of constructive severance.²⁴

III. LEGAL BACKGROUND

A. *The Common Law and State Statutory Approaches to the Distribution of Crops*

In most jurisdictions, the general common law rule provides that growing crops pass with the conveyance of a fee interest in land.²⁵ However, an

19. *Id.* at 597.

20. *Id.* In particular, the trial court stated that it was bound by the case of *Holdsworth v. Key*, 520 S.W.2d 637 (Mo. Ct. App. 1975), *superseded by stat., as recognized in In re Temple Stephens Co.*, 156 B.R. 38 (Bankr. W.D. Mo. 1993). *Id.* In *Holdsworth*, the court stated that “[i]n Missouri, it is a settled legal principle of long standing that unless otherwise provided in the deed of trust, unsevered crops standing on mortgaged land at the time of a foreclosure sale are subject to the lien of the deed of trust and pass to the purchaser of the land at the foreclosure sale.” *Holdsworth*, 520 S.W.2d at 639.

21. *Fletcher*, 934 S.W.2d at 597.

22. *Id.* at 599-600. See *infra* notes 139-48 and accompanying text for a detailed discussion of the Missouri cases that the court of appeals followed.

23. *Id.* at 598-99. The doctrine of constructive severance of crops states that once a crop matures and is no longer dependent on the soil, then a constructive severance occurs and it is as if the crops were already harvested and stored in a warehouse or barn. *Id.* at 598. For additional discussion on the doctrine of constructive severance, see *infra* note 30.

24. *Id.* at 598-99. Stillman argued that the court should follow the doctrine of constructive severance and included support from several jurisdictions which adhered to the doctrine. *Id.* at 599. However, no jurisdictions which encompassed Missouri were included in her support. *Id.* The court specifically stated that it was “bound to follow the controlling decisions of the Supreme Court of Missouri,” and, therefore, it could not accept the doctrine of constructive severance. *Id.*

25. Rideout, Jr., *supra* note 2, at 489. See also Julia Patterson Forrester, *A Uniform and More Rational Approach to Rents as Security for the Mortgage Loan*, 46 RUTGERS L. REV. 349, 409-10 (1994); David A. Lander, *Article 9 of the Uniform Commercial*

exception exists that allows the vendor to reserve his rights to the crops.²⁶ Nonetheless, unlike the relative predictability when addressing growing crops, courts generally remain divided on the issue of whether mature crops pass with realty at the time of a conveyance.²⁷

Missouri courts follow the common law enunciated by most jurisdictions. Thus, growing crops are considered realty and pass with the conveyance of the land, unless the vendor specifically reserves a right to the harvest.²⁸ The only method available to remove the crop from the lien at a foreclosure sale is to sever the crop from the ground prior to the sale.²⁹ Several Missouri courts have recognized that landowners may sell a crop while it still is growing on the land; however, this “constructive severance” is not effective to remove the crop from any deed of trust or to negate the consequences of a foreclosure sale.³⁰ Therefore, under Missouri common law, when a foreclosure sale occurs, the crops will pass with the realty to the purchaser at the foreclosure sale unless the crops actually are severed from the land.³¹

Code and Agricultural Collateral, 409 PLI/COMM 397, 402 (1987); Keith G. Meyer, *A Potpourri of Agricultural U.C.C. Issues: Attachment, Real Estate-Growing Crops and Federalization*, 12 HAMLIN L. REV. 741, 751 (1989). These scholars and courts reason that growing crops should pass to the purchaser with the title to the land because growing crops are deemed to be part of the nature of the realty. David M. Holliday, Annotation, *Conveyance of Land as Including Mature but Unharvested Crops*, 51 A.L.R. 4th 1263, 1266 (1987).

26. Rideout, Jr., *supra* note 2, at 489. Most states refer to this exception in their general common law rule. See *infra* notes 28, 33-47 for examples of states that discuss this exception.

27. See Holliday, *supra* note 25, at 1266.

28. Gerald D. Weidner, *Growing Crops in Missouri: The Real Estate Law-UCC Conflict*, 52 MO. L. REV. 647, 648 (1987). Missouri follows the general common law approach.

29. *Id.* at 649. Actual severance occurs after the crop is harvested and is the only method available to remove the crop from the lien. *Id.* Once the crop is severed from the ground, it becomes personalty and does not pass with the realty at a conveyance of the land. *Id.*

30. See, e.g., *Farmers' Bank v. Bradley*, 288 S.W. 774, 775 (Mo. 1926); *Starkey v. Powell*, 288 S.W. 776, 776 (Mo. 1926), *superseded by stat.*, as recognized in *In re Temple Stephens Co., Inc.*, 156 B.R. 38, 39 (Bankr. W.D. Mo. 1993); *Holdsworth v. Key*, 520 S.W.2d 637, 640 (Mo. Ct. App. 1975), *superseded by stat.*, as recognized in *In re Temple Stephens Co., Inc.*, 156 B.R. 38, 39 (Bankr. W.D. Mo. 1993). For a more comprehensive definition of “constructive severance,” see *Falk v. Amsberry*, 633 P.2d 799, 802 n.1 (Or. Ct. App. 1981) (constructive severance occurs when an item on property is deemed severed from the land, although it has not actually been physically removed from the land). For additional comments regarding the doctrine of constructive severance, see *supra* note 23. Several courts have adopted the doctrine of constructive severance. See *infra* notes 52-60.

31. See discussion *supra* note 29.

Although state courts are split throughout the United States as to whether mature crops should pass with the realty at a foreclosure sale when an actual severance has not occurred,³² several states follow the law applied by Missouri courts that unless an actual severance has occurred, the crops pass to the purchaser at a foreclosure sale.³³ These states include: Delaware,³⁴ Illinois,³⁵ Indiana,³⁶ Michigan,³⁷ Minnesota,³⁸ Mississippi,³⁹ Nebraska,⁴⁰ New Jersey,⁴¹ North Carolina,⁴² Oklahoma,⁴³ Oregon,⁴⁴ South Carolina,⁴⁵ Tennessee,⁴⁶ and Washington.⁴⁷ These states base their holdings on the idea that the degree of

32. See Holliday, *supra* note 25, at 1266.

33. Fletcher v. Stillman, 934 S.W.2d 597, 598 (Mo. Ct. App. 1996) (finding that crops pass with title to the land, whether mature or immature).

34. Womach v. Thomas, 486 A.2d 15, 18 (Del. Ch. 1984) (holding that mature crops are not excepted from the general rule that title to crops pass with the land, unless specifically reserved by the seller).

35. Chicago Joint Stock Land Bank v. McCambridge, 175 N.E. 834, 836 (Ill. 1931) (finding that the grantee becomes vested with complete title to the land and all crops growing or grown, mature or immature on the land).

36. *In re Estate of Meyer*, 668 N.E.2d 263, 266 (Ind. Ct. App. 1996) (reasoning that growing crops follow title to realty without agreement to the contrary).

37. Kroh v. Dobson, 37 N.W.2d 144, 145-46 (Mich. 1949) (determining that crops, whether mature or immature, pass with the realty, absent contrary intent in the contract).

38. Christenson v. Town of Dollymount, 63 N.W.2d 367, 368 (Minn. 1954) (stating that owner who possesses land acquires title to all crops growing on the land at that time).

39. Ellis v. Sutton, 88 So. 519, 521 (Miss. 1921) (noting that purchaser acquires crops at conveyance, even though the crops are mature).

40. Kobza v. Spath, 90 N.W.2d 246, 252-53 (Neb. 1958) (holding that unless reserved, crops standing on the ground, whether mature or not, pass to the purchaser at a sale).

41. Eckman v. Beihl, 184 A. 430, 434 (N.J. 1936) (holding that conveyance of real estate carries with it the crops, unless there is an express reservation in the deed).

42. Swindell v. Overton, 302 S.E.2d 841, 847 (N.C. Ct. App. 1983), *rev'd on other grounds*, 314 S.E.2d 512 (N.C. 1984) (determining that purchaser at foreclosure sale is entitled to unsevered crops).

43. Dixon v. Pugh, 178 P. 880, 882 (Okla. 1919) (finding that purchasers of land at a foreclosure sale are entitled to all crops on the land, whether mature or immature).

44. Falk v. Amsberry, 633 P.2d 799, 802-03 (Or. Ct. App. 1981) (determining that conveyance of land will convey the crops to the purchaser, unless reserved by the vendor).

45. Smith v. Bankhead, 106 S.E. 469 (S.C. 1921) (noting that crops still attached to the land pass with the conveyance of the land).

46. Langford v. Hudson, 241 S.W. 393, 394-95 (Tenn. 1922) (holding that crops pass with the land at a conveyance).

47. Rudy-Patrick Co. v. Dela Costa Farming Co., 557 P.2d 869, 872 (Wash. Ct. App. 1976) (concluding that crops pass with the realty, whether unripe or mature, absent reservation in the deed).

maturity of crops should not be the controlling factor used to determine the owner of crops after a foreclosure sale.⁴⁸ These courts hold this view because of the inherent uncertainty in determining when a crop completely matures.⁴⁹ In addition, these courts generally see the theory of constructive severance as “little more than a fictitious rationale” allowing articles on land to be considered personal property in order to depict parties’ intentions.⁵⁰ Instead, these states ignore the state of maturity of crops and hold that crops, until severed from the land, pass with the realty to the purchasers at the foreclosure sale.⁵¹

Several states take the contrary position that mature crops are “constructively severed,” thus the crops should not pass with the title to the land at conveyance.⁵² These states include: Colorado,⁵³ Hawaii,⁵⁴ Iowa,⁵⁵ Kansas,⁵⁶ Louisiana,⁵⁷ South Dakota,⁵⁸ Texas,⁵⁹ and Wyoming.⁶⁰ They adhere to the idea

48. See *supra* notes 33-47 and accompanying text.

49. See Holliday, *supra* note 25, at 1266. The courts which follow this reasoning state that it would be difficult for courts to determine the numerous controversies which would arise if the title to crops was determined by the state of maturity. See Holliday, *supra* note 25, at 1266.

50. *Falk*, 633 P.2d at 802 n.1.

51. See *supra* notes 34-47. Essentially all of these state courts reject the doctrine of constructive severance in its entirety. Several states, including Missouri, accept the idea that a crop may be sold or encumbered while it is still growing; however, this “constructive severance” does not effectively remove the crop from any prior lien on the land. *Holdsworth v. Key*, 520 S.W.2d 637, 640 (Mo. Ct. App. 1975).

52. For a description of the courts that do follow the doctrine of constructive severance, see *infra* notes 53-60 and accompanying text.

53. *Wood v. Wood*, 183 P.2d 889 (Colo. 1947) (determining that the rule that growing crops pass with the conveyance of land only applies to crops that still draw nutrients from the soil and does not apply to crops that are ripe and ready for harvest).

54. *United States v. 729.773 Acres of Land*, 531 F. Supp. 967 (D. Haw. 1982) (holding that cultivated cane sugar still growing on property is considered personal property and not part of the real property).

55. *Goldstein v. Mundon*, 210 N.W. 444 (Iowa 1926) (reasoning that crops are fully mature and do not pass to the purchaser when they no longer receive sustenance from the soil).

56. *Jones v. Anderson*, 233 P.2d 483 (Kan. 1951) (holding that the rule that crops pass with conveyance of land does not apply to crops which are ripe or ready to harvest).

57. *Porche v. Bodin*, 28 La. Ann. 761 (La. 1876) (deciding that purchasers are not entitled to crops, whether in the field or in the house).

58. *Kettering v. Barber*, 159 N.W. 133 (S.D. 1916) (holding that fully mature and unharvested crops do not pass to the purchaser at a foreclosure sale).

59. *Gulf Stream Realty Co. v. Monte Alto Citrus Ass’n*, 253 S.W.2d 933 (Tex. Ct. App. 1952) (determining that annually cultivated crops, whether growing or standing in the field ready to be harvested, are not part of the realty).

60. *Haldeman v. Wyoming Farm Loan Bd.*, 32 F.3d 469 (10th Cir. 1994) (interpreting Wyoming law to state that title to crops pass with real property to the extent that the crops had not yet matured at the time of the foreclosure sale).

that unharvested crops that are ripe and fully mature stop receiving any sustenance from the soil; consequently, they possess the characteristics of personalty and should not pass with the title to the land at conveyance.⁶¹ In other words, when the crop no longer draws nutrients from the soil, a constructive severance occurs and the crop no longer bears the same relationship to the land as it once did.⁶² Instead, it is as if the farmer already stored the crops in a warehouse or barn.⁶³ Parties asserting the theory of constructive severance often claim that this is “the more equitable and fair rule.”⁶⁴ Even courts rejecting the doctrine have admitted that the alternative rule (granting purchasers the crops) “may seem harsh” and can “result in significant losses to farm debtors.”⁶⁵

In addition to the two approaches just discussed and followed by the majority of the states, alternative methods of determining the title to crops are employed by three states. In Florida, the nature of the crops determines whether the crops pass to the purchaser at a foreclosure sale.⁶⁶ Mature crops grown by yearly cultivation are considered “*fructus industriales*” and do not pass with a conveyance of the realty.⁶⁷ In the alternative, trees, fruits and grasses that grow spontaneously and without cultivation are considered “*fructus naturales*” and, thus, pass to the purchasers.⁶⁸

A Georgia statute simply defines mature crops as personalty.⁶⁹ Consequently, courts in Georgia hold that mature crops do not pass to the

61. See Holliday, *supra* note 25, at 1272.

62. See, e.g., Wood v. Wood, 183 P.2d 889 (Colo. 1947); First Nat'l Bank v. Beegle, 35 P. 814 (Kan. 1894).

63. Holliday, *supra* note 25, at 1272. In addition, the defendant in *Fletcher* referred to this analysis when she made her argument in favor of accepting the doctrine of constructive severance in Missouri. *Fletcher v. Stillman*, 934 S.W.2d 597, 598 (Mo. Ct. App. 1996).

64. See *Fletcher*, 934 S.W.2d at 598. Stillman alleged that the doctrine of constructive severance was “the more equitable and fair rule.” *Id.*

65. Swindell v. Overton, 302 S.E.2d 841, 847 (N.C. Ct. App. 1983).

66. *Stoltzfus v. Covington County Bank*, 154 So. 2d 866, 867 (Fla. Dist. Ct. App. 1963). See also *Adams v. Adams*, 28 So. 2d 254 (Fla. 1946); *Summerlin v. Orange Shores, Inc.*, 122 So. 508 (Fla. 1929).

67. *Stoltzfus*, 154 So. 2d at 868. *Fructus industriales* include annual products of the earth, such as crops of grain and vegetables. *Id.* at 867. These products are the result of yearly labor and cultivation and are considered chattels; therefore, they do not pass with the realty at conveyance. *Id.*

68. *Id.* Until severed from the land, *fructus naturales* are not considered chattels and pass with the conveyance of land. *Id.*

69. GA. CODE ANN. § 44-14-101 (1997) provides:

(a) . . . the term “crops” means the fruits and products of all annual and perennial plants, trees, and shrubs and the crude gum, oleoresin, from a living tree.

(b) All mature or unmature crops are declared to be personalty.

purchaser at a conveyance.⁷⁰ This statute effectively renders all mature crops personalty; therefore, at a conveyance, whether voluntary or involuntary, the crops do not pass with the title to the land.⁷¹

In Mississippi, the legislature has enacted statutes concerning the distribution of crops. These statutes grant additional rights to the mortgagor and preclude the passage of title of crops at conveyance to the purchaser.⁷² One of these statutes allows the mortgagor the right to all crops growing on the property at the commencement of foreclosure proceedings.⁷³ In addition, the statute grants the farmer (mortgagor) the right to complete cultivation of the crops and permits the farmer to reenter the land to remove the crops, so long as the farmer first pays the purchaser a reasonable compensation for use of his former land.⁷⁴ Mississippi courts have allowed defaulting mortgagors,⁷⁵ tenants,⁷⁶ and evicted individuals⁷⁷ to reenter the premises in order to collect their growing crops.

70. See, e.g., *Miller v. Jackson*, 10 S.E.2d 35, 37 (Ga. 1940) (holding that crops of pecan nuts are considered personalty under the statute and do not pass to the purchaser by conveyance of the land); *Chatham Chem. Co. v. Vidalia Chem. Co.*, 136 S.E. 62, 63 (Ga. 1926) (determining that all crops in this state are personalty and do not pass to the purchasers at a judicial sale).

71. GA. CODE ANN. § 44-14-101 (1997). See *supra* note 69 for the full text of the statute.

72. MISS. CODE ANN. § 11-25-25 (1972) provides:

[I]n case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land.

In addition, MISS. CODE ANN. § 11-25-115 (Supp. 1997) states that growing crops are considered personal property.

73. MISS. CODE ANN. § 11-25-25 (1972). See *supra* note 72 for the full text of the statute.

74. MISS. CODE ANN. § 11-25-25 (1972).

75. *Wood v. Pace*, 143 So. 471, 473 (Miss. 1932) (deciding that defaulting mortgagor could collect his crop when he cultivated and maintained it).

76. *Garner v. Stuart Co.*, 75 So. 2d 747, 749 (Miss. 1954) (holding that the tenant had the right to enter the land after the expiration of the lease to collect the crops which he had planted).

77. *Id.* at 748-49 (stating that although the tenant was evicted from the property, he still had a reasonable time to enter the land and harvest his growing corn crop).

*B. The Uniform Commercial Code Approach
to Distribution of Crops*

In 1962, Missouri adopted a version of the Uniform Commercial Code (UCC).⁷⁸ The creators of the UCC debated whether to consider farmers as consumers or merchants.⁷⁹ As a compromise, they created special rules to attempt to protect the farmer.⁸⁰

As discussed earlier, real property law in most states provides that a purchaser at a foreclosure sale takes title to growing crops incident to the transfer of the purchased land.⁸¹ The crops pass with the land at a conveyance because they are considered part of the real property.⁸² However, the analysis arguably is different under the UCC. The UCC defines "goods" to include growing crops in both the Article 2 sales provisions⁸³ and the Article 9 secured transactions provisions.⁸⁴ Due to these provisions, Article 9 commentators have supported the theory that growing and mature crops should be considered personal property and should be governed by the UCC.⁸⁵ This idea conflicts with the majority of state common law decisions holding that crops should be considered as part of the realty. Consequently, there is a conflict between the common law and the UCC.

In *United States v. Newcomb*,⁸⁶ the Eighth Circuit Court of Appeals squarely addressed this conflict. This case involved a dispute between the government and a contract vendor who previously had sold a piece of real estate

78. See MO. REV. STAT. § 400.1-101 (1994).

79. Lander, *supra* note 25, at 399.

80. Lander, *supra* note 25, at 399. The original draftsmen actually created six special sets of rules pertaining to farmers; however, the 1972 amendment to the UCC eliminated three of the rules. Lander, *supra* note 25, at 399. The three remaining rules state that: (1) local filing is required to perfect a secured interest in all farm collateral under the second and third alternative versions of Section 9-401(1); (2) Section 9-312(2) provides priority treatment for purchase money security interests in crops; and (3) Section 9-307 states that a bonafide purchaser of farm products does not take free and clear of all liens created by the seller. Lander, *supra* note 25, at 399-400.

81. Lander, *supra* note 25, at 402. See also *supra* notes 33-47 and accompanying text.

82. Lander, *supra* note 25, at 402.

83. MO. REV. STAT. § 400.2-105 (1994).

84. MO. REV. STAT. § 400.9-105 (1994).

85. Lander, *supra* note 25, at 402. This reasoning may be explained by examining the purpose and scope of Article 9, which provides that it "applies so far as concerns any personal property and fixtures within the jurisdiction of this state (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods." MO. REV. STAT. § 400.9-102 (1994). Because crops are considered goods under the UCC, it appears that the drafters intended the UCC to pertain to security interests in crops.

86. 682 F.2d 758 (8th Cir. 1982).

under a contract for deed.⁸⁷ In particular, the court was to determine who was entitled to the proceeds from crops planted by the purchaser of the real estate who had granted a security interest in the crops to the Federal Housing Association (government) and later failed to make mortgage payments to the contract vendor.⁸⁸ The contract vendor argued that Missouri common law should govern the issue. Thus, following real estate law, title to the crops would not pass to the government because title to the land did not pass to the government when the purchasers defaulted on the payments.⁸⁹ The district court, however, held that Article 9 of the UCC, as adopted by Missouri, applied.⁹⁰ Therefore, the government's perfected security interest in the crop and the proceeds from the sale of the crop, superseded the contract vendor's interest which was not a security interest.⁹¹ The court determined that because the contract vendor did not adhere to the Article 9 requirements to create a valid security interest, the government had the only valid security interest in the crop and was entitled to the crop and the proceeds.⁹²

On appeal, Newcomb argued that the district court erroneously viewed the case as one involving conflicting Article 9 security interests.⁹³ The court of appeals rejected this argument and held that Article 9 did apply to the situation.⁹⁴ Applying Article 9, the court of appeals affirmed the district court's decision and granted the crops to the only perfected security interest holder, the government.⁹⁵ In reaching this decision, the court essentially held that all growing crops, by definition, are personal property and not real estate; therefore, Article 9 applies to growing crops.

87. *Id.* at 759. Newcomb sold farmland to the Rush family ("purchasers") under a contract for deed that was never recorded. *Id.* The purchasers planted a crop on the land and executed a security interest with Farmers Home Association ("FHA"). *Id.* On both the security agreement and financing statement, the FHA claimed a security interest in all crops then growing or later grown on the land and all proceeds from the sale of such crops. *Id.* The purchasers defaulted on their contract for deed and after a foreclosure suit, they were ejected from the property. *Id.* at 760. Newcomb proceeded to harvest the crops and sell them; however, the government (acting for the FHA) filed this action to recover the proceeds generated from the sale of the crop. *Id.*

88. For a detailed discussion on the facts, see *supra* note 87.

89. *Newcomb*, 682 F.2d at 760.

90. *Id.*

91. *Id.*

92. *Id.* at 761.

93. *Id.* at 760.

94. *Id.* at 761. By applying Article 9, the court seems to be stating that crops are always considered personal property; therefore, without an Article 9 security interest, an individual has no claim to the crops. This implicitly rejects the notion that crops could be part of the realty, completely contradicting Missouri real estate law.

95. *Id.*

There are several requirements that must be met in order to establish an enforceable security interest under Article 9.⁹⁶ Once a valid security interest has been established, it becomes enforceable against the debtor.⁹⁷ However, there exists no similar provision within the UCC that provides guidelines for a court to determine priority between the secured interest holder and a third party.⁹⁸ The court in *Newcomb* relied on various provisions within the UCC to determine that the security interest superceded the third-party interest,⁹⁹ but there is no specific provision that the court could rely on to reach its decision.

96. MO. REV. STAT. § 400.9-203 (1994) provides that:

(1) . . . a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown . . . , a description of the land concerned;

(b) value has been given; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the timing of attaching.

(3) Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by section 400.9-306.

97. MO. REV. STAT. § 400.9-203(2) (1994).

98. Although there is not a specific provision within the UCC which addresses this issue, there is a catch-all priority provision included in Section 400.9-201. This provision provides that “except as otherwise provided by this chapter a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.” MO. REV. STAT. § 400.9-201 (1994). The Uniform Commercial Code’s Official Comment explains that the security agreement is effective against third parties; however, an exception to this general rule arises when a specific provision defeats the catch-all provision. MO. REV. STAT. § 400.9-201 (1994) (comment). Because of this exception, it could be argued that Section 400.9-104, which excludes transfers of real estate from this article, precludes analysis of this issue under the catch-all priority provision.

99. *Newcomb*, 682 F.2d at 760-62. For instance, the court examined the purpose and scope section of Article 9 in order to determine that the UCC applied in this type of transaction. *Id.* at 760. The court also noted that ordinarily under Article 9 interests or liens in real estate are excluded; however, the court states that because crops are defined as personal property, and not real estate, they are not subject to the exclusion. *Id.* at 761. Lastly, the court mentioned that Section 400.9-204(4) specifically permits the acquisition of a separate security interest in future crops in connection with a land conveyance. *Id.* at 762.

Technically, the *Newcomb* decision does not directly overrule prior Missouri decisions granting the crops to the purchaser at a foreclosure sale.¹⁰⁰ No Missouri case has considered a situation involving an Article 9 security interest in crops; however, pre-UCC cases concerning similar issues were decided to the contrary.¹⁰¹ In addition, a post-UCC case involving an outright sale of the growing crops held that the prior mortgage had priority.¹⁰²

While *Newcomb* is a federal decision and is not in direct conflict with any prior Missouri decisions, it still is likely that a change in Missouri law regarding the disposition of crops will occur. The decision in *Newcomb* does indirectly contradict Missouri real estate cases rejecting the doctrine of constructive severance.¹⁰³ *Newcomb* involved a situation in which a prior mortgage (contract for deed) existed and the mortgagor encumbered the crop with another lien (the government's security interest). Similarly, the mortgagor could have contracted to sell the growing crops instead of executing a security interest.¹⁰⁴ Because crops are considered goods under the sales provisions of the UCC¹⁰⁵ and Article 2 allows a present sale of growing crops,¹⁰⁶ the holding in *Newcomb* would apply in this type of transaction and the sale of the growing crop would effectively remove the crop from the lien of the prior mortgage.¹⁰⁷ Allowing this sale or execution of a security interest to remove the growing crops from a prior mortgage is tantamount to the adoption of the doctrine of constructive severance.¹⁰⁸ Missouri courts consistently have rejected the doctrine of constructive severance; therefore, the holding in *Newcomb* seems to conflict indirectly with prior Missouri decisions and creates a question as to where Missouri actually stands on the issue of constructive severance. When a Missouri court finally is faced with a case involving this type of transaction, it will have to determine whether it should follow *Newcomb* or prior Missouri real estate law.

100. Weidner, *supra* note 28, at 654.

101. Weidner, *supra* note 28, at 654. See, e.g., *Farmers' Bank v. Bradley*, 288 S.W. 774 (Mo. 1926).

102. Weidner, *supra* note 28, at 654 (discussing *Holdsworth v. Key*, 520 S.W.2d 637 (Mo. Ct. App. 1975)). *Holdsworth* has been criticized by subsequent courts. See *In re Temple Stephens Co., Inc.*, 156 B.R. 38, 39 (W.D. Mo. 1993). This court questioned why the UCC was not used to determine the outcome of the case. *Id.* The court stated that because the attorneys and the court did not think to mention the UCC, the *Holdsworth* opinion only stood for the proposition that prior to the UCC, a security interest in crops went with the deed of trust. *Id.*

103. Weidner, *supra* note 28, at 654.

104. Weidner, *supra* note 28, at 654.

105. MO. REV. STAT. § 400.2-105 (1997).

106. MO. REV. STAT. § 400.2-107 (1997).

107. Weidner, *supra* note 28, at 654.

108. Weidner, *supra* note 28, at 654.

Other recent decisions confront the conflict between common law and the UCC regarding the distribution of crops. In *Anna National Bank v. Prater*,¹⁰⁹ the court was asked to determine whether a real estate mortgagee's interest in crops under a "rents and profits" clause contained in the mortgage was sufficient to constitute a security interest subject to Article 9 of the UCC.¹¹⁰ The court determined that the "rents and profits" clause did create a lien upon the crops; however, the right derived from the real estate mortgage.¹¹¹ Article 9 of the UCC is expressly limited to secured transactions involving personal property and does not apply to real estate transactions.¹¹² Thus, no security interest existed that could be governed by the UCC.¹¹³ The court then looked to Illinois common law to reach its decision.¹¹⁴ Because unsevered crops growing on mortgaged lands are considered part of the realty under Illinois common law, the court determined that the mortgagee was entitled to the crops when he took possession of the land.¹¹⁵ This decision seems to establish a method for avoiding determination under the UCC.¹¹⁶ By providing a "rents and profits" clause within the real estate mortgage, the matter is excluded from the UCC and state common law is used to reach a decision.¹¹⁷

In *Rubin v. Kampen*,¹¹⁸ the court was faced with the issue of priority interests between a bankruptcy trustee and a holder of a deed of trust.¹¹⁹ The bank had a mortgage on land owned by the debtor and an unperfected security interest in crops growing on the mortgaged land.¹²⁰ The debtor filed a bankruptcy petition before the crops were harvested and the bank then claimed that its security interest gave it priority over the crops.¹²¹ The court held that the

109. 506 N.E.2d 769 (Ill. App. Ct. 1987).

110. *Id.* at 775. The court noted that this issue was one of first impression in Illinois. *Id.*

111. *Id.* at 776.

112. *Id.*

113. *Id.* The UCC did not apply in this situation because Section 9-104(j) of the Illinois Revised Statutes specifically excludes from application of Article 9 "the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder . . ." *Id.* at 775. The court determined that the real estate mortgagee's right to the crops was incident to the real estate involved; therefore, the UCC exclusion provision applied. *Id.* at 776.

114. *Anna Nat'l Bank*, 506 N.E.2d at 776.

115. *Id.*

116. *Id.*

117. *Id.* The "rents and profits" clause creates a lien upon the crops to protect the mortgagee upon default. *Id.* Because the mortgagee's right to the rents and profits are incident to the foreclosure of the real estate involved, the rents and profits clause does not create a security interest subject to Article 9. *Id.*

118. 48 B.R. 389 (Bankr. W.D. Mo. 1984).

119. *Id.* at 391.

120. *Id.*

121. *Id.* at 392.

bank's security interest was unperfected because of an insufficient description of the land on which the crops were growing.¹²² Because the security agreement was not perfected, the bankruptcy trustee's lien had priority.¹²³ In addition, the bank claimed that under Missouri common law, crops pass with the realty. Therefore, the bank argued that its mortgage on the underlying land gave the bank a lien on the crops.¹²⁴ The court held that Missouri real estate law granting growing and unsevered crops to the deed of the trust holder at the time of a foreclosure sale had no application when the bankruptcy trustee's lien intervenes before the foreclosure sale is held.¹²⁵ The court stated that the bankruptcy trustee's hypothetical lien attached to the crops when the bankruptcy petition was filed.¹²⁶ Consequently, it is as if the crops actually were severed prior to the foreclosure hearing.¹²⁷ This decision allows a judgment lien properly attached to growing crops to effectively remove the crops from a prior mortgage lien.¹²⁸ In reaching this decision, a Missouri court again chose to use the UCC for analysis rather than the Missouri common law.

One final consideration is an approach that was taken in *In re Hoover*.¹²⁹ An Ohio bankruptcy court followed the decision reached in *Newcomb* and determined that a secured party with an interest in a crop retained his interest even after the real estate on which the crop was growing reverted to an individual other than the debtor.¹³⁰ However, the court chose to extend the *Newcomb* decision and apply the theory of unjust enrichment.¹³¹ The Ohio Revised Code adopted portions of the UCC stating that the principles of law and equity shall supplement its provisions.¹³² Therefore, the court determined that unjust enrichment had occurred because the secured creditors "enjoyed the benefit of using the applicant's land to increase the value of their collateral."¹³³

122. *Id.* at 393.

123. *Kampen*, 48 B.R. at 393.

124. *Id.* at 392.

125. *Id.* at 393.

126. *Id.* at 393 n.5.

127. *Id.*

128. Weidner, *supra* note 28, at 657.

129. 31 B.R. 432 (Bankr. S.D. Ohio 1983).

130. *Id.* at 437. Although no Ohio case discussed this issue, the court found the Eighth Circuit's decision in *Newcomb* persuasive, and adopted its holding. *Id.*

131. *Id.* at 438. The court defined unjust enrichment as a situation which involves an individual who "retains money or benefits which in justice and equity belong to another." *Id.* (citing *Hummel v. Hummel*, 14 N.E.2d 923, 923 (Ohio 1938)).

132. OHIO REV. CODE ANN. § 1301.03 (West 1997) states that "the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other invalidating cause shall supplement its provisions."

133. *Hoover*, 31 B.R. at 438.

The court held that the landowner was entitled to reasonable compensation for the use of his land.¹³⁴

IV. INSTANT DECISION

In *Fletcher v. Stillman*,¹³⁵ the court initially considered whether the facts at issue presented a case of first impression.¹³⁶ The court described the two distinctive theories governing the distribution of crops: the necessity of actual severance and the theory of constructive severance.¹³⁷ The court stated that jurisdictions that adhere to the theory of constructive severance reason that once a crop is mature, it is no longer gaining sustenance from the soil; therefore, it does not bear the same relationship to the land as if it were still growing.¹³⁸

The court examined three cases to determine whether it was dealing with a case of first impression with respect to the appropriate rule governing the distribution of crops.¹³⁹ First, the court analyzed *Vogt v. Cunningham*¹⁴⁰ and determined that the *Vogt* court exhaustively examined other theories used to determine the distribution of crops and held that the matter rested on the relationship of the crops to the land, and not the state of maturity.¹⁴¹ The court stated that contrary to the defendant's belief, the *Vogt* decision was directly on point. Hence, the case was not one of first impression.¹⁴²

134. *Id.* The court determined that the land owner was entitled to \$4,666.69 for compensation for the use of his land. *Id.* The remaining funds would be used to satisfy the secured claim. *Id.*

135. 934 S.W.2d 597 (Mo. Ct. App. 1996).

136. *Id.* at 598. The defendant asserted that this was a case of first impression because it involved mature crops, whereas the cases the circuit court relied on all involved crops that were still growing at the time of the foreclosure sale. *Id.*

137. *Id.*

138. *Id.* Because the crop is no longer dependent on the soil, it is as if it were already stored in a barn or warehouse. *Id.*

139. *Id.*

140. *Vogt v. Cunningham*, 50 Mo. App. 136 (1892).

141. *Fletcher*, 934 S.W.2d at 598. The court mentioned the dictum in *Vogt v. Cunningham*, 50 Mo. App. 136, 140 (1892), which stated that “[t]he right of the former owner or his tenant, as against the purchaser under the foreclosure sale, is made to depend on the fact as to whether or not the crops have been separated from the soil, and not upon any state of maturity.” *Fletcher*, 934 S.W.2d at 598.

142. *Fletcher*, 934 S.W. 2d at 599. The court referred to a quote used in *Vogt v. Cunningham*, 50 Mo. App. at 140-41, which stated that “[i]f . . . the crops are to be considered as land or personal chattels, as they continue or do not continue to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point.” *Fletcher*, 934 S.W.2d at 599.

The *Fletcher* court then examined *Farmers' Bank of Hickory v. Bradley*¹⁴³ and *Starkey v. Powell*,¹⁴⁴ which were handed down concurrently, and concluded that the Supreme Court of Missouri had clearly rejected the doctrine of constructive severance.¹⁴⁵ The court referred to a statement made in *Bradley* specifically stating that an actual severance must occur before a crop will be free from the lien of the deed of trust.¹⁴⁶ The *Fletcher* court also explained that when *Starkey* was transferred to the Supreme Court of Missouri, the *Starkey* court held that the *Bradley* decision controlled the case at bar. Therefore, the doctrine of constructive severance was rejected.¹⁴⁷ After analyzing these two decisions, along with the *Vogt* decision, the *Fletcher* court determined that Missouri courts consistently had rejected the doctrine of constructive severance.¹⁴⁸

The court then explained that the Missouri Constitution¹⁴⁹ bound courts to follow the controlling determinations reached by the Supreme Court of Missouri.¹⁵⁰ Thus, the court determined that it was constitutionally required to follow the holdings in *Bradley* and *Starkey*, which clearly rejected the doctrine of constructive severance.¹⁵¹

Finally, the court acknowledged the defendant's assertion that *Bradley* and *Starkey* were distinguishable because they involved circumstances in which the crops were not mature at the time of the foreclosure sale.¹⁵² Nevertheless, it determined that this distinction did not make a difference.¹⁵³ The court stated that *Bradley* and *Starkey* were not determined on the narrow question of crop maturity; instead, they were decided on the broader basis that Missouri would not accept the doctrine of constructive severance.¹⁵⁴

Basing its decision on the prior Missouri cases cited above and the notion that courts are constitutionally bound by decisions of the Supreme Court of Missouri, the court rejected the doctrine of constructive severance.¹⁵⁵ In rejecting the doctrine of constructive severance, the court concluded that a crop

143. 288 S.W. 774 (Mo. 1926).

144. 288 S.W. 776 (Mo. 1926).

145. *Fletcher*, 934 S.W.2d at 599.

146. *Id.* The court quoted the dictum in *Bradley*, which explained, "We have uniformly held that neither the owner of the land nor his grantee could free the growing crop of the lien of the deed of trust, except by and actual severance from the soil before possession taken or foreclosure had under the deed of trust." *Id.* (citing *Bradley*, 288 S.W. at 775).

147. *Fletcher*, 934 S.W.2d at 599.

148. *Id.* at 598.

149. MO. CONST. art. V, § 2.

150. *Fletcher*, 934 S.W.2d at 599.

151. *Id.* at 599-600.

152. *Id.* at 600.

153. *Id.*

154. *Id.*

155. *Id.* at 599.

may only be freed from the lien of a deed of trust by actual severance from the land.¹⁵⁶

V. COMMENT

The decision reached in *Fletcher v. Stillman* certainly comports with prior Missouri case law. However, the rejection of the doctrine of constructive severance and the holding that there must be an actual severance of the crops in order for the debtor to retain possession of them after a foreclosure sale appears to ignore serious policy concerns, including fundamental notions of fairness.

Although the *Fletcher* court followed the majority of common law jurisdictions,¹⁵⁷ other state courts have reached far more equitable decisions. With the troubles that continue to plague Missouri farmers, it appears that a more pro-farmer common law theory could help to revitalize the agricultural economy.¹⁵⁸ Although the *Fletcher* court mentioned the consequences of adopting the doctrine of constructive severance in its entirety,¹⁵⁹ it failed to consider the policy implications of rejecting the doctrine, as well as possible alternatives to avoid the hard-line rule that the courts continue to apply.

For instance, notions of equity would encourage allowing the farmer to maintain his crops after a foreclosure sale of his land. Theoretically, the purchaser at a foreclosure sale will pay more for the land because he realizes the worth of the unharvested crops. However, realistically it is unlikely that the farmer will receive fair market value for the worth of his crops at a forced sale. Consequently, if current Missouri common law is followed, the purchaser at a foreclosure sale is unjustly enriched. By purchasing at the foreclosure sale, the purchaser receives a windfall: he not only receives the farmland at a reduced price but also receives products from another individual's labor. In order to erase this inequity, farmers need the opportunity to be able to harvest their crops.

Lenders may attempt to argue that a change in law would not produce more fairness. Because land often is not sold for the entire debt amount, lenders may feel that the additional crop rights help increase purchase price at foreclosure sales. While this may be true, it is unlikely that lenders of farmland look to one

156. *Id.* at 600.

157. See generally Part III.A. for a discussion of the various jurisdictions and their approaches to the distribution of crops after a foreclosure sale.

158. Rideout, Jr., *supra* note 2, at 482-83. Farmers who obligated themselves to long term mortgages at high interest rates are now unable to pay off their huge land debts. Rideout, Jr., *supra* note 2, at 482-83. Pro-farmer laws in this area could allow farmers to collect their crops and at least salvage their year's work.

159. *Fletcher*, 934 S.W.2d at 599. The court notes that if the state of maturity determines the distribution of the crops, there will be numerous situations that will pose serious difficulties in establishing the level of maturity. *Id.* While the court is bound by existing case law, other policy implications and possible legislative amendments could have been discussed.

year's crop production to determine whether to approve a loan. Lenders would not rely on an annual crop production that might not occur due to unavoidable circumstances, such as drought, flooding or fire. In addition, if a lender feels strongly about having control over the planted crops in case of foreclosure, the lender has the right to take out a separate lien on the crops. This lien would ensure worried lenders that they have priority rights in both the farmland and the cultivation. In cases in which lenders are secure with only the farmland lien, the destitute farmer at least would be entitled to retain the crops that he planted.

By rejecting the doctrine of constructive severance, the *Fletcher* court essentially obliterates the farmer's chance of recovering any of the crops that he planted, sowed and planned to harvest.¹⁶⁰ Due to the high interest mortgages assumed by farmers in the mid-1970s and early 1980s when inflation created increased cash flows,¹⁶¹ farmers now are unable to pay off their debts.¹⁶² In essence, the farmer's livelihood is eliminated, creating the possibility that agricultural land will not be used for its best purpose.

A more fair and equitable solution would be to adopt a pro-farmer statute similar to that implemented in Mississippi.¹⁶³ That statute permits the mortgagor (farmer) to reenter his former land in order to cultivate and harvest his crops that were growing at the time of the foreclosure sale.¹⁶⁴ In exchange for the privilege of harvesting the crops, the former landowner first must pay the party entitled to possession a reasonable compensation for the use of the land.¹⁶⁵ Because of the remedial nature of this portion of the statute, courts have liberally construed the provision.¹⁶⁶ If a situation arises where the farmer has not paid the purchaser for the use of the land, then the court may, on demand of the purchaser, order the amount to be paid.¹⁶⁷ While this statute provides a pro-farmer resolution to the distribution of crops issue, it maintains some measure of equity by providing compensation to the purchaser for the use of the land.

160. It could be argued that lenders should not be entitled to the crops because they merely plan to immediately turn around and re-sell the land. In addition, from an economical and social standpoint, their possible loss due to lower interest rates does not compare to the loss of livelihood for farmers.

161. Rideout, Jr., *supra* note 2, at 482.

162. Rideout, Jr., *supra* note 2, at 483.

163. For the complete language provided in MISS. CODE ANN. § 11-25-25 (1997), see *supra* note 72. For a more in depth discussion on the statute and its effect, see *supra* notes 72-77.

164. MISS. CODE ANN. § 11-25-25 (1972).

165. MISS. CODE ANN. § 11-25-25 (1972).

166. See, e.g., *Joiner v. Leflore Grocer Co.*, 110 So. 857, 860 (Miss. 1926) (holding that purchaser at foreclosure sale was only entitled to reasonable rent for use after the foreclosure sale because of the remedial purpose of the statute); *Wood v. Pace*, 143 So. 471, 473 (Miss. 1932) (acknowledging remedial purpose of statute and construing it liberally to give former tenant possession of pecans still growing on trees).

167. MISS. CODE ANN. § 11-25-25 (1997).

Although Missouri currently does not have a statute protecting debtor farmers, the legislature has enacted a statute that protects tenants' rights to growing and unharvested crops.¹⁶⁸ This statute provides that all mortgages of real property or security agreements providing a security interest in personal property are valid and binding upon mortgagors and debtors.¹⁶⁹ However, the statute also includes an exception that states that this provision will not affect the rights of a tenant to the growing crops on foreclosed land.¹⁷⁰ Because the legislature acknowledged a need for an exception for tenants with regard to growing crops, it seems likely that it would be receptive to a statute that protected farmer-debtors as well.

Although the *Fletcher* court was not confronted with a UCC analysis, it is likely that future Missouri courts will have to decide the issue of the applicability of the UCC to determine the distribution of crops. While the Eighth Circuit already has determined its position regarding this issue,¹⁷¹ a Missouri state court has not yet been asked to determine specifically Missouri's approach to the problem. While many commentators and judges have determined that the Eighth Circuit approach is clearly the correct answer,¹⁷² there are legitimate arguments in favor of applying the common law instead of the UCC.¹⁷³

In *Newcomb*,¹⁷⁴ the court held that Article 9 applied and that growing crops are personal property, not part of the real estate.¹⁷⁵ The court supported its position by referring to various provisions within the UCC. However, there was

168. MO. REV. STAT. § 443.290 (1994) provides that:

All mortgages of real property or security agreements providing a security interest in personal property, or both, with powers of sale in the mortgagee or secured party, and all sales made by such mortgagee, secured party or his personal representatives, in pursuance of the provisions of the mortgages or security agreements, shall be valid and binding by the laws of this state upon the mortgagors and debtors, and all persons claiming under them, and shall forever foreclose all right and equity of redemption of the property so sold. Nothing herein shall be construed to affect in any way the rights of a tenant to the growing and unharvested crops on lands foreclosed as aforesaid, to the extent of the interest of the tenant under the terms of contract or lease between the tenant and the mortgagor or his personal representatives.

169. MO. REV. STAT. § 443.290 (1994).

170. MO. REV. STAT. § 443.290 (1994).

171. See *United States v. Newcomb*, 682 F.2d 758 (8th. Cir. 1982).

172. See, e.g., Meyer, *supra* note 25, at 762 (discussing why the author believes *Newcomb* provides the best answer to the dilemma); *In re Hoover*, 31 B.R. 432 (Bankr. S.D. Ohio 1983) (following the *Newcomb* reasoning but extending the decision to apply unjust enrichment).

173. See *supra* notes 164-71 and accompanying text for a description of several arguments the farmer could raise.

174. *Newcomb*, 682 F.2d at 758.

175. *Id.* at 761.

no clear-cut answer provided within the UCC.¹⁷⁶ While the UCC specifically refers to the priority interest between the debtor and the secured interest holder,¹⁷⁷ there is no equivalent provision providing information regarding who has a priority interest between the secured interest holder and a third party.¹⁷⁸

Due to the absence of a specific provision within the UCC determining a priority dispute between the secured interest holder and a third party, a third party has a valid argument that the provisions of Article 9 should not apply to him. Furthering the third party's argument is the fact that Article 9 includes a specific provision regarding the priority of security interests in fixtures.¹⁷⁹ A detailed analysis is included in the statute provision that delineates the situations in which a perfected security interest in a fixture will have priority over a conflicting interest of an encumbrancer or owner of real estate.¹⁸⁰ In interpreting statutes, many scholars adhere to the whole act rule that suggests that the interpretation of one section of the statute only can be successfully accomplished by examining the entire statute.¹⁸¹ The Supreme Court also has held that when interpreting a statute, the court should not simply examine a particular clause,

176. *Id.* at 761-62. For instance, the court referred to the scope and purpose section of Article 9, the definitions section and a section which permits the acquisition of a separate security interest in crops. *Id.*

177. MO. REV. STAT. § 400.9-203 (Supp. 1997).

178. See *supra* notes 96-98 and accompanying text for a description of the relevant UCC provisions.

179. MO. REV. STAT. § 400.9-313 (1994). The statute section is entitled "Priority of security interests in fixtures". MO. REV. STAT. § 400.9-313 (1994). The statute provides:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of real estate where the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or the fixtures are readily removable factory or office machines or readily movable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this article; or the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

180. MO. REV. STAT. § 400.9-313 (1994).

181. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, § 1 (2d ed. 1995).

but instead, the court should examine the entire statute as a whole.¹⁸² Applying this rule, it could be argued that the legislature did not intend for third parties to be covered by Article 9 when determining priority to crops; otherwise it would have included provisions similar to those found in the sections referring to fixtures.

Another valid argument, which was attempted by the defendant in *Newcomb*,¹⁸³ is based on the exclusions provided in Section 400.9-104.¹⁸⁴ Section 400.9-104 provides a list of circumstances in which Article 9 should not be applied.¹⁸⁵ One of the enumerated exclusions states that Article 9 does not apply to the creation or transfer of an interest in, or lien on, real estate.¹⁸⁶ However, the court in *Newcomb* determined that because growing crops are considered personal property, not real estate, the Article 9 exclusion provision did not apply.¹⁸⁷

While this appears to be sound logic, other courts have differed from the *Newcomb* court and have applied the various exclusions within the exclusion provision to similar situations. Although no court has directly used the real estate exclusion, it follows that courts could use the same type of analysis in future decisions. These courts hold that Article 9 does not cover the particular matter because of the exclusion section and, instead, apply the state common law.¹⁸⁸ For example, an Illinois appellate court determined that a landlord's statutory crop lien for rent had priority over the bank's security interest in proceeds from the sale of crops.¹⁸⁹ The court examined the provision of Article 9 that specifically excludes landlord's liens and determined that the drafters of Article 9 could not have included more specific language.¹⁹⁰ Due to the unambiguous language of the statute, the court held that the adoption of Article 9 had no effect on the superiority of the landlord's crop lien.¹⁹¹ In reaching this decision, the court emphatically denied applying the scope and purpose

182. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

183. *United States v. Newcomb*, 682 F.2d 758, 761 (8th. Cir. 1982).

184. MO. REV. STAT. § 400.9-104 (Supp. 1997) provides a list of topics which should be excluded from application of Article 9. Included in that list is "the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder" MO. REV. STAT. § 400.9-104 (Supp. 1997).

185. MO. REV. STAT. § 400.9-104 (Supp. 1997).

186. MO. REV. STAT. § 400.9-104 (Supp. 1997).

187. *Newcomb*, 682 F.2d at 761.

188. *See, e.g., Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317 (E.D. Mo. 1973); *Dwyer v. Cooksville Grain Co.*, 454 N.E.2d 357 (Ill. App. Ct. 1983); *Associates Discount Corp. v. Fidelity Union Trust Co.*, 268 A.2d 330 (N.J. Super. Ct. Law Div. 1970).

189. *Dwyer*, 454 N.E.2d at 357.

190. *Id.* at 359.

191. *Id.* at 360.

provision to extend the application of Article 9.¹⁹² This decision suggests that some courts will be unwilling to apply Article 9 when the situation expressly involves a matter which is deemed to be excluded under the statute. While it does not appear that a court has refused to apply the UCC due to the real estate lien exclusion, these decisions could provide a pathway for a court to uphold the real estate exclusion and apply the common law of the state. If Missouri chose to follow this approach, the common law would mandate that the crops return to the individual entitled to possession of the land.¹⁹³ By following the common law of Missouri instead of the UCC, two very different results would occur.

Due to this discrepancy in outcomes, it appears that a rule needs to be established in order to allow creditors and secured interest holders adequate notice on the procedures they need to implement in order to have a priority interest in crops. If Missouri determines that the UCC should apply regardless of the real estate lien exclusion, more precise priority rules need to be enacted within Article 9 regarding crop distribution. Obviously, the legislature is capable of drafting such explicit rules because it has chosen to do so in the fixtures provisions of Article 9.¹⁹⁴ In addition, other states, such as Illinois, have modified certain statutes dealing with real estate mortgages to make it clear that Article 9 governs claims to crops.¹⁹⁵ The Illinois statute provides that with regard to any crops growing or grown on mortgaged real estate, the rights of a mortgagee in possession shall be subject to a security interest properly perfected under Article 9 of the UCC.¹⁹⁶ A similar statute enacted in Missouri would allow all interest holders notice of any priority interest in the crops, thereby eliminating any uncertainty over the present state of the law.

If, however, Missouri refuses to apply the UCC and instead follows the common law approach in all situations, a more pro-farmer approach should be considered. Due to the vast number of Missouri farmers and the economic situation many farmers now face, a pro-farmer statute could seriously lift some of the burden that the current law presently applies. If the legislature is

192. *Id.* The court stated that “[t]here is no need for this court or any court to search for hidden purposes in the provision of Article 9 in order to determine its scope. The language of 9-104(b) and 9-102(2) is crystal clear—no part of Article 9, including the priority rules, apply to a landlord’s statutory lien.” *Id.* The scope and purpose section was one of the three sections alluded to as support for the *Newcomb* decision. This court would clearly disagree with the use of that section to support a determination to apply Article 9.

193. *Fletcher v. Stillman*, 934 S.W.2d 597, 600 (Mo. Ct. App. 1996). While the court does not specifically address this issue, the court adheres to the rule that the individual who has possession of the land should also have possession of the crops. *Id.* In applying this rule to the instant situation, the original land owner would have possession of the land; therefore, the land owner would also be entitled to the crops.

194. MO. REV. STAT. § 400.9-313 (1994).

195. 735 ILL. COMP. STAT. ANN. 5/15-1702 (West 1992).

196. 735 ILL. COMP. STAT. ANN. 5/15-1702 (West 1992).

unwilling to freely distribute the crops to the farmer who loses his land through foreclosure sale, a compromise could be reached by enacting a statute similar to that of Mississippi.¹⁹⁷ A similar statute would allow the mortgagor the opportunity to re-enter his land and harvest or cultivate his crops, so long as he first paid a reasonable compensation for use of the land.¹⁹⁸ While this type of statute greatly benefits the mortgagor, it also attempts to appease the purchaser by entitling him to some money for use of his newly purchased land. By implementing such a statute, the farmer may be able to alleviate some of his present economic troubles by at least recovering some of his past investments and profits from the cultivation and harvest of his crops.

Regardless of whether Missouri chooses to follow the UCC approach or the common law approach to the distribution of crops, it appears that the law needs to be clearer in order to allow all parties an opportunity to protect themselves from other interests. The conflict between individuals with real estate interests and security interest holders over the distribution of crops can be troublesome and will likely continue until a specific rule is enunciated.¹⁹⁹ Due to the uncertainty that currently prevails, attorneys representing a vendor (farmer) should draft a provision in the contract that specifically reserves his right to the crops.²⁰⁰ In addition, if the contract contains a reservation for mature crops, attorneys should include the reservation in the deed of conveyance of the land.²⁰¹ These simple safeguards could enable a farmer to retain his crops after a foreclosure sale.

VI. CONCLUSION

The decision reached in *Fletcher v. Stillman*—that there must be an actual severance of the crops in order for the debtor to retain possession of them after a foreclosure sale—adheres to prior case law in Missouri and the majority of common law jurisdictions. However, these decisions holding the crops to be part of the realty inherently fail to give sufficient weight to the notion of fairness and equity and leave the debt-ridden farmer in dire straits. Equally troublesome is the notion that different results could be reached depending on the courts'

197. MISS. CODE ANN. § 11-25-25 (1972).

198. MISS. CODE ANN. § 11-25-25 (1972).

199. Lander, *supra* note 25, at 430.

200. *See* Holliday, *supra* note 25, at 1267.

201. *See* Holliday, *supra* note 25, at 1267.

desire to apply the UCC instead of the state common law. The UCC contradicts the view that crops are part of the realty and, instead, deems crops personal property. Because of the conflicting results reached by the UCC and the common law, a universal rule needs to be implemented throughout the state. In order to revitalize the plagued agricultural economy, this universal rule should be constructed in a pro-farmer light.

JENNIFER J. SMITH