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Recent Cases

Bankruptcy—Effect of Discharge of One Tenant by the Entireties

First National Bank v. Pothuisje

Plaintiff loaned H and W money on their joint personal note. At that time they owned the land in question as tenants by the entirety. H filed a petition in bankruptcy and was discharged from all his provable debts, the land not having been scheduled as an asset of his estate. The bank seeks a joint judgment against H and W, and prays the farm be sold to satisfy the judgment, there being no other property subject to execution. From an order sustaining H's demurrer, the plaintiff appealed.

Held: Although the bankruptcy court discharged H of all his joint and personal liabilities, it had no jurisdiction to deal with this debt or the property held by the entireties. A triple liability was created when H and W joined in executing a note. This note was more than a joint and several obligation. It was also the liability of that distinct legal entity which arose on marriage. Judgment reversed.

At common law when a fee is given to H and W, both are seised of the estate by the entirety, and they cannot take the estate by moieties. The survivor is entitled to the whole, and this right is not defeated by prior conveyance by the other, or by sale under execution against such other. Nor does the interest of one of the tenants pass to the trustee in bankruptcy, as title itself is not capable of division into separate interests, undivided or otherwise.

Under the common law view, when H and W held property by the entireties, H could, by virtue of his control over both his wife's and his own property, alien his estate without the concurrence of W, and it was liable to execution for his debts, such transfers being subject to defeat by W's survivorship. Where this husbandly control has been abrogated by the Married Women's Property Acts, it is usually held that during their joint lives, H has no interest in land held by them as tenants by the entirety that can be sold under execution for his sole debt. However, a joint judgment against both spouses, where by the nature of the obligation it is possible, will reach the estate, and any joint judgment

1. 25 N. E. (2d) 436 (Ind. 1940).
2. 2 BL COMM. *182; Raptes v. Pappas, 259 Mass. 37, 155 N. E. 787 (1927); Wimbush v. Danford, 292 Mo. 588, 238 S. W. 460, 466 (1922).
3. 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 194.
5. 1 TIFFANY, op. cit. supra note 3, § 205; Hall v. Stephens, 65 Mo. 570 (1877); In re Brown, 60 F. (2d) 269 (D. C. W. D. Ky. 1932); Wilson v. Newberry, 238 Ky. 635, 38 S. W. (2d) 695 (1931).
obtained against \( H \) and \( W \) more than four months before \( H \) goes into bankruptcy is a lien that cannot be displaced by the discharge in bankruptcy.\(^8\)

As to the effect of discharge of one of the spouses in bankruptcy, there are two diametrically opposed conceptions. Missouri decisions maintain that a discharge of one spouse prior to obtaining a joint judgment precludes any future attempt to reach the entireties property.\(^9\) The discharge would be a bar to recovery of a judgment against the discharged spouse and such an estate can be reached only by a proceeding or judgment against both spouses.\(^10\) (It may be observed that a discharge in bankruptcy of one co-maker of a note does not destroy the personal liability of his co-maker.\(^11\) The harshness of the Missouri rule has been modified somewhat by granting the creditor's request for a postponement of discharge until a joint judgment has been obtained in the state courts,\(^12\) though the power is discretionary in the bankruptcy court.\(^13\)

The instant case contends such discharge of one spouse is not a bar to the recovery of a joint judgment. Nor does the discharge prevent enforcement of such judgment against their entireties property. The Michigan courts have allowed a quasi in rem suit against entireties property despite discharge in bankruptcy of one of the spouses.\(^14\)

While the court of appeals indicated in Wharton v. Citizens Bank,\(^15\) that it is impossible to go behind the discharge of \( H \) in bankruptcy in order to obtain a judgment which would be the basis for a levy on the entireties property of \( H \) and \( W \), it has been authoritatively determined that where it is necessary to perfect a claim against a surety on a bond for the release of an attachment, the discharge of the principal debtor in bankruptcy does not prevent the state court from rendering a judgment against him on the verdict, with perpetual stay of execution, so as to leave the creditor at liberty to proceed against the sureties.\(^16\)

It might be argued by analogy that the creditor in the Wharton case sought a judgment against \( H \) merely as a support on which to rest his claim against the entireties property. There is no policy of exempting from creditors the bankrupt's interest in such property; where the spouse is a co-debtor there is no reason for concern for her interest.

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\(^8\) Frey v. McGaw, 127 Md. 23, 95 Atl. 960 (1915); Ades v. Caplin, 132 Md. 66, 103 Atl. 94 (1918) (judgment obtained within four months of \( H \)'s suit in bankruptcy and no lien obtained on entireties property).


\(^10\) Note (1939) 82 A. L. R. 1235.

\(^11\) Dickherber v. Turnbull, 31 S. W. (2d) 234 (Mo. App. 1930); 11 U. S. C. A. § 44 (1927); Molloy v. Molloy, 43 Ohio App. 49, 182 N. E. 660 (1930). (This follows from the express provisions of the Bankruptcy Act, and does not depend upon the "joint and several" liability of the co-makers).

\(^12\) Lockwood v. Exchange Bank, 190 U. S. 294 (1903); Phillips v. Krakower, 46 F. (2d) 764 (C. C. A. 4th, 1931).

\(^13\) 1 Remington, Bankruptcy (2d ed. 1915) § 1104.


\(^15\) 223 Mo. App. 236, 15 S. W. (2d) 860 (1929).

\(^16\) Hill v. Harding, 130 U. S. 699 (1889).
The Missouri doctrine is carried to the bitter end in *Dickey v. Thompson*.\(^{17}\) There a conveyance intended to defraud creditors could not be set aside by the trustee in bankruptcy where the land so conveyed was entireties property. This conclusion was reached despite the fact the same trustee served in that capacity for both \(H\) and \(W\). One of the purposes of the Bankruptcy Act is to obtain equal distribution among all creditors, and the result of *Dickey v. Thompson*, with the corollary doctrine of withholding the bankrupt's discharge until the creditor can obtain a judgment in the state court, tends to favor that creditor over the others.\(^{18}\)

The instant case surmounts all these difficulties by recognizing that the discharge of one spouse in bankruptcy does not prevent a later acquisition of a joint judgment, to be used as a basis for levying against property held by the entirety. According to this court, the decision opens up a new field of credit to persons holding property by the entireties.

**WILLIAM AULL, III**

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**Criminal Law—Burglary—Breaking by Person With a Qualified Right of Entry**

**Hawkins v. Commonwealth**

Defendant was convicted of feloniously breaking a storehouse with intent to steal, under the Kentucky statute.\(^2\) He was employed as a truck driver and had been given a key to his employer's storehouse to enable him to lock the door at the close of the day's work. The evidence indicated that he unlocked the door during the night and stole some of the tools. The court, in affirming the defendant's conviction, held that an employee, although authorized to enter his employer's storehouse for purposes within the scope of his employment, who enters at a time beyond his authority for the purpose of carrying out a previously formed design to steal, is guilty of a violation of the statute. The court said that the status of an employee entering in this manner was that of a stranger.

The question of interest in this case is whether an employee, with authority to enter the premises, can be guilty of a felonious breaking and entering of those premises. The cases seem to be in accord with this decision in holding that

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17. 323 Mo. 107, 18 S. W. (2d) 388 (1929).

1. 143 S. W. (2d) 853 (Ky. App. 1940).
2. KY. STAT. ANN. (Carroll, 1936) § 1164: "If any person shall feloniously, in the night or day, break any warehouse, storehouse, office, shop, or room, in a steam, wharf, or other boat, whether such place be or be not a depository for goods, wares or merchandise, and whether the goods, wares and merchandise be or be not exposed for sale in such place, with intent to steal, or shall feloniously take therefrom or destroy any goods, wares, or merchandise, or other thing of value, whether the owner or other person be or be not in such house, office, room, or shop, he shall be confined in the penitentiary not less than one nor more than five years."
such a person can be guilty of a breaking, either due to a restricted right of entry or the intent with which the entry, though authorized, was made. Modern statutes, which make up our present criminal law, do not expressly deal with points of this character. This makes it necessary to go back to the common law decisions for purposes of construction and definition. Somewhat pertinent to the matter under discussion are the early English decisions holding that a servant, properly on the premises, was guilty of burglary if he entered a part of the premises to which his authority did not extend, with a criminal intent.4

There have been several analogous cases reported in Kentucky. The earliest was a case of burglary by use of a key which an employee of a beer company got from a cold storage warehouse, ostensibly to enter his employer's storage space, but in fact to enable him to enter another storage apartment and steal a keg of beer. The defendant was convicted of burglary under the same statute as that relied on in the principal case. The court held that though the defendant entered by use of the key there was a breaking within the meaning of the statute; the mere fact that he was given the key did not authorize him to enter this apartment; it may have facilitated his entry, but it did not change the effect of his act. In a later case,5 the defendant was employed by the owner of the house and got possession of a key for the alleged purpose of getting his clothes. He entered by use of the key and took away articles of value. The court, in finding the defendant guilty of burglary, said that although he was given permission to enter and the means of entry, these were obtained by fraud and conferred no right; the consent given by the house owner was for the defendant to enter to get his clothes, not for the purpose of stealing. These cases, combined with the principal case, show conclusively that the Kentucky courts consider entry of premises by a key given for some restricted purpose, with intent to steal, as a breaking sufficient to establish the crime of burglary under their statutes.

The case of State v. Corcoran6 dealt with an employee who had been given a key to the shop for the purpose of opening it in the mornings, but who entered in the evening and stole various articles. The defendant based his defense on the ground that as he had been given a key to the premises there could be no breaking, and no burglary. The court held that if giving the key had authorized the defendant to enter at any time, there could have been no unlawful breaking or entering, but that the defendant's authority to enter was confined to the usual hours of work, and entry at another time amounted to an unlawful breaking. Mere possession of the key here, as in the principal case, was not considered sufficient to allow the defendant to enter at any time he chose.

Another case,7 which depends on the fact that the right of entry was limited to the purposes of employment and the normal hours of employment, involved a defendant employed as delivery man by the owner of the burglarized building.

3. Edmonds Case, Hut. 20 (C. P. 1619); Rex v. Gray, 1 Str. 481 (K. B. 1735).
5. Young v. Commonwealth, 126 Ky. 474, 104 S. W. 266 (1907).
6. 82 Wash. 44, 143 Pac. 463 (1914).
He entered at night and took from the house bran and oats. The court held that the fact that the defendant was a domestic servant was immaterial; that he had no authority to enter the building at night; that the fact that he was employed there during the day did not relieve him from the charge of burglary. But in a case where the theft was by the owner’s trusted friend, who had been given a key and the right to come and go at will with as great a freedom as the owner, it was held that there could be no breaking, either actual or constructive, by this friend because of the complete and unrestricted right of entry.

A number of the cases involving this point look hard at the intent with which the entry was made. These cases hold that if the entry was with the intent to commit a felony, then it amounted to burglary, whether or not there appeared to be a right of entry.

Another situation where much the same problem is raised as in the principal case is where a person is lawfully within a building, such as a hotel, and then breaks into a room or part of the building where he has no right or authority to be. The cases on this point hold that such an action is sufficient breaking to constitute burglary if done with the intent to commit a crime. Authority to enter the building itself does not prevent forceful entry into a part of the building from amounting to a breaking, just as in the principal case the defendant’s authority to enter as evidenced by the key did not prevent his forceful entry at a time when he had no right to be on the premises from being a breaking.

Missouri seems to have no cases on this point reported, but it would seem that under Missouri’s statutes applicable to this situation, and in view of the position of other jurisdictions, the courts would have little difficulty in finding that an entry by a person with a right to enter at certain times or for certain purposes amounts to a breaking sufficient to make out a burglary when the entry was at a different time or for another purpose.

ELMUS L. MONROE

9. State v. Howard, 64 S. C. 344, 43 S. E. 173 (1902); McCready v. State, 25 Ariz. 1, 212 Pac. 336 (1923); Pointer v. State, 148 Ala. 676, 41 So. 942 (1906); see Lowder v. State, 63 Ala. 143 (1879). In People v. Ferns, 27 Cal. App. 285, 286, 149 Pac. 802 (1915), the court says: “No matter what may be said of the character of his entry, as to whether or not it was lawful, if he entered the room for the purpose and with the intent to commit the crime of grand or petit larceny, a perfect case of burglary was established.”
10. State v. Clark, 42 Vt. 629 (1870) (guest in a hotel caught in another guest’s room); Page v. State, 170 Tenn. 586, 98 S. W. (2d) 98 (1936) (defendant lawfully in hotel broke into auditor’s office and took money); cf. State v. Moore, 12 N. H. 42 (1841) (guest in hotel entered tap-room in night and took money; held no breaking); see note supra.
CRIMINAL LAW—INSANITY—IRRESISTIBLE IMPULSE

State v. Jackson1

The accused did not deny commission of the homicide but relied on the defense of insanity and irresistible impulse. The Missouri Supreme Court affirmed the refusal of the trial court to give an instruction on irresistible impulse.

The court lays down as the only test for insanity: "... whether the accused was capable of distinguishing right from wrong as applied to the particular act." Mere irresistible impulse is not an excuse. The court uses the expression "volitional insanity" as meaning the same thing as irresistible impulse; yet it also declares that the latter connotes: "... that although the accused can distinguish between right and wrong, still he is unable because of mental disease2 to resist the impulse to commit the criminal act."

Apparently the first Missouri case in which the subject was brought before the court was Baldwin v. State,3 in which the instruction given by the trial court, while not entirely clear, seems in include irresistible impulse. However, this case is cited in later cases as asserting the right and wrong test only,4 and a case decided soon after this5 very definitely laid down the right and wrong test as the only one recognized. In State v. Kotovsky,6 the judge writing the opinion expressed the belief that the right and wrong test was not the only test and that the irresistible impulse test should also be considered. However, since the majority of the court did not share this view the opinion is not authority for the irresistible impulse test.

The court has never given any reasons in support of the refusal to consider irresistible impulse, beyond a few short expressions of concern.7 In State v. Pagels,8 a case often cited in later cases as authority for the right and wrong test alone, the court said: "It will be a sad day for this state, when uncontrollable impulse shall dictate 'a rule of action' to our courts." In State v. Williamson,9 the court came nearer than in any other case to giving a reason for its steadfast refusal; it said: "Whether the courts in dealing with this subject (irresistible impulse) have kept pace with the scientific world and the

1. 142 S. W. (2d) 45 (Mo. 1940). See also State v. West, 142 S. W. (2d) 468 (Mo. 1940).
2. Italics mine. See note 16, infra.
3. 12 Mo. 223 (1848).
5. State v. Huting, 21 Mo. 464 (1855).
6. 74 Mo. 247 (1881).
7. State v. Huting, 21 Mo. 464 (1855); State v. Erb, 74 Mo. 199 (1881); State v. Kotovsky, 74 Mo. 247 (1881); State v. Pagels, 92 Mo. 300, 4 S. W. 931 (1887); State v. Williamson, 106 Mo. 162, 17 S. W. 172 (1891); State v. Miller, 111 Mo. 542, 20 S. W. 243 (1892); State v. Soper, 148 Mo. 217, 49 S. W. 1007 (1899); State v. Dunn, 179 Mo. 95, 77 S. W. 848 (1903); State v. Berry, 179 Mo. 377, 78 S. W. 611 (1904); State v. Riddle, 245 Mo. 451, 150 S. W. 1044 (1912); State v. Wessley, 266 Mo. 677, 228 S. W. 817 (1921); State v. West, 142 S. W. (2d) 468 (Mo. 1940).
8. 29 Mo. 300, 317, 4 S. W. 931 (1887).
9. 106 Mo. 162, 17 S. W. 172 (1891).
humanity of the age, may well be questioned; but so far, it seems to us, this court has adopted the only rule by which society at large can be protected. We see no reason for overturning a well-settled rule and attempting to follow the ignis fatuus of 'uncontrollable impulse.' We might as well announce there would be no more prosecutions for homicide."

In *State v. Miller,* there was an instruction of the trial court that included the irresistible impulse test and the case was affirmed, without comment on this subject, by the supreme court. This cannot be taken as recognition of the doctrine as the accused could not complain of a charge favorable to him.

The refusal of the court is not limited to an irresistible impulse to kill in question in a prosecution for homicide, but has also been applied in prosecutions for rape, embezzlement, and kleptomania. Kleptomania is the best recognized of the irresistible impulses due to mental disease. However, the supreme court adheres to its flat statement that the court will not recognize this defense of irresistible impulse.

In the case of *State v. Palmer,* the court says that in order to be criminally liable the accused must have sufficient mental capacity to have criminal intent. By definition, irresistible impulse is caused by mental disease and takes away the person's capacity to refrain from doing the act that he knows is wrong. Thus if the accused, because of mental disease, does not have capacity for criminal intent, it would seem that he is irresponsible and not criminally liable.

It may also be doubted whether a person who commits a criminal act because of an irresistible impulse, whether caused by mental disease or otherwise, should be punished, though he may very properly be confined for the protection of society. In cases where the irresistible impulse is not caused by mental disease there are several objections to recognizing it as a defense. The first and most universal objection is that such a defense would be simulated by all defendants, so that some who were deserving of punishment would escape. It is also objected that at the time of the trial it would be very difficult to determine whether or not the defendant had been suffering from some transitory mental or emotional condition that would cause such an irresistible impulse. Also, it would be impractical to attempt treatment of all such cases in non- penal institutions, and it is not certain that there is any satisfactory treatment for such passing and changing conditions. These objections carry such weight that even those states that recognize the doctrine of irresistible impulse as a defense, limit it to cases where such impulse is caused by mental disease. These objections, however,

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10. *Id.* at 173, 17 S. W. at 175.
11. 225 S. W. 913 (Mo. 1920). See also Baldwin v. State, 12 Mo. 223 (1848).
15. 161 Mo. 152, 172, 61 S. W. 651 (1901), citing 1 CLEVENGER, MEDICAL JURISPRUDENCE OF INSANITY (1898) 125.
16. 14 Am. Jur., Criminal Law, § 35; WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933) 44.
do not apply where the irresistible impulse is caused by mental disease any more than in the application of the right and wrong test.

The leading case advocating the use of the irresistible impulse test is Parsons v. State, 18 decided by the Supreme Court of Alabama. In this well-reasoned opinion the court says that in order to put criminal responsibility on the defendant it is necessary to show that he has "capacity of intellectual discrimination and freedom of will." The opinion continues that the courts are not justified in stating that such a thing as mental disease causing irresistible impulse does not exist, especially in the face of almost overwhelming medical and psychological testimony to the contrary. Thus the Alabama Court concluded that where the testimony, expert and otherwise, presented a fair issue on the matter, the trial court should leave to the jury the question of whether in the particular case there is an irresistible impulse caused by mental disease. 19

However, Missouri refuses to distinguish between irresistible impulse caused by mental disease and that resulting from other causes, and denies the validity of either as a test for insanity and is thus in accord with the majority of jurisdictions in holding that the right and wrong test is the only one that can be used in determining the sanity or insanity of a defendant in a criminal case. 20

FRED L. HOWARD

FEDERAL JUDGMENTS—LIENS

In re B. P. Lientz Mfg. Co. 1

This case presented the question whether a judgment rendered in favor of the protesting creditor against the debtor and B. P. Lientz in the Federal District Court sitting in Jackson County, Missouri, was a lien from rendition on reality of the judgment debtor situate in Jackson County. The court held that the judgment was not a lien on such reality of the debtor until the creditor had complied with the Missouri statute 2 requiring that before a judgment rendered in any court held in a county having more than sixty thousand inhabitants was a lien on reality of the judgment debtor situated within that county, an abstract of such judgment must be entered in a book kept by the clerk of the circuit court having jurisdiction over civil causes within such county. Since no such abstract had been filed, there was no lien.

To reach its decision, the court first examined the Act of August 1, 1888, 3 declaring that judgments rendered in district courts of the United States within any state should be liens on reality of the debtor throughout such state in the

18. 81 Ala. 577, 2 So. 854 (1886).
19. Ibid.

same manner and to the same extent as the liens of state judgments; provided that such act should apply only when the laws of such state should authorize "the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State." The court then turned to the Missouri statute which is a revision of the statute held by the Supreme Court in 

Rhea v. Smith not to conform to the Act of 1888, and decided, noting wherein the statute is revised, that since it put the United States District Courts on an equality with the circuit courts of the state (so far as territorial extent of the liens of the two courts is concerned), it complied with the Act of 1888. From this holding it is inferred that the Missouri law on judgment liens is entirely in accord with the provisions of the Act of 1888.

To understand the problems raised by the case, a brief résumé of judgment liens is necessary. Judgments of federal courts at law are not liens independent of statute any more than are judgments of any other court, since the mere entry of judgment created no lien at common law. Until 1888 there was no specific federal lien statute, but by virtue of the Process Acts, the first of which was enacted in 1789 and which provided, among other things, that "... modes of process ... in the circuit and district courts ... shall be the same in each state respectively as are now used or allowed in the supreme courts of the same," it was early held that where by custom or statute state judgment creditors were empowered to reach land in the hands of subsequent purchasers from their debtors, federal judgment creditors might reach such land.

Where the state law required recording of the judgment in the county where the land lay, however, it was feared that federal judgments might be prejudiced through lack of federal control of the state recording officers. Consequently, it was held that inasmuch as the county was the territorial boundary of the state court's jurisdiction, the state judgment which was a lien throughout the county was by nature of that fact necessarily a lien throughout the state court's territorial jurisdiction, so the federal judgment should be a lien throughout the federal court's jurisdiction, that is, throughout the district embracing several coun-

4. Mo. Laws 1935, § 1103, p. 207: "Judgments and decrees rendered by the Supreme Court, by any United States District or Circuit Court held within this state, by the Kansas City Court of Appeals, the St. Louis Court of Appeals, the Springfield Court of Appeals, and by any Court of Record, shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held." (Italics mine)

5. Mo. REV. STAT. (1919) § 1555: "Judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held." (Italics mine)


9. 1 STAT. 276, c. 36, § 2 (1850).

ties. The federal courts refused to recognize the importance of the county as a recording unit and the necessity of protecting potential purchasers of land by having a record of the charges against land in the county in which it lay.

The obvious inconvenience of this doctrine resulted in the Act of 1888, paraphrased above. Although a number of decisions on problems of federal judgment liens were reported since that time, the case of *Rhea v. Smith* has been the only one to reach the United States Supreme Court. The question there was whether the judgment rendered by a federal district court sitting in Jasper County, Missouri, was a lien from rendition on lands of the judgment debtor situated in that county. The Supreme Court reversed the Missouri Supreme Court, holding that the judgment was a lien from rendition. Mr. Chief Justice Taft examined three Missouri statutes and held that since they did not conform to the Act of 1888, the rule prior to that time, as enunciated in *Massingill v. Downs*, should apply. The narrow holding is correct: by virtue of Section 1555, Missouri Revised Statutes, 1919, the judgment of any state court of record was a lien from rendition on real estate of the debtor situated in the county for which the court was sitting, hence judgments of the Circuit Court of Jasper County were liens from rendition on realty situated within the county, and the Act of 1888 adopted this rule for federal judgments. But the Court went further and said that the question of conformity was a nice one, that mere "approximate conformity" would not suffice, and that the Act of 1888 did not apply in Missouri because that state had not passed laws making the "conditions of creation, scope and territorial application of the liens of federal court judgments the same as state court judgments." It is this erroneous *dictum* quoted that has confused the problem of federal judgment liens. Its assumption is that the Act of 1888

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12. See text accompanying note 3, supra.


14. 308 Mo. 422, 272 S. W. 964 (1925).

15. Mo. Rev. Stat. (1919) § 1554: "Judgments and decrees obtained in the supreme court, in any United States district or circuit court held within this state, in the Kansas City court of appeals or the St. Louis court of appeals, shall, upon the filing of transcript thereof in the office of the clerk of any circuit court, be a lien on the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed." See also note 5, supra, and § 1156.

16. 7 How. 760 (U. S. 1848).

17. 274 U. S. 434, 441, 700, 1144 (1927).

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somehow delegated to the states the authority to legislate regarding federal judgment liens and that Section 1554, which was interpreted with Section 1555, Missouri Revised Statutes, 1919, to mean that the judgments and decrees of federal courts and state appellate courts should be liens on lands of the debtor only upon filing of a transcript with the clerk of the circuit court in the county in which such lands are located, is an effort by Missouri to exercise that delegated power. A careful reading of the Federal Act discloses that it is entirely passive: provided that the state makes provision for equal recording of federal judgments, as compared to state judgments, the federal judgment is a lien in the same manner and to the same extent as the state judgment. Clearly any effort of the state to regulate federal judgment liens is nugatory. The Supreme Court should have held that under Section 1555, Missouri Revised Statutes, 1919, the circuit court judgment was a lien from rendition on lands of the debtor in Jasper County, therefore the federal court judgment was likewise a lien from rendition by virtue of the Act of 1888, and should have disregarded any language in Section 1554, Missouri Revised Statutes, 1919, indicating that there must be transcription of the judgment of the federal district court sitting in Jasper County before there could be a lien on lands of the debtor situated in that county. It is noteworthy that just two years after this case was settled, the Supreme Court of Nebraska ruled that judgments of the United States District Court for Nebraska were liens from time of rendition only in the county in which the court was sitting and that a transcript must be filed before a lien existed in other counties. The essence of this holding is that since Nebraska has provided proper facilities for recording the federal judgments, federal judgments are liens in the same manner and to the same extent as the state judgments, although if anything, the statutes involved in this case attempted more discrimination against the federal judgment liens than did the Missouri statutes involved in the Rhea case.

The Missouri statute was amended in 1935 and now purports to regulate state and federal judgment liens on equal terms. If conformity of regulation is the test, as indicated by Rhea v. Smith, the terms of the revised section should

Rights) (1936) 11 WIS. L. REV. 142; White, In re Decision in Federal Lien Case of Rhea v. Smith (1927) Vol. 6, No. 10 TITLE NEWS; Hackman, Concerning Rhea vs. Smith (1929) 22 LAWYER & BANKER 35; and Notes (1926) 35 YALE L. J. 637; (1928) 7 N. C. L. REV. 103; (1927) 6 NEB. L. BULL. 186; (1928) 15 VA. L. REV. 86; (1932) 8 NOTRE DAME LAWYER 96; (1928) 37 YALE L. J. 330; (1936) 1 Mo. L. REV. 96; (1936) 10 FIA. L. J. 371; (1937) 33 W. VA. L. Q. 240; (1928) 13 IOWA L. REV. 228; (1929) 14 IOWA L. REV. 115.


20. Ibid.

21. Niemi Bros. v. Rosenbluh, 147 Misc. 159, 263 N. Y. Supp. 445 (1933), adopts this view. The court distinguished the case from United States v. Harpootlian, 24 F. (2d) 646 (C. C. A. 2d, 1928), on the ground that after the Harpootlian case, New York passed a statute enabling the county clerk to register the federal judgments. Hence while New York had not conformed to the Act of 1888 when the rule of the Harpootlian case was enunciated, it had conformed by 1933 and the judgment in the Niemi case was not a lien because it had not been properly recorded.

22. NEB. COMP. STAT. (1929) §§ 8927, 8939 and 8986, as amended by Neb. Laws 1927, c. 59.

23. See note 4, supra.
now apply to federal judgments, and if the literal words of the Act of 1888 are to be followed, the limitations on state judgments should be applied to federal judgments. Some argument has been made that because the state judgment is a lien throughout the county immediately upon rendition, the federal judgment, even under the Act of 1888, should be a lien from rendition throughout the larger territorial jurisdiction of the federal court, that is, throughout all the counties embraced in the federal district.24 This overlooks both the fact that the county is designated in the state statute because it is the generally used recording unit, not because it happens to coincide with the territorial jurisdiction of the state court,25 and also that this situation is just what the Act of 1888 sought to rectify.26

In the Lientz case the problem arose under a special statute,27 and assuming that the other Missouri law is in conformity with the Act of 1888, the question arises whether this section also conforms. The Act of 1888 demands equal recording facilities for the federal judgments before they shall become liens in the same manner as state judgment liens. Under Sections 1103 and 1142,28 Missouri Laws, 1935, the equal recording problem does not arise since both state and federal judgments are liens from rendition in the county in which each court is sitting, while to be a lien in some other county than that in which the judgment is rendered, there must be transcription of the judgment. But under Section

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24. It should be noted that the state statute unfortunately refers to the county “for” which the court sits. It is argued that the federal judgment is a court “for” all the counties in the district. See (1936) 1 Mo. L. Rev. 96; Rhea v. Smith, 308 Mo. 422, 433, 272 S. W. 964, 966 (1925).
25. Most of the state courts embrace several counties but it cannot be argued that the state judgment is a lien throughout more than one county without further recording. The statutes are too explicit on that subject. See note 4, supra.
26. 19 Cong. Rec. 2359 et seq. (50th Congress, 1st sess. 1888). Mr. Warner of Missouri objected to the Act on the grounds that, as introduced, it perpetuated the undesirable condition in adopting the state lien law. But it was enacted in that form since it was felt by the committee that it embodied the best possible language to preserve conformity.
27. Mo. Rev. Stat. (1929) § 1150: “In certain cities and counties, abstracts of judgments to be entered by circuit clerk—to have priority lien.—No judgment thereafter rendered by any court in a city having over one hundred thousand inhabitants, or in any county having over sixty thousand inhabitants, shall be a lien on real estate situate in such cities or counties, until an abstract of said judgment shall be entered in a book to be kept by the clerk of the circuit court having jurisdiction of civil causes within such city or county, and which shall state in ruled columns: First, the names of the parties; second, the date; third, the nature of the judgment or decree; fourth, the amount of the debt, damages and costs; fifth, the book and page in which it is entered; sixth, the satisfaction or other disposition thereof, with the necessary space for notes thereon. The liens of all judgments entered in said book, as herein provided for, shall have priority according to the period of time of their respective entries into said book—such period being deemed the period of time within which the abstract thereof should be furnished to or provided by the clerk of such circuit court under the provisions of this article.”
28. See note 4, supra, for § 1103. Mo. Laws 1935, § 1142, p. 207, is as follows: “Judgments and decrees obtained in the Supreme Court or either court of appeals or any United States Court or any court of record in this State, shall, upon the filing of a transcript thereof in the office of the Clerk of the Circuit Court of any other county, be a lien upon the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.”
1150, Missouri Revised Statutes, 1929, it is conceivable that the judgment of the circuit court sitting in a county of more than sixty thousand inhabitants or in a city having more than one hundred thousand inhabitants, which has jurisdiction over civil causes within such city or county, may be regarded as a lien from rendition, since the clerk is under a duty to record the judgments of the circuit court as soon as they are rendered, whereas the judgment of a federal court handed down at the same time or earlier may never become a lien at all on lands in that county, or will become a lien at a later time than that of the state court, depending on the diligence of the attorney for the federal judgment creditor. That is, the clerk of the state court is under an independent duty to record of his own motion the state, but not federal, judgments rendered in that county. Hence there is not equal recording under this section, and following the Rhea v. Smith rule of “exact conformity,” the instant case might have been decided contra.

It is submitted that the shadow thus cast on Section 1150, Missouri Revised Statutes, 1929, is unnecessary. A thorough examination of the statute indicates that the intent of the legislature was to establish a repository for the recording of these state and federal judgments in order that they might become liens, such a repository being necessary in order to facilitate examination of title in cities and counties having many circuit courts, hence many possible sources of judgment liens. But it is not feasible, as noted above, to burden the clerk of the circuit court with the duty of recording judgments of federal and other state courts, since he already is under the duty of recording the judgments rendered in his own circuit court. His duty in that regard is independent of the lien law and should be compared to the duty of the federal clerk to keep a docket of federal judgments. However, so ticklish is the situation regarding federal judgments, since Rhea v. Smith, that it might easily be held that because of the double duty cast by Section 1150 on the circuit court clerk, the provisions for recording are not equal and hence the Act of 1888 does not apply. It is suggested that if the statute were amended so that no judgment of any court could become a lien on any lands of the judgment debtor until it should be recorded in the office of the recorder of deeds in the county in which the land is situated, there would be more certain compliance with the Rhea v. Smith rule of “exact conformity,” and the potential purchaser of land would have to search only one set of records to ascertain what charges exist against that land.

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29. See note 27, supra.
FEDERAL PROCEDURE—EVIDENCE—CHARACTER OF CLAIMED PRIVILEGE AGAINST PHYSICAL EXAMINATION

Sibbach v. Wilson & Co.¹

In an action to recover damages for bodily injuries inflicted in Indiana, the Federal District Court of Illinois ordered petitioner to undergo a physical examination to determine the nature and extent of her injuries. Compliance having been refused, petitioner was adjudged guilty of contempt. By Indiana law such an order was proper, but in Illinois it would not be allowed. Rule 35(a)² of the new Federal Rules provides: “In an action in which the mental or physical 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 Circuit Court of Appeals affirmed.³ On certiorari the Supreme Court held that while the examination was properly ordered under Rule 35(a), the cause must be remanded by reason of an express provision in Rule 37 that refusal to comply with an order for examination was not punishable by contempt.

Professor Wigmore points out that though there is no general privilege on the part of a civil party to prevent the inspection of his body, a “privilege has been claimed, and in a few jurisdictions acknowledged, in a class of cases in which, above all, there is most detriment and least service in its existence, namely, actions for corporal injuries.”⁴ Missouri, along with the general trend of authority, seems to have repudiated any such rule.⁵

The Act of June 19, 1934, which empowers the Supreme Court to prescribe the new rules of procedure, states that: “Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.”⁶ A prior Supreme Court⁷ case had held that a federal court could not order a plaintiff in an action for injury to the person to submit to examination in advance of trial. It does not appear for certain whether the court considered this ruling to be a matter of “substantive” or “procedural” law. To be true, it quotes Judge Cooley to the effect that “the right to one’s person may be said to be a right of complete immunity: to be let alone.” But in other respects the Court treated the matter as “procedural,” for it admitted that a statute of the United States authorizing an order of the sort would be valid, and concededly Congress cannot determine the substantive law of the state.

Another Supreme Court ruling⁸ is to the effect that such an order is permissible where such examinations were authorized by statute. In that case it is

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1. 61 Sup. Ct. 422 (1941).
4. 3 WIGMORE, EVIDENCE (3rd ed. 1940) § 2220(6). Note 13 sets out the division of authority.
impossible to tell whether the matter was treated as "procedural" or "substan-
tive" inasmuch as the injury and the action arose in the same state. The lan-
guage of the Court far from clarifies the matter.

In the case under discussion, petitioner was in a dilemma. By Indiana law, where the injuries occurred, an order for examination was proper, but in Illinois such an order cannot be made. If he contended his right to be exempt from examination was substantive, the law of Indiana was applicable and the exami-
nation was permissible. Whereas if he contended it was a procedural matter, the new federal rules, rather than the Illinois practice, would apply. Petitioner admits Rule 35(a) is a rule of procedure and the Court thinks rightly so. No doubt this case would have been a stronger one for exact analysis had the Indiana law been that no such order could be made. But petitioner insisted that by the prohibition against abridging substantive rights, Congress meant "important" or "substantial" rights. This position seems exemplary of the difficulty of classifying a rule dealing with the powers of the court as "substantive" or "procedural."

The Court lays down its test as being whether "a rule really regulates pro-
cedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." The Court seems to realize that any other decision would result in endless and needless litigation. Further, it recognizes that the new Federal Rules work a major change in policy but that this change is justifiable in the interest of "speedy, fair and exact determination of the truth."

The District Court for the Eastern District of Illinois has dealt with our problem of the modification of substantive rights by the new Rules of Procedure as regards the pleading of contributory negligence.\(^9\) The contributory negligence problem has also arisen, not as a matter of pleading, but as regards burden of proof.\(^10\) Likewise the problem has been raised in connection with self-executing court conveyances of real estate.\(^11\)

It would seem the decision under consideration might well furnish a basis for solution of any future analogous problem.

JOSEPH W. HARDY

INSURANCE—INSURABLE INTEREST IN LIFE—ASSIGNMENT OF POLICY

Walker v. General American Life Insurance Co.\(^1\)

Plaintiff sued upon two policies of life insurance issued by defendant to plaintiff's husband, now deceased. The insured had used the name of "John Parker" in the policies, which was not his true name, and named as beneficiary "Elizabeth Parker, wife of John Parker." Elizabeth Parker was insured's

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1. 141 S. W. (2d) 785 (Mo. 1940).
paramour. Plaintiff contended she was entitled to recover since the person described as wife of insured was not in truth and fact his wife. The trial court overruled this contention, and upon appeal this ruling was affirmed on the ground that the intent of insured must govern in ascertaining who the beneficiary is under the policy, and that every person has an insurable interest in his own life and may insure it for the benefit of anyone he sees fit to name as beneficiary.

It is well settled insurance law that a contract of life insurance not supported by an insurable interest is contrary to public policy and void.2 The two objections to the indiscriminate enforcement of life insurance contracts are that they are wagering contracts,3 and that they tend to encourage the taking of human life.4 The social and economic objection to a wagering contract is that it leads to an unearned gain.5 A life insurance contract is clearly a wagering device whenever the beneficiary is the moving party in procuring the contract, and the beneficiary has no interest in the life insured.6 As to the objection that it promotes murder, it is evident that every life insurance contract in which the beneficiary and insured are not the same person, creates a temptation to the beneficiary to murder the insured, in the sense that the opportunity for gain exists if only the crime can be concealed.7 The harmful tendency of such a contract is minimized where the insured consents to the naming of the beneficiary,8 or the beneficiary has a sufficient motive, pecuniary or otherwise, for desiring that the death of the insured should not occur.9

Where, as in the principal case, the insured is the moving party in procuring the insurance and has consented to the naming of the particular beneficiary, the considerations against gambling are satisfied. The selection of the beneficiary by the insured is sufficient guaranty of the existence of such good faith and confidence between them that the possibilities of murder will be reduced to a negligible minimum.10 The authorities are in universal accord in holding that every person has an unlimited insurable interest in his own life and may lawfully insure it for the benefit of his own estate, or in behalf of any other person, and it is not necessary that such beneficiary shall possess an interest in the life insured.11 But the insured must do so in good faith to promote the beneficiary's

3. Whitmore v. Supreme Lodge, 100 Mo. 36, 13 S. W. 495 (1889).
4. Patterson, Insurable Interest in Life (1918) 18 Col. L. Rev. 381.
5. Id. at 386.
6. Id. at 389; King v. Metropolitan Life Ins. Co., 211 S. W. 721 (Mo. App. 1919).
7. Patterson, supra note 4, at 389.
welfare, and not in a collusive manner, which would be equivalent to the beneficiary procuring the insurance. Missouri statutes provide that no insurance company shall issue an insurance policy upon the life of any person in which the beneficiary named has no insurable interest, but these statutes have never been applied to hold invalid a policy which was procured by the insured and made payable to one having no insurable interest in his life.

The most interesting point of the instant opinion is the obiter dictum that the rule of the case is but a corollary of the general proposition that any legally competent person may be the donor of his own property and give it to whom he pleases. It further states that with the absolute ownership of property goes the right of arbitrary disposition of it, and this right of arbitrary disposition is reflected in deeds or wills exhibiting the loves, hates, partialities, or caprices of the testator or grantor. However, this language is hardly consistent with the view of the Missouri courts that there can be no assignment of an insurance policy to one having no insurable interest in the life of insured. Although the law permits a contract of insurance to be made by a person on his own life for the benefit of another who has no pecuniary interest in his life, yet, by a distinction hard to maintain on principle, many courts, including those of Missouri, hold the assignment of a policy to one having no insurable interest in the life of the insured is invalid, or, if made to a creditor, valid only to the amount of his advances. For support of its position, the Missouri courts generally cite an early case of the United States Supreme Court which intimated that an assignment of a life insurance policy to one having no insurable interest in the life of insured cannot be sustained under any circumstances. But the broad language of this case has been rejected in the case of Grigsby v. Russell, a later decision of the Supreme Court. In the latter case the correct rule was stated to be that an assignee of an insurance policy need have no interest, regardless of whether or not he pays the premiums and regardless of whether or not he pays an adequate consideration for the assignment, as long as the assignment is wholly unconnected in thought and in purpose with the issuance of the policy.

14. Mutual Life Ins. Co. v. Richards, 99 Mo. App. 88, 72 S. W. 487 (1903); Kelly v. Prudential Ins. Co., 148 Mo. App. 249, 127 S. W. 649 (1910); Locke v. Bowman, 168 Mo. App. 121, 151 S. W. 468 (1912); Tripp v. Jordan, 177 Mo. App. 339, 164 S. W. 158 (1914); Lee v. Equitable Life Assur. Soc., 195 Mo. App. 40, 189 S. W. 1195 (1916); Allen v. Astina Life Ins. Co., 228 Mo. App. 14, 62 S. W. (2d) 916 (1933). Early Missouri law was contra. See McNairland v. Creath, 35 Mo. App. 112 (1899), MO. STAT. ANN. (1932) § 5751, prohibits assignment of a policy to a person having no insurable interest in the insured’s life, but as construed in N. Y. Life Ins. Co. v. Rosenheim, 56 Mo. App. 27 (1894), it applies only to policies of companies operating under the assessment plan. There is no statute on this as to insurance policies of companies operating on the stipulated premium plan, which makes up the majority of insurance. The law as to this is left to Missouri judicial decisions, which holdings accord in principle with the results reached under the above statutory provisions as to assessment insurance.
18. 222 U. S. 149 (1911).
courts, however, have not as yet adopted this more desirable interpretation of the Grigsby case. 19

An assignment of the rights under an insurance policy has been viewed as a transfer of property. 20 This seems to be a sound approach, since the contract of insurance brings into being a chose in action, 21 which is one type of property. 22 It is desirable to allow such assignments in order to further the considerations in favor of free alienation of property. 23 The Missouri court in the instant case seems to admit this, yet courts handling prior cases in Missouri have not wished to allow the assignment in favor of an assignee who possesses no insurable interest. If the power to assign is restricted in any way, the result is necessarily to make the property less valuable. 24 It could even be argued that a limitation upon the power to assign rights under an insurance policy amounts to a refusal to give such rights the status of property. 25

In the early Missouri case of McFarland v. Creath, 26 which was decided before the rule was adopted preventing assignments of the policy to one lacking interest in the insured's life, it was reasoned that a man has complete control over the disposition of his property, and can dispose of it by will or otherwise. Hence the conclusion was reached that public policy did not forbid the assignment of insured's interest in the proceeds of a policy to one having no insurable interest in the life of insured, where the assignee took no part in procuring the insurance policy at the time it was issued. The language of the court in the principal case is virtually the same as the reasoning used in the McFarland case, but the Missouri courts have not reached the conclusion to which the reasoning referred to inevitably leads. 27

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22. Gordon v. Ware Nat. Bank, 132 Fed. 444, 447 (C. C. A. 8th, 1904) (policy is a chose in action, a species of property, and will be of little value if not transferable).
23. Grigsby v. Russell, 222 U. S. 149 (1911); Patterson, supra note 4, at 421 ("Freedom of contract and of gift is still the underlying principle" of the doctrine of insurable interest).
24. Grigsby v. Russell, 222 U. S. 149 (1911), quoting from Mr. Justice Holmes: "So far as reasonable safety permits, it is desirable to give life policies the ordinary characteristics of property. To deny the right to sell except to persons having such an interest (insurable) is to diminish appreciably the value of the contract in the owner's hand."
25. See note 24, supra. One of the chief characteristics of property is its alienability.
26. 35 Mo. App. 112 (1889).
SALES—WHAT IS A SALE—PRICE—DISTINCTION BETWEEN SALE AND EXCHANGE

Freund Motor Co. v. Alma Realty & Investment Co.¹

Defendant leased an automobile salesroom to the original lessee at a rental based upon an amount equal to "one per cent of the total gross sales" made by the lessee. Plaintiff purchased the interest of the original lessee in the lease, and the lease was assigned to him with the consent of the defendant lessor. Plaintiff under protest paid rent on the basis of one per cent of the total gross sales as defendant construed the phrase, that is, that total gross sales meant the sale prices of the new cars without deducting the amount of the allowance made for used autos taken in trade, and a like percentage on the resale of the used cars. Plaintiff, in this action in equity, seeks a declaratory judgment construing the lease and a recovery of rents paid. Plaintiff claims that the term "total gross sales" is the sale price of new cars less the amount allowed in trade for used, that is, that he should pay one per cent of the actual money consideration he receives for each car. The court held for the plaintiff, saying that the term "sale" is ordinarily defined as a contract to give property for money, and that this was the intention of the parties. The court said that taking a used car in trade is an exchange of property for property and not a transfer of property for money, coming within the definition of a sale.²

What is a sale? Is it a transfer of property for a money consideration, or does it also include a transfer of property for property? What is price? There is a conflict of authority on these questions in this country, and we shall consider the different views taken by the courts.

The statement that the price must be payable in money seems to have been taken from the Roman law. The Roman law view was that the price "must be in money, must be fixed, and must be real."³ Roman law allowed certain contracts to be made with a freedom from formality not permitted in other kinds of contracts, and the contract of sale was one of the favored types. Since it was a favored contract, peculiar rules were necessary to determine its boundary lines and to distinguish it from other contracts, and a contract of sale was, therefore, distinguished from a contract of exchange.⁴ The common law followed this distinction, and the Roman and common law view was codified in the English Sale of Goods Act of 1893 which provided: "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."⁵

However, the Uniform Sales Act which has been adopted by thirty-five legis-

1. 142 S. W. (2d) 798 (Mo. App. 1940).
2. Therefore, under a legal analysis, the ordinary purchase of a new car where a used car is given in trade involves two separate legal concepts: an "exchange" to the extent of the allowance made for the old car, and a "sale" to the extent of additional cash consideration.
3. BUCKLAND, TEXTBOOK OF ROMAN LAW (1921) § CLXX.
4. 1 WILLISTON, SALES (2d ed. 1924) § 170.
5. 1894, 56 & 57 VICT., c. 71.
ative jurisdictions in this country changed the view of the Roman law, the common law, and the Sale of Goods Act. The Uniform Sales Act states: "The price may be made payable in any personal property." This section brings exchanges of goods and contracts to exchange goods within the act, and it has been expressly held that exchanges of property constitute a sale within the act.

In those jurisdictions which have not adopted the Uniform Sales Act, we have a conflict of authority. In making a survey of the cases and authorities, it seems that the majority takes the narrow view that a sale is a transfer of property in consideration of a payment of money, in contrast to a barter or exchange which is a transfer of goods for other goods. Other courts go to the opposite extreme and expressly state that a sale is a transfer of property from one party to another in consideration of some price or recompense in value, and consideration may be any agreed equivalent. Some jurisdictions, however, take an intermediate view and hold that a sale may exist without an actual payment of the consideration in money, provided the bargain is made and the value measured in money.

Even though the majority of jurisdictions give a narrow interpretation to the term "sale" and require a money consideration, it is interesting to note that in the construction of various statutes the word "sale" has been held to include transactions for other than a money price, thereby giving a broad construction to the term. An exchange has been held universally in the United States to be within the section of the Statute of Frauds relating to the sale of goods. Also a transfer by a dealer of his whole stock of merchandise in satisfaction of a debt was held to be a sale under the Massachusetts bulk sales act making such sale void as against creditors. Various courts in construing statutes prohibiting the sale of intoxicating liquors have included a transfer of liquor for other than a money consideration to be a sale.

Missouri has not adopted the Uniform Sales Act. The Missouri cases seem to follow the old Roman and common law view requiring a money consideration.

6. **Uniform Sales Act § 9 (2).**
11. 1 **Williston, Sales** (2d ed. 1924) § 56, n. 29.
A typical example of the Missouri view is stated in 
Stout v. Caruthersville Hardware Co.,
the court saying: "An essential element of a sale is a money price." 
In Martin v. Ashland Mill Co.,
the Missouri court expressly makes a distinction 
between an exchange of goods and a sale, saying, "there being no price in money 
agreed upon for the wheat delivered, there was no sale. It was a commutation 
of goods for goods, and, therefore an exchange and not a sale." The court in 
this same case, however, admits that there is little difference between the two, 
saying, "the distinction however, between a sale and an exchange is rather one 
of shadow than of substance, for in both cases the title is absolutely transferred, 
and the same rules of law are applicable." It is interesting to note that the 
Missouri sales tax act does not follow the majority Missouri view, for the act 
expressly defines a sale as "any transfer, exchange or barter . . . of tangible 
personal property for valuable consideration . . ." This express definition 
may indicate that the legislature was aware of the fact that the commonly ac-
cepted usage of the term "sale" in this state is the same as the Roman and com-
mon law requiring a money consideration.

The real issue in the instant case was what the word "sale" meant in the 
lease. The court stated that the construction it gave to the lease arrived at the 
manifest intention of the parties and justified its conclusion by giving an example: 
if the sale price of a new car is $1,500 and $500 is allowed on a used car and the 
used car is subsequently resold for $500, the amount of money realized on the 
two transactions is $1,500. But if the percentage is paid on the sale price of 
$1,500 without deducting the trade-in value of the used car and is again paid 
on the resale price of $500 of the used car, the plaintiff lessee would have to pay 
one per cent in rent on $2,000, not on $1,500, the actual amount realized on the 
two transactions. This construction of the lease does, it is true, conform with 
the majority Missouri and common law view which requires a money considera-
tion for a sale and which distinguishes between a sale and an exchange. But does 
the above example really indicate actual intention, or does it indicate merely 
the intention a hypothetical reasonable man might have had? It seems that an 
objective test of a reasonable man must be used in construing this lease, because 
the plaintiff was not an original party but an assignee, and therefore a subjective 
test as to what was in the mind of each party while making the lease could not be 
used. What does "sale" mean under an objective test? What interpretation would 
a layman give to the lease in this case? The original lessee paid a rental of one 
per cent of the sale price of the new cars regardless of whether payment was 
made in cash or by cash and a used car, and he did not protest or think it unre-
reasonable. Under the present sales tax system if one buys an article and pays for

313 Mo. 552, 281 S. W. 744 (1926); Martin v. The Ashland Mill Co., 49 Mo. App. 
23 (1892); Burkhardt v. Decker, 221 Mo. App. 1066, 295 S. W. 838 (1927); Stout 
v. Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619 (1908); Puryear-
Meyer Grocer Co. v. Cardwell Bank, 4 S. W. (2d) 489 (Mo. App. 1928).
15. 131 Mo. App. 520, 110 S. W. 619 (1908).
16. 49 Mo. App. 23 (1892).
17. Mo. Laws (Extra Session) 1933-34, pp. 155-166.
it partly in cash and partly by trading in another article he pays two per cent tax on the original price of the article; and if the used article traded in is later resold to a subsequent purchaser, the subsequent purchaser pays a sales tax on said used article and the ordinary man does not think this practice unreasonable. Of course we must remember that this practice is expressly provided for by statute and there is no other alternative but to follow it. On the other hand, in computing the commission of automobile salesmen the local practice seems to be that the commission is paid only on the cash amount received on a new car and the trade-in value of a used car is deducted before the commission is figured. If this is the accepted universal practice, then the plaintiff did not give an unreasonable construction to the lease in the present case by claiming that the one per cent in rent should be paid only on the actual cash received. Where the meaning of a word is not clear, perhaps the fairest solution is to give the word its technical meaning.

PAUL MARGOLIS, JR.

TORTS—DEFAMATION—PUBLICATION OF LIBEL

McDonald v. Polk & Company

Plaintiff was an attorney of St. Louis, the holder of various positions of honor and prominence in his profession. Defendant is a mail advertising agency with branches in all the large cities in the United States. It sells "mailing lists" for mail advertising and, as a part of the service if a customer desires, will address and stamp the envelopes, place therein the advertising matter furnished by the customer, and attend to the mailing. One of the defendant's customers purchased a list of 10,000 names and addresses of businessmen, lawyers, newspapers, banks, judges, etc., and subsequently delivered to defendant printed copies of the libelous circulars. The defendant addressed the envelopes, placed the circular therein, stamped, and mailed the circular, but had nothing whatever to do with the preparation of the circular. It contended that it was not liable unless its employees who attended to the addressing, enclosing, stamping, and mailing of the circular, knew that it was or might be libelous. Plaintiff contended that the defendant published the libelous circular and, therefore, was liable regardless whether or not it knew the circular was libelous. The supreme court allowed plaintiff to recover, holding that the acts of the defendant constituted a publication, and that it should be liable regardless whether or not it knew of the libelous nature of the circular.

In determining the liability of the defendant, the court dealt with two problems: (1) whether the acts done by the defendant would constitute a publication; and (2) assuming there was a publication, whether or not the defendant's liability would be absolved because the defendant had not consciously published the libel.

1. 142 S. W. (2d) 635 (Mo. 1940).
A clearer way for posing the problem of this case would have been to determine whether the defendant was a publisher or a mere disseminator. The court, once it had decided that the defendant mail advertising company was a publisher of the libel in question, then went on to discuss whether liability was dependent upon knowledge that the circular was libelous. This really has no application in a suit where the defendant has already been determined to be a publisher of a libel. As a general rule, all persons who participate in the publication of libelous matter are responsible for such publication, and whether they knew the matter was libelous has no bearing. Such a question is strictly limited to the case of a disseminator. Disseminators of libelous matter are liable as though the dissemination were an original publication by him unless he neither knows nor should have known of its defamatory character. There, the question narrows down to one of knowledge or negligence.

The acts done by the defendant in the principle case present an interesting situation for the study of the distinction between a publisher and a disseminator. It could be argued here that Polk & Co. was a disseminator and not a publisher. A disseminator is one who circulates the physical embodiment of the defamatory matter. News vendors are so classified. Newspapers are considered publishers because they do more than merely circulate the defamatory matter, as they set it up on their presses and in many ways change its physical form before circulating it. Radio stations are held to be publishers as they also change the physical form of the libelous matter in sending it out over their air-waves, using their intricate machinery in the process. But here defendant did no more than receive libelous matter, already composed and printed, and aid in its circulation. In reality they did not change the physical form of the defamation. With this in mind, the defendant cited the case of Becker v. Brinkop & Heil. This was clearly a disseminator case as the defendant had distributed libelous circulars regarding the plaintiff who was a candidate for nomination for committee woman, and the court upheld the defense that the libel was not consciously published. The court said in the course of its opinion, "To make the defendants liable for the publication of the libelous circular, it must appear that defendants were aware that

2. (1925) 37 C. J. § 298, p. 12.
the circular was, or probably might be, libelous . . . These elements must appear, for the reason that, if the defendants could prove that they were wholly ignorant of the contents of the circular, and had no reason to suppose that it contained libelous matter, they could not be held liable for it because it could not then be said that they had consciously published a libel." 8 This is the law as regards disseminators, but it is not the law as to publishers. 9

The defendants in the instant case do not fall clearly into the category of publishers such as newspapers, neither do they come clearly into the category of mere distributors. There were operations remaining to be done which are not normal to the ordinary disseminator, e. g., a newsboy or a circulating library. Their operations for which they were paid consisted of placing these circulars in envelopes, stamping and addressing the envelopes, and mailing them.

Perhaps even more important in helping the court determine that the defendant was a publisher is the nature of the business. It seems only right that newspapers, radio stations, and advertising agencies such as this defendant should be held responsible for any damage they might cause through publishing a libel, knowingly or otherwise, because of the widespread harm made possible. Furthermore, these latter groups are business enterprises, run for profit. If they make possible harmful statements concerning reputation without other justification than exists in the way of news, entertainment to listeners, or the supply of channels for distribution of printed materials, they should be forced to take the risk.

RICHARD LEWIN

TORTS—HUMANITARIAN DOCTRINE—POSITION OF IMMINENT PERIL

Duckworth v. Dent 1

The plaintiff and a companion were standing between two cars which were parked, about six feet apart, on the east side of a street in Salem, Missouri. The plaintiff was facing south with his foot on the bumper of the car parked farthest south. The defendant drove his car north past these two parked cars; stopped north of the car parked farthest north; backed toward the south; bumped against the car parked farthest north, and caused that car to roll back onto the plaintiff. It was not the defendant's car which hit the plaintiff but the car which was parked farthest north. The plaintiff's companion saw the defendant backing toward


1. 142 S. W. (2d) 85 (Mo. 1940).
the parked car and, before the defendant hit that car, he stepped onto the sidewalk out of danger.

The case was submitted to the jury on the humanitarian doctrine and judgment was rendered in favor of the plaintiff. On appeal to the Springfield Court of Appeals this judgment was affirmed.2 Pursuant to a dissenting opinion by Tatlow, P. J.,3 the case was certified to the supreme court where the judgment was reversed for the defendant, the court holding that the case should not have been submitted on the humanitarian doctrine but should have been tried on the theory of primary and contributory negligence.4

The conflicting holdings of the two courts arises from their divergence of opinion as to when the plaintiff’s position of imminent peril arose. The court of appeals found that the plaintiff was in a position of imminent peril when the defendant commenced to back into the parking space.5 The supreme court6 (and Justice Tatlow in his dissenting opinion)7 found that the plaintiff’s position of peril did not arise until after the defendant bumped against the parked car and that car had commenced to roll toward the plaintiff. Many Missouri cases have stated that the plaintiff’s position of imminent peril is the basic fact of the humanitarian doctrine.8 The conflicting opinions in the instant case bring the truth of that statement into sharp relief.

Accepting for the moment the finding of the court of appeals as to when the plaintiff’s position of peril arose, and applying the constitutive facts of a cause of action under the humanitarian doctrine,9 we would be forced to conclude, as did that court, that the plaintiff should have recovered under the humanitarian doctrine. For if we accept their major premise, we would reason as follows: (1) The plaintiff was in a position of imminent peril at the moment the defendant commenced to back his car into the parking space; (2) the defendant, because of his continuous lookout duty,10 had constructive notice thereof; (3) after receiving

2. 135 S. W. (2d) 28 (Mo. App. 1939).
3. Id. at 33.
4. 142 S. W. (2d) 85, 87 (Mo. 1940).
5. 135 S. W. (2d) 28, 36 (Mo. App. 1939).
6. 142 S. W. (2d) 85, 87 (Mo. 1940).
8. Banks v. Morris & Co., 302 Mo. 254, 257 S. W. 482 (1924); State ex rel. Vulgamott v. Trimble, 300 Mo. 92, 253 S. W. 1014 (1923); Baker v. Wood, 142 S. W. (2d) 83 (Mo. 1940).
9. In Banks v. Morris & Co., 302 Mo. 254, 257, 257 S. W. 482, 484 (1924), Ragland, J., gives the following formula as containing the constitutive facts of a cause of action under the humanitarian doctrine: "(1) Plaintiff was in a position of peril; (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; (4) he failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof plaintiff was injured."
10. This "formula" has been cited and followed in Siegel v. Wells, 287 S. W. 775, 777 (Mo. App. 1926); Bode v. Wells, 322 Mo. 350, 386, 386, 15 S. W. (2d) 335, 337 (1929); Huckleberry v. Missouri Pac. R. R., 324 Mo. 1025, 1033, 1034, 26 S. W. (2d) 980, 982 (1930).

10. Those in charge of locomotives, street cars, and automobiles have a continuing obligation to keep a lookout while driving in public places, or places in the
such notice, the defendant had the present ability with the means at hand to have averted the impending injury to the plaintiff simply by sounding his horn, or by stopping his car before he bumped against the parked car; (4) the defendant failed to perform his statutory duty to exercise the highest degree of care\textsuperscript{11} to avert such injury by bumping against the parked car without sounding a warning; (5) by reason thereof the plaintiff was injured.

On the other hand, if we accept the major premise of the supreme court (and Justice Tatlow) we would be forced to conclude that the humanitarian doctrine was not applicable to this case and that the case should have been tried on the theory of primary and contributory negligence. For if the plaintiff's position of peril did not arise until the defendant bumped against the parked car and started that car rolling toward the plaintiff, then the act of the defendant (the bumping against the parked car without sounding a warning) was the act which created the position of peril, and also the act which, without time or opportunity for further action by the defendant, caused the injury. The humanitarian doctrine is not applicable to this type of case.\textsuperscript{12}

The real question in the instant case is, therefore, was the supreme court (and Justice Tatlow) justified in finding that the plaintiff was not in a position of imminent peril until the parked car had been struck and had commenced to roll toward the plaintiff? To answer this question, we must determine precisely what the expression "position of imminent peril" means.

The most widely accepted definition of this expression is that of Justice White in his separate concurring opinion in Banks v. Morris & Co.\textsuperscript{13} Justice White's definition is to the effect that the expression "position of imminent peril" means that the plaintiff has been placed in a position such that the ordinary and natural effort to be expected of him will not remove him therefrom and put him in a place of safety. Applying this definition to the facts of the instant case, can it be contended that at the moment the defendant started backing into the parking space, but before he bumped against the parked car, the plaintiff was in a position such that the ordinary and natural effort to be expected of him would not remove him therefrom and put him in a place of safety? His companion certainly removed himself from the same position by his ordinary and natural effort after the defendant started backing into the parking space but before he struck the parked car.

\textsuperscript{11} Missouri Law Review, Vol. 6, Iss. 2 [1941], Art. 5

\textsuperscript{12} Nature of public places. See the authorities collected in Mayfield v. Kansas City So. Ry., 337 Mo. 79, 85 S. W. (2d) 116 (1935); State ex rel. Brosnahan v. Shain, 344 Mo. 404, 126 S. W. (2d) 1135 (1939); Note (1939) 4 Mo. L. Rev. 472.


\textsuperscript{12} Ridge v. Jones, 335 Mo. 219, 71 S. W. (2d) 713 (1934); Roach v. Kansas City Pub. Serv. Co., 141 S. W. (2d) 800 (Mo. 1940).

\textsuperscript{13} 302 Mo. 254, 273, 257 S. W. 482, 486, 487 (1924). This definition has been approved in Huckleberry v. Missouri Pac. R. R., 324 Mo. 1025, 26 S. W. (2d) 980 (1930); Baker v. Wood, 142 S. W. (2d) 83 (Mo. 1940); Gaines, The Humanitarian Doctrine in Missouri (1935) 20 St. Louis L. Rev. 113, 123.
This case is another example of the direction which our court seems to have taken since the decision of the Perkins case in restricting the scope of the humanitarian doctrine through delimiting the position of imminent peril.

LYNDON STURGIS

TORTS—RIGHT OF PRIVACY

Sidis v. F-R Publishing Corp.¹

William James Sidis twenty years before this proceeding had been a child prodigy in mathematics. His taste for public recognition dimmed so far that he became practically a recluse from society. Defendant in one of its articles entitled "Where Are They Now?" printed Sidis' story from childhood to date in an amusing manner, dwelling at length on his present activities and idiosyncrasies. Sidis sued to recover damages for violation of his rights of privacy and for malicious libel. The court held that one's private life was not subject to absolute immunity from public scrutiny, and where the interests of the public in news overrides the interest of the individual to be let alone, there is no actionable wrong in providing the public such information.

The "right of privacy" is of recent development and possesses aspects of far-reaching importance. While the problem was noticed as early as 1831,² it is only since 1900 that the field has been explored. Yet the status and nature of the right have remained indefinite.³ In only one part of the field, that of the use of names or pictures for business use or competition, has the subject been clarified somewhat.⁴


1. 113 F. (2d) 806 (C. C. A. 2d, 1940).
2. Lakin v. Gun, Wright 14 (Ohio, 1831). The court recognizes the problem by asking what is the nature of the action brought: "is it slander or nuisance?"
3. The real beginning of the subject is still regarded as being Warren and Brandeis, The Right of Privacy (1890) 4 Harv. L. Rev. 193. See also Green, The Right of Privacy (1932) 27 Ind. L. Rev. 237; and comments in (1940) 5 Mo. L. Rev. 343; (1931) 19 Ky. L. J. 137; (1919) 12 Col. L. Rev. 693. On the principle case, see (1940) 29 Cal. L. Rev. 87; (1940) 39 U. of Pa. L. Rev. 251; (1940) 28 Wash. U. L. Q. 136; (1941) 39 Mich. L. Rev. 501; (1941) 3 U. of Chi. L. Rev. 382.
4. The situation in New York is the best illustration. Civil Rights Law § 50, provides a codification of the rule: "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." But recognizing the confusion in the rest of the field, the New York law is: "Except to the limited extent provided by statute there is no right of privacy." Kimmerle v. New York Evening Journal, 262 N. Y. 99, 186 N. E. 217 (1933).
The principal case points out that the primary test between privacy and news is one of balancing between the social factors involved. As the court says: "Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy." Other courts have recognized that the so-called right of privacy does not prohibit publication of matters which are of public or general interest. But just where to draw the line or what weight to be given to the various considerations present real problems. Among them, of course, should be the manner in which the individual has become known to the public. In the present case Sidis had for twenty years ardently desired and striven for privacy to such an extent that he had gone to great lengths to achieve it. The interest of the public was in a figure only slightly known twenty years before. Yet the court held that the public interest outweighed Sidis' desire for privacy. The present case is the first actually to admit that it is balancing the two interests, although other cases have indicated in a round-about manner that they were doing it.

The common law right of privacy developed long after the traditional common law rights had become fixed. In order to find a basis for the new right, it was deemed a property right by analogy. A true property right is one which is exclusive. But at the same time the constitutional rights of freedom of speech and of press have developed the interest of the public for news and their zeal in protecting that interest. This is not the only example of such clashes of interests. When two interests compete against each other, one must be subordinated to the other depending upon a weighing of values from the social viewpoint. So every right must be relative in a society which seeks to protect each, yet serve the common interest.

This balancing of interests, begun in the courts of equity, is now clearly being carried over to the law courts in the privacy cases. But the equity terms of balancing of equities and balance of convenience have not been popular in the law courts and the phrases have not been used, although the exact idea has been. The courts passing on the question up to the present case have employed stare decisis and analogy, but they are actually in each case weighing the relative in-

6. RESTATEMENT, TORTS (1934) § 867, comment c. This section itself reflects the confused state of thought on the point.
7. (1941) 8 U. of CHI. L. REV. 382. It is suggested that one can become the subject of public interest through presenting himself or through no effort of his own. The principal case is the latter.
12. See the statements of Mr. Justice Brandeis and Mr. Justice Holmes in the case of Truax v. Corrigan, 257 U. S. 312 (1921).
interests of the public and the individual.\textsuperscript{13} The lines have not been clearly drawn, and it is submitted that they should not be. Since the right of privacy is a relatively new doctrine in the law and each case differs widely in scope, the cases should be decided functionally by balancing the conflicting interests.

ROBERT J. FOWKS

WILLS—MENTION OF SPECIFIC ARTICLES IN RESIDUARY CLAUSE

Methodist Episcopal Church \textit{v.} Thomas\textsuperscript{1}

The testator's will, after directing the payment of his debts and funeral expenses, made the following bequests: first, a bequest of $100 for the upkeep of the family cemetery; second, a bequest of $1000 to the Methodist Church; third, a bequest to one Thomas and wife of all the remainder of the personal property of every kind, including the Thomases' note for $2400 which the testator held. After the payment of debts and costs of administration there was not sufficient personal property to pay the church its bequest of $1000 and also to deliver to the Thomases their note for $2400.\textsuperscript{2} Suit was brought praying for a construction of the will. That the bequest to the church was a general legacy was not questioned.\textsuperscript{3} Both parties agreed that the sole question for determination was whether the mention of the $2400 note in the residuary clause constituted a specific bequest as to that note.\textsuperscript{4} Held, there was no intent on the part of the testator to make a specific bequest of the $2400 note, but rather, the specific mentioning of the note in the residuary clause merely identified the note as being a part of the residuary estate. Hence, the church must be paid $1000 before the Thomases take anything under the residuary clause.

\begin{enumerate}
\item 145 S. W. (2d) 157 (Mo. App. 1940).
\item 2. When the property available for distribution among the beneficiaries of a will is insufficient to satisfy all the bequests, the question arises, which legacies shall "abate" or give way to the payment of others? In the absence of an expression of a contrary intention by the testator, legacies will abate in the following order: residuary legacies will abate before general legacies, general legacies will abate before specific legacies. Atkinson, \textit{Wills} (1937) § 250; Note (1932) 80 U. or PA. L. REV. 1034.
\item 3. A bequest of a sum of money without any designation of the source from which it is to be paid is a general legacy. \textit{In re Temple's Estate}, 211 Mo. App. 71, 245 S. W. 633 (1922); Guthrie v. Guthrie's Ex'r., 168 Ky. 305, 183 S. W. 221 (1916); Crabtree v. Kelly, 65 N. D. 501, 260 N. W. 262 (1935); \textit{In re Collins' Estate}, 156 Misc. 763, 282 N. Y. Supp. 728 (Surr. Ct. 1935).
\item 4. A specific legacy is a gift of a specific article of the testator's estate distinguished from all the other things of the same kind, and which can be satisfied only by the delivery of the particular thing given. Fidelity Nat. Bank & Trust Co. \textit{v.} Hovey, 319 Mo. 192, 5 S. W. (2d) 437 (1928); \textit{In re Calnan's Estate}, 28 S. W. (2d) 420 (Mo. App. 1930); Note (1928) 4 Ind. L. REV. 278.
\end{enumerate}
There are two so-called "general rules" applicable to the class of cases typified by the instant case. The first of these so-called rules is that an enumeration of specific articles in a residuary clause will not make the bequest specific as to such articles. The second so-called rule (sometimes it is referred to as an "exception" to the first rule) is that the bequest of the specified articles is a specific bequest, if the specified articles are so enumerated as to distinguish or differentiate them from the residue, and the fact that the specific bequest is found in the residuary clause does not detract from or exclude it as specific.

When a case of this class is presented for determination, the question to be decided is, which of these two rules should be applied to this particular case? Or, in other words, the question to be decided is, in this particular case, were the specified articles enumerated as a part of the residue, or were they set apart and distinguished from the residue? The answer to this question must depend upon what the testator intended. If, when the testator enumerated these specific articles in the residuary clause, his intention were to indicate or identify the property which would make up his residuary estate, the first rule should be applied. If, however, when the testator enumerated these specific articles, his intention were to distinguish them from the residue, and give them as specific legacies separated and apart from the residue, then the second rule should be applied.

As a means of determining what the intention of the testator was, the plain and ordinary meaning of the words he used is helpful, if not conclusive. Thus, where a testator gave all the remainder and residue of his estate, "including" a specified article (or articles), it usually has been held that his intention was to identify this article as a part of the residue and not to bequeath it specifically. Where the testator gave all the residue, "consisting of," or "consisting in part of" specified articles, he was held to have had the same intention. On the other hand, where the testator gave, in the residuary clause, certain specified articles and then the residue, it was held that his intention was to bequeath the specified articles as specific legacies apart from the residue. Where the testator gave the residue, "and also" a specified article, it likewise was held that his intention was to make a specific bequest of the article. If a testator gave the residue, "and in addition" a specified article, or the residue, "together with" a specified

8. In re Kemp's Estate, 169 Mich. 578, 135 N. W. 270 (1912). In re Crouse's Estate, 244 N. Y. 400, 155 N. E. 685 (1927), and In re Day's Estate, 150 Misc. 691, 271 N. Y. Supp. 170 (1934), are to the effect that the enumeration of specific articles in the residuary clause does not make a specific bequest as to such articles, but the exact words used by the testator are not given in the report.

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article, or the residue, "as well as" a specified article, it would seem that his intention was to make a specific bequest of the specified article.\textsuperscript{11}

The court in the instant case recognized that it is the intention of the testator that governs, and in view of the wording which the testator used—all the remainder, \textit{including} the note—the decision of the court as to what that intention was certainly is supported by authority. The mention of the note in the residuary clause certainly is compatible with an intention merely to pass the note as a part of the residue. The testator may have doubted whether the word "property" included the note, and whether it would be given back to the makers unless this was shown to be the testator’s desire. Unfortunately, because of a change in the estate not contemplated by the testator, words designed to clarify provoked a controversy. The case suggests important lessons in the drafting of wills.

\textbf{Lyndon Sturges}