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Recent Cases

PROPERTY—DISTINCTION BETWEEN REAL PROPERTY AND CHATTEL
REAL—MINING LEASES—OPTION FOR PROFIT A PRENDRE

Thacker v. Flottman¹

Farrell and wife, by an instrument dated February 4, 1949, and denominated a “Mining Lease and Option,” gave “unto the lessee 133 days to prospect for said clays, and in the event that the prospecting proves satisfactory and, if in the opinion of the lessors there are sufficient clays to justify the taking of this lease, then at the end of the said 133 days above mentioned this instrument shall become a true and binding lease for the full term of years first above mentioned. . . .” The instrument contained agreements relative to royalties, the keeping of records, inspection by the lessors and rights of ingress and egress. It was further provided that plaintiffs (“lessees”) were given “the option within said term of 133 days” to purchase “such amount of clay as has been determined to exist. . . .” The lessors were to convey “by proper deed of conveyance . . .,” in the event the plaintiffs exercised the last mentioned option. Plaintiffs prayed for a judgment determining them to be the owners of the clay. Defendant admitted the execution of the instrument of February 4, 1949, but denied that plaintiffs had any right, title or interest in or to the described premises and further answered alleging plaintiffs had abandoned the lease and forfeited all rights under the aforementioned instrument. In addition, defendant alleged that on September 29, 1949, Farrell and wife leased the premises to him. The instrument of September 29, 1949, denominated a “Lease Contract,” purported to grant to defendant, for a term of one year, the exclusive right to prospect for and mine minerals and clay. Royalties were provided for. Furthermore the “contract” provided that, at the termination or renewal of the “contract” the defendant (“lessee”) should have the right to purchase the clay in or on the land, and if purchased, the Farrells would convey the clay by appropriate deed. The trial court found for plaintiffs and defendant appealed. The Supreme Court, Van Osdol, C., after considering the interests in dispute, held that title to real estate was not involved in a constitutional sense,² and ordered that the cause be transferred to the St. Louis Court of Appeals, which affirmed the decision of the trial court.³

It would seem that at first, the instruments involved in the controversy purported to give to the parties in the case a right to enter upon the realty, examine it, and prospect for clay, coupled with an option or options which, if exercised, would supposedly give plaintiffs a “binding lease” for three years or, as an alternative, plaintiffs might elect to purchase the clay. In addition, defendant’s instrument purported to give him an option to purchase the clay. It has been held that an

¹. 250 S.W. 2d 810 (Mo. App. 1952), trf'd. by 244 S.W. 2d 1020 (Mo. 1952).
³. 250 S.W. 2d 816 (Mo. App. 1952).
instrument, which does not give a right to take minerals, but only to search and prospect for them, with the additional right to elect to take the mineral rights, does not grant a profit a prendre, but only a license coupled with an option, and until the option is exercised, no interest in the land is conveyed. At this point then, the instruments would seem to have conveyed no interest in the Farrell realty, a license being defined as "a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein." This statement does not always apply however. Judge Clark classifies licenses as follows:

1. A license giving a privilege only is always revocable.

2. A license which gives a privilege plus the right to extinguish some legal interest of the licensor. This is irrevocable, in the sense that after the licensor's interest is destroyed, he cannot thereafter restore it. The classic example is a license to extinguish an easement.

3. A license, which, if coupled with an enforceable interest of the licensees, is generally irrevocable.

4. A license coupled with contractual rights so as to make the license irrevocable.

5. A license, upon the strength of which the licensee acts or changes his position, is irrevocable. This is a doctrine at law somewhat analogous to the equitable doctrine of part performance and the Statute of Frauds.

It would appear then that the licenses in the instant case, if such they were, would fall into Judge Clark's fourth category, as they were coupled with contractual rights.

Nor would the options grant or convey any interest in the property; as the supreme court pointed out in the instant case, an option does not convey any interest but gives a right of election only. An option for a lease passes title to nothing, either realty or personality. If the instrument conveys no interest in the property and imposes no obligation upon the "lessee," no leasehold is created until the lessee elects to exercise his option; or one may have an option not only to lease, but to purchase mineral property, but here again, the option conveys no interest, but gives only a right of election. It will be remembered that plaintiffs had an option to take a "lease" of three years and an option to elect to take a

4. Mendenhall v. Klinck, 51 N. Y. 246, 247 (1872); Cahoon v. Bayard, 123 N. Y. 298, 301, 25 N. E. 376 (1890). The instrument in the prior case gave the right to "explore, bore, or in any way and manner test and examine . . . for oil . . . ; and in case they find oil, or are satisfied there is any there, and elect to take the same . . . , to convey to them . . . ." And the instrument in the second case provided "shall have the right to enter upon the premises . . . for the purpose of prospecting and examining for mines and minerals; . . . and if he, after making such examination and test, etc., shall be of opinion that they are worth working, he shall then have the right to go on and dig, carry away and cause to be worked such of the substances there to be found."

5. 17 R.C.L. 564.

6. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND, 24-64 (2nd ed. 1947).

7. 58 C I.S., MINES AND MINERALS, § 166.

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conveyance of the clay. But neither option gave them any interest in the Farrell Realty, either a leasehold (a chattel real or personalty) or a freehold (realty).

It is readily seen from the above discussions of a license that a mining licensee's position may not be too secure, especially if the licensee has a privilege only. This situation is considerably remedied in Missouri by statutes. However,

8. Mo. Rev. Stat. § 444.010-.020 (1949), which provide as follows:

"444.010. Mineral land owner to post conditions under which mining operations may be conducted thereon.—1. When any person owning real estate in this state, or any person having a leasehold interest in such real estate for mining purposes by lease from the owner thereof, duly acknowledged and recorded in the county wherein the land lies, shall permit any person or persons, other than their servants, agents or employees, to enter and dig or mine thereon for lead, ore or other minerals, with the consent of such owner or owners or lessee, he or they shall keep a printed statement of the terms, conditions and requirements upon which such lands may be mined or prospected, and the time during which the right to mine or prospect thereunder shall continue, posted or hung up in a conspicuous place, in plain, legible characters, in the principal office or place of business of such person or company in the county in which said lands are situated, or in a county contiguous thereto, and shall deliver to any person mining or prospecting, or about to mine or prospect on said lands, and requesting it, a printed copy of such statement.

2. All persons digging or mining on said lands, after the posting up of such statement, shall be deemed to have agreed to and accepted the terms thereof, and shall, together with such owner or lessee, be bound thereby, and upon failure or refusal to comply with the terms, conditions and requirements of such statement, he or they shall forfeit all right thereunder, and the owner or lessee, as aforesaid, of such lands, may re-enter thereon and take possession of the same, nor shall the receipt of any ore or mineral by any such owner or lessee, after any such forfeiture has been incurred, be deemed or taken as a waiver of such forfeiture.

444.020. Failure to post statement of conditions, effect—rights of miners.—1. Whenever any such owner or lessee of real estate shall permit any person or persons, other than their servants, agents, or employees, to enter and dig for lead or other minerals on such real estate, with his consent, but without such owner or lessee complying with the provisions of section 444.010, and such person or persons having so entered upon said lands by the permission or consent of such owner or lessee as aforesaid, and having in good faith dug or opened any shaft, mine, quarry, prospect or deposit of mineral, or extended or opened from any shaft or mine any room, drift, entry or other excavation, he or they shall have the exclusive right as against such owner or lessee giving such permit or consent, and against any person claiming by, through or under the owner or lessee to continue to work, mine and dig such shaft, mine, prospect or deposit of mineral so dug or opened by him or them as aforesaid, in said real estate, with a right of way over such lands for the purpose of such mining, for the term of three years from the date of the giving of such consent or permit; provided, however, that if such person or persons, in each case so mining as aforesaid, shall fail or neglect to work or cause to be worked such shaft, mine, quarry, prospect or deposit of mineral for ten days, not including Sundays, in any one calendar month, after commencing said work, he or they shall forfeit all rights to work, mine or hold the same as against such owner or lessee, unless such failure or neglect was caused by unavoidable circumstances, or by the act of such owner or lessee or his agent, or unless such owner or lessee consent thereo; provided further, that such person or persons, so mining as aforesaid, shall pay to the owner or lessee of said lands
these statutes have been interpreted to provide for a license only, giving no interest in the soil or unmined minerals. But if no length of term for the license is posted, the licensee has an irrevocable right to continue for the statutory term of three years. Of further value to the miner (licensee) is the fact that an assignment of license is enforceable.

The instruments in the instant case provided that plaintiffs were to have a binding lease if they thought sufficient clay existed for "the taking of this lease," and the second purported to "lease" the land to defendant for a term of one year. It becomes important to ascertain whether or not an actual lease could have arisen under these instruments, or whether the interests would have been incorporeal hereditaments. The case of Boone v. Stover distinguishes the two, the court emphasizing the possessory aspect of a true leasehold estate. It was there held that "By a lease, the lessee obtains an estate in possession of the land and its products, in respect to which he can maintain ejectment; but, in a license or grant of an incorporeal hereditament the grantor does not divest himself of the possession, and the liberty of working a mine or mines on it is not inconsistent with the retention of possession by the grantor." The possessory aspect of the lease would seem to be the controlling factor then in distinguishing a lease of the minerals giving such permit or consent the royalty for mining thereon, at least once every month, if demanded by such owner or lessee, by delivering the same to him at or near the mouth or opening of such mine, shaft or quarry, or at the nearest usual place of business of such owner or lessee, or at any other place that may be agreed upon by such miner and owner or lessee; which said royalty, unless otherwise agreed upon by them, shall be the same in kind and proportionate amount as is paid by others mining the same kind of ore or mineral on said lands to such owner or lessee, or the value of such royalty in cash; and if there be no other person mining on said lands on terms prescribed by such owner or lessee, then he or they shall pay to such owner or lessee the same rate and kind of royalty on lead ore or minerals taken out by him or them as is paid by miners on lands nearest thereto belonging to other persons, or the value of such royalty in cash.

2. Such owner or lessee or any real estate shall have a lien on all minerals taken or dug therefrom for the royalty due thereon until the same is paid; and if any such person or persons so mining shall refuse or fail to pay such royalty to such owner or lessee or his agent, when demanded as aforesaid, he or they shall thereby forfeit the right to work such mine, shaft, quarry, prospect or deposit of mineral, and the said owner or lessee may thereupon enter and take possession of the same.”

10. Supra, note 9.
12. 66 Mo. 430 (1877). An instrument which gave the lessee "the sole and exclusive right of entering in and upon the lands . . . for the purpose of quarrying, cutting, crushing and removing stone, for the term of ten years . . . but not to hold possession of any part of said lands for any other purpose" was held to have created an incorporeal hereditament for term of years, and not to have created a true lease on the minerals in place. Baker v. Hart, 123 N. Y. 470, 25 N.E. 948 (1890). "The distinguishing characteristic of a lease is that it carries a present interest and estate in the land for the period specified, and the criterion seems to be the right to the possession of the land, and if such right is not conferred, the transaction is to be deemed a license." 16 R.C.L. 549.
in place from an incorporeal heriditament granting the right to remove them. Indeed, the supreme court in the instant case stated that a so-called mining lease usually grants only a right of removal and does not convey, for term of years, the minerals in place; hence no possessor is estate for years is denied. The supreme court seemingly analyzed the instruments as not intended as true leases.

If the interest is not a lease, the question arises whether it is a license or a profit a prendre. The latter is an incorporeal interest in the land of another, forever or for term of years, to acquire by severance something which, prior to severance, was part of the land. A profit a prendre is assignable and the holder of the profit has rights in rem, in that third persons as well as the grantor shall not interfere with the exercise of the profit. This is said to be the factor which distinguishes a profit a prendre from a license. The courts have often failed to clearly state whether they are discussing a profit or a license, thus ignoring the distinction.

It is submitted that from the language of the first instrument in the instant case the parties intended a profit a prendre, as the first instrument used the term "taking of this lease" and used the words "binding lease." The second instrument purported to grant defendant "the exclusive right and privilege..." Furthermore, the supreme court in the instant case in describing the interest of the "lessee" as being non-possessor, used the term "estate," implying a profit, for such terminology is clearly inapplicable to a license. The court further stated that this estate, or right to remove minerals, "is real property subject," [italics supplied], but went on to say that the estate may be one for term of years, and hence personality, the time limit or duration of the estate being controlling. The supreme court also

13. 3 Tiffany, Real Estate Property § 839 et. seq. (3d ed. 1939).
14. 3 Tiffany, Real Property § 840 (3d ed. 1939).
15. 3 Tiffany, Real Property § 846 (3d ed. 1939), citing Boone v. Stover, supra note 12 for this point.
16. The supreme court in the instant case was of the view that a profit may be either a chattel real or realty, citing Mills & Willingham, Law of Oil and Gas § 5. It would seem that there is only scant authority which expressly holds that a profit a prendre for term of years is a chattel real. Several old authorities are of the view that profits may be in fee for life or for years. Sheppard's Touchstone *238 2 Bl. Comm. *20 et. seq.; 3 Kent's Comm. *401 et. seq. But none of them actually say that the right itself is personality if for term of years. However, it is submitted that the view of the Supreme Court of Missouri in the instant case was sound. A true, possessor lease is personality. Why then should not a profit a prendre for term of years be personality? Restatement, Property § 450, Special Note, says: "In this Restatement the term 'easement' is so used as to include within its meaning the special meaning commonly expressed by the term 'profit.'" And in § 454 (b) of the same work, it is said: "Depending on its period of duration, an easement in gross may be, as an interest in land, either real property or a chattel real. Thus, if it is to endure indefinitely or for a period measured by the life of a human being, it is real property. If its duration is measured by a definite period or periods of time, it is a chattel real." In accord is 2 American Law of Property § 8.10 (published by Little, Brown & Co., 1952), stating that "The classification of an easement in gross as a chattel real or as real estate depends upon the period of time for which it was created. If created for a definite period of time it is a chattel real. If created for an indefinite period or one measured by a human life it is real estate," citing Restatement, Property § 454 (b); Goldman v. Beach Front Realty Co., 83 N. J. L. 97, 83 Atl. 777 (1912).
stated that leaseholds are personalty. We then observe that whether the "lessee" of a "mining lease" has a true leasehold of the minerals in place, or a profit a prendre for a term of years, it is personalty and not reality. The estate for years then, be it corporeal or incorporeal, must be distinguished from estates of inheritance, whether corporeal or incorporeal, as they are reality.\(^{17}\)

A further distinction which must be made in these situations, and which the facts of the instant case present, is between a profit a prendre in fee and a mineral fee. It will be recalled that the instruments in litigation purported to give to plaintiffs and to defendant options to "purchase" the clay. The question could be presented then as to what interests would have arisen had the proper party exercised his option and had the Farrrells honored it. From the supreme court's discussion to the effect that these mineral rights are usually non-possessor, i.e., profits a prendre, it is likely that this would have been the interest, to wit, a profit a prendre in fee rather than a mineral fee, which is a distinct, corporeal, possessory estate.\(^{18}\) A mineral fee, for purposes of ownership, is entirely separate from the ownership of the surface.\(^{19}\) The mineral fee may be created by grant,\(^{20}\) or by exception,\(^{21}\) or the original owner may himself retain the mineral fee by conveying the "surface deed."\(^{22}\) The controlling question, in deciding whether there is a creation of a profit a prendre in fee, or whether there is a fee in the minerals in place, is whether a possessory estate of inheritance is conveyed or an inheritable "right" is conveyed.\(^{23}\)

If the dispute is whether a possessory mineral estate is for years, or in fee, a definite, determinative term will decide the issue.\(^{24}\)

It should always be kept in mind that whether the mining interest is in fee or for term of years, or whether it is possessory or non-possessor, once the

For a vigorous criticism of the merger by the Restatement of easements and profits see CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 8, 66, 80-81, 227-228 (2d ed. 1947).

17. Where there is a grant, bargain and sale to the grantee, "his heirs and assigns" of "the free and uninterrupted use, privilege and liberty" to prospect for and remove minerals, the grantee has an incorporeal hereditament in fee. Such a grant is neither a lease nor a sale of the minerals in place, as no possessory estate arises, although there is created a non-possessor estate in the grantee, a profit a prendre which may be assigned. Funk v. Haldeman, 53 Pa. 229 (1866). Further authority for the proposition that a profit may be for years or in fee is 3 TIFFANY, REAL PROPERTY § 842 (3d ed. 1939), stating that a profit may be created either by deed or by lease.

18. 36 AM. JUR., Mines and Minerals § 36.
19. 3 TIFFANY, REAL PROPERTY § 846 (3d ed. 1939).
24. This is so despite the fact that during the term the lessee could lawfully remove all coal. Austin v. The Huntsville Coal & Mining Co., 72 Mo. 535 (1880), where the instrument used the terms "lease and convey, . . . for the term of twenty years, . . . all the coal." The court held this was a leasehold only and not a conveyance of a freehold estate in the minerals in place. The
grantee severs the minerals, whether on or below the surface of the ground, the minerals are then chattels, and are no longer realty, if the severance was for purposes of removal.26

The present case was ordered to be transferred to the St. Louis Court of Appeals upon the ground that title to real estate was not involved in the constitutional meaning.26 This would seem to be in accord with prior decisions of the Supreme Court of Missouri holding that a suit to specifically enforce a contract to lease27 a dispute involving the validity of a lease,28 a case involving the question of to whom rentals were payable,29 a controversy over an undivided interest in a leasehold,30 do not involve title to realty in a constitutional or jurisdictional sense. To be within the meaning of the constitution, the judgment or decree must directly affect or operate upon the title itself.31

CONCLUSION

By way of conclusion it is submitted that the portions of the two instruments which gave permission to prospect gave licenses only; with options in the plaintiffs to take either a profit a prendre for term of three years, or a profit a prendre in fee; with an option in defendant to take a profit a prendre in fee. To determine whether the interest is in fee or for term of years, the deciding factor is the existence or non-existence of a definite time period of duration. To determine whether the interest is corporeal or incorporeal, one must ascertain whether the parties intended that a possessory interest in the minerals in place was or was not to have been conveyed.

Robert F. Pyatt

PROPERTY—RIGHTS OF RIPARIAN OWNER IN MISSOURI WITH RESPECT TO OBSTRUCTION OF A NATURAL OR ARTIFICIAL WATERCOURSE

Happy v. Kenton1

Defendants owned land at the southeast end of Snowden Lake, a U-shaped natural lake extending across the county line between Ray and Carroll counties. Plaintiff owned land at the southwest end of Snowden Lake. Prior to 1944, when the water in the lake reached a certain height, it would flow southeastwardly out of the lake at the southeast end across defendants' lands through a depression and eventually into the Missouri River, 1¼ miles distant. In the latter part of 1943, defendants constructed a levee or dam on their land at the southeast end of the lake, across the outlet through which the water had previously drained. By reason of the dam, the water level of Snowden Lake was raised, and the size

25. 2 Tiffany, Real Property § 587 (3d ed. 1939).
28. General Theatrical Enterprises v. Lyris, 121 S.W. 2d 139 (Mo. 1938).
29. McCaskey v. Duffy, 335 Mo. 383, 73 S.W. 2d 188 (1934).
1. 247 S.W. 2d 698 (Mo. 1952).
of the lake increased as much as three or four times its largest size prior to 1944, and at times water overflowed at the southwest end of the lake onto the land owned by plaintiff, damaging his crops. Plaintiff contended that the defendants had obstructed a natural watercourse, and were thereby liable for ensuing damage; defendants contended that they did not obstruct a natural watercourse but only prevented surface water from flowing across their lands. From a judgment of $11,000 for loss of growing crops for the years 1944-1949 defendants appealed.

The principal issue was thus narrowed to the question of whether defendants had obstructed a natural watercourse to the injury of the plaintiff. The problem was complicated by the fact that although there was evidence that the natural outlet of the lake was across defendants' land, there was also evidence that the outlet had been artificially deepened following the lines of natural drainage about 40 years before. The question of whether the outlet of Snowden Lake constituted a natural watercourse was determined by applying the test used first by the Missouri courts in Benson v. Chicago & A. R.R., and since approved in many subsequent Missouri cases:

"There must be a stream usually flowing in a particular direction, though it need not flow continually. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water courses."

On the same question the court applied a further test for a natural watercourse adopted in Place v. Union Township in which it was held that a slough which was shown to be a natural drain and something more than a "mere temporary conduit of surface water" was a natural watercourse. There was evidence in the instant case that the drain or ditch was a definite channel in which water from Snowden Lake flowed most of the year.

2. For an excellent discussion of the problem of the creation of riparian rights on an artificial stream or watercourse see Evans, Riparian Rights in Artificial Lakes and Streams, 16 Mo. L. Rev. 93 (1951), citing some authorities to the effect that riparian rights do not attach to artificial watercourses, but concluding that riparian rights should attach, that "when a stream diversion has occurred or an artificial lake, reservoir, or other body of water has been created and has continued long enough to assume in the minds of those in the neighborhood a settled condition, (sometimes called an appearance of permanency) the artificial condition is now to be regarded the same as if it had been caused by nature rather than by the hand of man." This author further concludes that "If the new condition appears to be permanent and settled, the length of time of its continuance is only one factor, though an important one, and the period of limitations of itself has no unusual significance."

3. 78 Mo. 504 (1883), quoting Hoyt v. City of Hudson, 27 Wis. 661 (1871), which seems to have been the first case to use this test.

4. 66 S.W. 2d 584 (Mo. App. 1933). See also Schalk v. Inter-River Drainage District, 226 S.W. 277 (Mo. App. 1920).
The court cited Brill v. M.K.T. Ry., where defendant constructed a ditch, which became the new channel for a creek, and after 35 years dammed the ditch, flooding plaintiff’s adjoining land. There the court said “If the artificial channel is substituted for a natural one, or is created under such circumstances as indicate that it is to be permanent and to be a watercourse the same as though it were created by nature, riparian rights may attach to it.”

The court next considered defendants’ contention that the escaping flood waters were surface water and stated that “Many cases have been written and much has been said concerning the relative rights and duties of landowners with respect to natural watercourses and with respect to their treatment of surface water. It has often been said that in Missouri we adhere to and enforce the ‘common law rule’ as opposed to the ‘civil law rule.’ Whether the rule in this state is properly denominated ‘the common law rule’ has been questioned.” The court further stated, “However that may be and irrespective of terminology, Missouri is committed to the doctrine that one may not obstruct a natural watercourse without liability for ensuing damages to others, but that one may otherwise treat surface waters as a common enemy and obstruct their flow without liability for ensuing damages so long as he does so reasonably and not recklessly or negligently.”

The court concluded, upon a consideration of the evidence, that the drain or ditch in the principal case should be considered as a natural watercourse, and affirmed the verdict of $11,000.

The court gave little attention in its opinion to defendants’ contention that

5. 161 Mo. App. 472, 144 S.W. 174 (1911). See 3 Farnham, WATER AND WATER RIGHTS § 827b (1904): “If the artificial channel is substituted for a natural one, or is created under such circumstances as indicated that it is to be permanent and to be a watercourse the same as though it was created by nature, riparian rights may attach to it.” Also see Id. § 575 (1904): “But if a watercourse, in fact, exists, the fact that it is not an ancient one will not confer a right to obstruct it. And the rule is not changed by the fact that the water was flowing in an artificial channel.”

6. Keener v. Sharp, 341 Mo. 1192, 111 S.W. 2d 118 (1937); Goll v. Chicago & A. Ry., 271 Mo. 655, 197 S.W. 2d 244 (1917); Webb v. Carter, 121 Mo. 147, 96 S.W. 776 (1906); McIntosh v. Rankin, 134 Mo 340, 355 S.W. 995 (1896); Munkres v. The Kansas City, St. J. & C.B. R.R., 72 Mo. 514 (1880); Welton & Edwards v. Martin, 7 Mo. 307 (1842); Blackburn v. Gaydou, 245 S.W. 2d 161 (Mo. App. 1951); Brink v. R.R., 17 Mo. App. 177 (1885); McGhay v. Woolston, 175 Mo. App. 327, 162 S.W. 292 (1913); Scott v. Missouri Southern R.R., 158 Mo. App. 625, 139 S.W. 259 (1911); Beauchamp v. Taylor, 132 Mo. App. 92, 111 S.W. 609 (1908); Standley v. Atchison, T. & Santa Fe Ry., 121 Mo. App. 537, 97 S.W. 244 (1906); Edwards v. Mo. K. & T. Ry., 97 Mo. App. 103, 71 S.W. 366 (1902). See also 67 C. J. Water § 289 to the effect that the common law or common-enemy rule “is that surface water is a common enemy which every proprietor may fight as he deems best, and that accordingly the lower proprietor may take any measures necessary for the protection or improvement of his property, although the result is to throw the water back upon the land on an adjoining proprietor, provided it is not done in such a way as to create a nuisance and destroy his property. This rule, however, does not apply where a natural or prescriptive watercourse is obstructed or interfered with to the damage of another.”
waters escaping the lake in flood periods were surface waters, subject to diversion without liability by plaintiff, so long as not done recklessly or negligently, although a number of Missouri cases⁷ deem such overflow surface waters. It is of interest that most of the cases supporting this view involved drainage districts or railroads, both of which proceed under statutory authority in the construction of levees or embankments which may affect riparian rights.

In City of Harden v. Norborne Land Drainage District,⁸ it was stated that “there are fifteen Missouri decisions holding that overflow out of banks from rivers or other watercourses in times of flood is surface water” and that “we have always followed the common law doctrine that surface water is a common enemy, and that each proprietor may ward it off though by so doing he turns it on his neighbor.” However, it should be noted that the defendant here was proceeding under authority of a statutory drainage act.

One writer has stated that Missouri “has shifted from one rule to the other and back” as to liability for injury caused by water which escapes its natural channel in flood periods.⁹ However, a number of Missouri cases support the position taken by the court.

In Jones v. Hannovan,¹⁰ diversion of one small creek to another creek by defendant, resulting in overflowing of plaintiff’s land at times of flood, was held to create liability, the court saying that as soon as surface water enters a stream, it ceases to be surface water and constitutes a watercourse. In Schalk v. Inter-River Drainage District,¹¹ the rule that overflow of flood waters of a stream are to be treated as surface water was qualified “at least to the extent of holding that a slough, which connects with a running stream only during high water, and through which such overflow waters flow between well-defined banks and return to the

⁷ Sigler v. Inter-River Drainage District, 279 S.W. 50, 311 Mo. 175 (1925); Anderson v. Inter-River Drainage and Levee District, 309 Mo. 189, 274 S.W. 448 (1925) (overflow water at flood periods can be treated as common enemy if channel of watercourse not obstructed); Adair Drainage District v. Quincy, O. & K.C. R.R., 280 Mo. 244, 217 S.W. 70 (1919); Inter-River Drainage District v. Ham, 275 Mo. 384, 204 S.W. 723 (1918) (overflow water from a stream is surface water, but increased overflow caused by a levee creates liability under the constitutional mandate that private property shall not be taken or damaged for public use without just compensation); Goll v. Chicago & A. Ry., 197 S.W. 244, 271 Mo. 655 (1917) (“overflow water in Missouri is surface water” where channel not obstructed); Abbott v. Kansas City, St. J. & C.B. R.R., 83 Mo. 271 (1884); McCormick v. K.C., St. J. & C.B. R.R., 57 Mo. 433 (1874); Harris v. St. Louis San Francisco Ry. 224 Mo. App 455, 27 SW. 2d 1072 (1930); Brown v. St. Louis & San Francisco Ry., 212 Mo. App. 541, 248 S.W. 12 (1923); Wells v. Payne, 235 S.W. 488 (Mo. App. 1921); Lee v. Inter-River Drainage District, 207 Mo. App. 500, 226 S.W. 280 (1921); Schalk v. Inter-River Drainage District, 226 S.W. 277 (Mo. App. 1920); Edwards v. Missouri Kan. & Texas R.R., 97 Mo. App. 103, 71 S.W. 566 (1902) (overflow waters are surface waters, but if caused by obstruction of natural flow, there is liability for resulting damages); Kenney v. K.C., Pittsburg & Gulf R.R., 74 Mo. App. 301 (1898) (if slough was not watercourse defendant had a right to dam it up).

⁸ 360 Mo. 1112, 232 S.W. 2d 921 (1950).
⁹ 3 FARMHAM, WATER AND WATER RIGHTS § 889b (1904).
¹⁰ 55 Mo. 462 (1874).
¹¹ 226 S.W. 277 (Mo. App. 1920).
main stream, may be regarded as still a part of the stream and therefore not necessarily surface water."

The inability of the court to designate the Missouri doctrine of riparian rights in terms of one of the commonly recognized common law doctrines is of no moment in the principal case, it is true, since there were actual and substantial damages. Under either the natural flow or reasonable use doctrines of riparian rights there is liability for obstructing a natural or artificial watercourse where actual and substantial damage results to plaintiff’s property.

There are many differences between the two doctrines, however, which affect the rights of riparian landowners, and which make it of more than academic interest to determine, if possible, which doctrine the Missouri courts follow. The differences between the two major doctrines are brought out in the following brief summary of the features of each.

The natural flow theory includes the concept that each riparian proprietor on a watercourse or lake has a right to have the body of water maintained in its natural state, not sensibly diminished in quantity or impaired in quality, subject, however, to the privilege of each riparian proprietor to use the water to supply his natural wants, and to make such other uses in connection with riparian land not sensibly or materially affecting the natural quantity or quality of the water. Thus all riparian proprietors have equal rights to have the water flow as it was wont to flow in the course of nature, qualified only by the equal privileges in each to make limited uses of the water. Under this doctrine, a cause of action arises when there is an unprivileged use, even though there is no interference with the use or harm done to the plaintiff. This doctrine is relatively definite and certain, but is non-utilitarian in that it prohibits many beneficial uses of water which cause no actual harm to anyone.

The reasonable use doctrine involves the concept that each riparian proprietor is entitled to be free from an unreasonable interference with his use of the water, and that each proprietor is privileged to make beneficial use of the water for any purpose provided only that such use does not unreasonably interfere with the beneficial uses of other riparian proprietors. This doctrine is entirely utilitarian and tends to promote the fullest beneficial use of water resources. A cause of

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12. Keener v. Sharp, 341 Mo. 1192, 111 S.W. 2d 118 (1937). Standley v. A.T. & Santa Fe Ry., 121 Mo. App. 537, 97 S.W. 244 (1906): "Yet if the defendant, by obstructing the flow of water in the channel of the stream caused it to overflow and thus become surface water, it would be liable for all damages occasioned thereby." The court on this question in the principal case referred to 56 Am. Jur., Waters, § 75, p. 562, in which it is stated, "The great weight of authority, however, is to the effect that both under the so-called 'common-law' or 'common enemy' rule, a natural drainaway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression." (No Missouri cases cited.)

15. 4 Restatement, Torts p. 344 (1939), and also page 346, in which the American Law Institute adopts the reasonable use doctrine.
action arises only when the use being made by the defendant unreasonably interferes with the use being made by the plaintiff. This doctrine is followed by the American Law Institute in its *Restatement of the Law of Torts*.

One writer has summed up the distinction between the natural flow and the reasonable use doctrines by saying that the former emphasizes the right to the flow of the stream and the latter the privilege of use.16

A third doctrine, in effect in a number of western states, is described as the prior appropriation doctrine,17 and gives a priority on use of water to the first user. This doctrine is beyond the scope of this note, and probably not of interest in Missouri, since it is primarily statute law, and generally administered by administrative tribunals.

Because England presently follows the natural flow theory, it may be that the natural flow doctrine was a part of the law of England in 1606, the year selected by Missouri when it adopted the common law in 1816,18 and that Missouri is committed by statute to the natural flow theory. However there is considerable doubt that the natural flow doctrine was the law of England prior to 1606, and for a significant period beyond that date. One writer19 shows that as late as 1831, cases were decided in England upon the doctrine of prior appropriation, citing the case of *Liggins v. Inge*,20 and that the natural flow doctrine was first employed in the case of *Mason v. Hill*,21 decided in 1833. This writer demonstrates that the natural flow doctrine was derived from the civil law, particularly from the Code Napoleon, was introduced into American jurisprudence by Kent and Story, and was adopted from the American decisions by the English court in 1833.22 It was not until 1851 that the case of *Embury v. Owen*23 was decided, and it is this case which is widely cited as the leading case on the English

17. See note 14, supra.
20. 7 Bing. 682, 131 Eng. Rep. 263 (1831); “And, by the law of England, the person who first appropriates any part of the water flowing through his own land to his own use has the right to use as he thus appropriates against any others.”
21. 3 B. & Ad. 304, 110 Eng. Rep. 114 (1832); “Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor.” 5 B. & Ad. 1 (1833): “There is no authority in our law that the first occupant has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.”
22. See note 18, supra. In support of the view that the natural flow doctrine came to England via American decisions see the Chancery Case of Wright v. Howard, 1 Sim. & Stu. 190 (1823), in which it was stated “no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.” Cited as authorities for this holding were Hatch v. Dwight, 17 Mass. 288 (1821) and 3 KENT COMM. *442 (2d ed. 1832).
doctrine of natural flow. Another writer, after reviewing the facts just stated, concludes that the English cases are at best only persuasive authority, that the adoption of the common law did not ipso facto fix the property rights of a riparian owner in a stream, and the American courts which have not expressly adopted the English doctrine by decision are free to follow the reasonable use doctrine. Missouri cases bear out this view.

A search of the decisions in Missouri brings to light no instances where nominal damages or an injunction were granted for obstruction or diversion of flow of a watercourse where no actual damage was shown. Such a case would be an indication that the natural flow doctrine was being followed. There are several instances of obiter dicta in the cases, however, in which language was used which would seem to indicate that Missouri would follow the natural flow doctrine.

In Griesinger v. Kleinhardt, decided by the supreme court in 1928, involving the right of a riparian owner on an artificial lake created by the damming of a creek to have the level of the lake maintained and not arbitrarily lowered by another riparian owner, the court said “The right to the flow of a natural non-navigable stream, in its natural way, applies to the upper and lower owners of land across which the stream flows. That may apply with equal force to a stream diverted to an artificial channel.”

In Dardenne Realty Co. v. Abeken, decided in 1937 by the St. Louis Court of Appeals, an upper riparian owner dammed the channel of a creek and diverted the water to maintain several artificial lakes which he had constructed. The court affirmed the action of the trial court in issuing a mandatory injunction to


25. Dickey v. Volker, 321 Mo. 235, 11 S.W. 2d 278 (1928) (Considering a contention that decided cases in England prior to the 4th year of the reign of James the First were a fortiori the common law rule on the same question in Missouri by reason of the statute adopting the common law, the court held that such decisions are “only evidence of law.”); Musser v. Musser, 281 Mo. 649, 221 S.W. 46, 48 (1920) (In construing a will under the laws of Kansas, which declare the common law to remain in force, the court said “Precedents elsewhere established by courts under the common law system, whether in England or one of our own states, may serve as guides to a court in the absence of its own former rulings, in determining what the applicable principle of the common law is in a given case. Further than this their province is purely persuasive and they rise to the dignity of rulings in a particular jurisdiction only when given judicial sanction.”); Dean v. Lee, 227 Mo. App. 206, 52 S.W. 2d 426, 429 (1932) (Referring to a contention that decisions of the English courts prior to 1607 were a part of the jurisprudence of Missouri and binding on Missouri courts, it was stated “the true rule seems to be that the courts of this state, under the statutory provision cited, must determine what the common law was, prior to the year 1607, and that the decisions of the court prior to that time are evidence of what those courts declared the common law to be.”); Robertson v. Jones, 355 Mo. 828, 136 S.W. 2d 278, 279 (1940) (“It is true the common law of England, so far as it is applicable, is in force in this state except where changed by statute.”); Cook v. Cook, 232 Mo. App. 994, 124 S.W. 2d 675 (1939); L. E. Lines Music Co. v. Holt, 332 Mo. 749, 60 S.W. 2d 32, 61 S.W. 2d 326 (1933).

26. 321 Mo. 186, 9 S.W. 2d 978 (1928).

27. 223 Mo. App. 945, 106 S.W. 2d 966 (1937).
restrain defendants from interfering with or diminishing the actual flow of the
creek and diverting any water therefrom except for domestic purposes.

It therefore appears that there is some basis by way of statute, and rather
more basis by way of dictum, to support the view that should a proper case be
presented, the Missouri court would designate the natural flow doctrine as the
Missouri doctrine, and grant an injunction or nominal damages, preventing
acquisition of a prescriptive right to continue the obstruction or use.

On the other hand, as previously expressed, there is considerable logical
reasoning to support the view that the Missouri court is not bound by the
statute adopting the common law of England, since that law was not at all
clear at the time adopted by statute in Missouri, and that the court, not being
bound by adoption of any specific doctrine in its previous decisions, is free to
adopt the natural flow, reasonable use, or even the prior appropriation doctrine,
or modification of one or more of these doctrines.

Perhaps with the increasing trend toward the use of water from the smaller
streams of Missouri for irrigation of ordinary cropland and the widespread
practice of terracing farm land to control the flow of surface water along the
lines of natural drainage, cases will be presented involving diversion of per-
ceptible quantities of water for irrigation purposes or erosion control which does
not cause actual and substantial damage to other riparian owners. Such cases
would involve the possible acquisition of prescriptive rights, and would probably
require the Missouri court to define its position on riparian rights more clearly.

PAUL A. HANNA

PROPERTY—SURFACE WATER—DRAINAGE— POLLUTION

Clark v. City of Springfield

Defendant city maintained near plaintiff's premises a sanitary sewer which
drained in the direction of plaintiff's home. This sanitary sewer was also used as
a storm sewer to transport rain water which had been collected from the streets.
It appeared that on numerous occasions after ordinary rainfalls the pressure of
the water and sewage forced off the manhole covers located near plaintiff's home,
causing filth and human excrement to boil and spout into the air and flow along
the ground onto plaintiff's property. At the times when the pressure of the water
and sewage was not sufficient to force the covers from the manholes, the raw sewage
and water would spurt up through the holes in the covers and thus flow onto
plaintiff's premises. After this water receded, deposits of raw human excrement,
filth, etc., were left upon plaintiff's property, causing odors and contaminating a
well used by plaintiff for drinking and household purposes. The defendant city
also maintained a storm sewer to collect the surface waters from the drains and

30. 241 S.W. 2d 100 (Mo. App. 1951).
gutters in that section of the city. This storm sewer conducted the water to a point near plaintiff's home where the surface water was discharged on neighboring lands, from which point it flowed by force of gravity down upon plaintiff's premises.

In a suit for damages sustained by reason of the above nuisance, plaintiff offered evidence that the conditions complained of could have been alleviated by an extension of the storm sewer and use of a stronger pump in the sanitary sewer, and that plaintiff and a neighbor had offered defendant city a right of way to extend the storm sewer. The city defended on the ground that plaintiff's property was located in the natural passage point for drainage water; and that the sewers were constructed in 1936, more than ten years prior to the commencement of this suit so that plaintiff's suit was barred by the statute of limitations. The plaintiff recovered judgment for $3,020, and defendant city appealed.

The Springfield Court of Appeals held that the inundation of plaintiff's premises was by surface water, and applied the common enemy doctrine. Under this doctrine, the court said that a proprietor of land may guard against the surface water or divert it from his premises. But this was qualified by the provision that the rights given under the common enemy doctrine must be exercised within reasonable limits, and not recklessly, so as not to injure needlessly the servient tenements; and the court applied the rule that one cannot artificially impound or collect surface water and cast it in increased and destructive quantities upon the servient estate to its damage.

The court agreed that nuisance was the proper theory of plaintiff's suit. Quoting with approval from the case of Paddock v. Somes, the court held that: "An actionable nuisance may, therefore, be said to be anything wrongfully done or permitted, which injures or annoys another in the enjoyment of his legal rights." The inundation of plaintiff's property with the mixture of surface and sewer water, the scum of filth left after it had receded, and the noxious odors therefrom, were certainly an interference with plaintiff's premises and his legal rights to enjoy them.

The defense of the statute of limitations was rejected by the court. It was indicated that this might have been a valid defense had this been a permanent nuisance. But since the evidence showed that it was temporary in character and abatable, it was held that the statute of limitations was not applicable.

There are two major rules which have been applied to determine liability for interference with surface waters. The first of these is the English "civil-law" rule. Under this rule the owner of the upper or dominant estate has a legal and natural easement in the lower or servient estate for the drainage of surface water, flowing in its natural course and manner. The natural flow of water may not be interrupted or prevented by the servient owner to the detriment or injury of the dominant estate. The other major rule is the "common law" or "common enemy" rule. Under this doctrine no natural easement exists in favor of the dominant estate for the drainage of surface water; the proprietor of the lower estate may at his

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2. 102 Mo. 226, 237, 14 S.W. 746, 749, 10 A.L.R. 254 (1890).
3. 241 S.W. 2d 100 at 106 (1951).
option lawfully obstruct, hinder, or divert the flow of such water thereon without liability by reason of such obstruction or diversion. To this latter doctrine, some courts have added the qualification that the obstruction or diversion by the lower owner must be reasonable in view of the uses to which the dominant and lower estates are put.4 Another rule, adopted by the Restatement of Torts,5 is the "reasonable use rule." Under this rule the liability for interference with surface water is dependent upon the reasonableness of the benefit to the upper estate as compared with the injury to the lower estate. Regardless of the rule adopted, the courts are almost unanimous in holding that the owner of the higher land may not artificially collect the surface water and discharge it at one place and in increased quantities upon the lower land.6

The Missouri courts have not been consistent in applying any one of the above rules. In the early case of Launier v. Francis,7 the court indicated that it would follow the civil-law rule. But in 1874 the court, again by dictum, indicated that it would follow the common enemy rule,8 and this rule was applied to the surface water cases during the next five years.9 Then in 1879 the case of McCormick v. Kansas City, St. Joseph & Council Bluffs R.R.10 came up on second appeal. Although the court based plaintiff's right of action on the damage caused by collection and discharge of surface water, the court quoted with authority the law applied by civil-law jurisdictions. The judge writing the opinion seemed to assume throughout the opinion that the civil-law rule is applicable in Missouri. Later the same year, the civil-law was applied to decide a case,11 but this seems to be the only time this rule has been applied in Missouri. In 1883, in the case of Benson v. Chicago & Alton R.R.,12 the court again applied the common enemy rule, apparently not noticing that the court had earlier departed from this rule.13 But the next year, in a landmark case,14 the court recognized the variances in Missouri law, and, after discussing the history and merits of the two doctrines, readopted the common enemy rule, expressly rejecting the McCormick and Shane cases. Since that

4. For a more complete discussion, see 56 Am. Jur. 550-554.
5. Restatement, Torts §§ 822-864 (1934). This has been applied in New Hampshire, Franklin v. Durgess 71 N.H. 186 (1901) and possibly in Minnesota, Bush v. City of Rochester, 191 Minn. 591, 255 N.W. 256 (1934). See also, Kinyon and McClure, Interference with Surface Waters, 24 Minn. L. Rev. 891 (1940).
7. 23 Mo. 181 (1856).
10. 70 Mo. 359 (1879).
12. 78 Mo. 504 (1883).
13. The court, in recognizing the McCormick case, said it dealt only with the collection and discharge rule.
time, the Missouri courts have consistently followed a form of the common enemy rule.\textsuperscript{15}

It is not clear whether the Missouri courts have adopted the strict common enemy rule, or whether they have adopted the common enemy rule with the so-called reasonableness qualification. In several cases where the common enemy rule has been applied, it has been stated in terms of the reasonableness qualification.\textsuperscript{16} In all these cases, however, the added reasonableness qualification was only \textit{dictum}—the same result would have been reached following the strict common enemy rule. Rather, it seems that the courts have intended to apply only the strict common enemy rule. In \textit{Beauchamp v. Taylor}\textsuperscript{17} the instruction of the trial court was one under the reasonableness qualification. In reversing the trial court, the court of appeals said that the reasonableness qualification applies only to the negligence and recklessness with which the work is done, and not to the necessity or the reasonableness of the injury as compared to the benefit received.\textsuperscript{18} And in \textit{Johnson v. Leaseneby}\textsuperscript{19} the facts were such that the application of the reasonableness qualification might have changed the decision. However, the court applied the strict common enemy rule, couching it in terms that did not include any suggestion of the reasonableness qualification. It is to be noted that the court in

\begin{enumerate}
\item Anderson v. Inter-River Drainage & Levee District 309 Mo. 189, 274 S.W. 448 (1925); Adair Drainage District v. Quincy, Omaha & Kansas City R.R., 280 Mo. 244, 217 S.W. 70 (1919); Goll v. Chicago & Alton Ry., 271 Mo. 655, 197 S.W. 244 (1917); Cox v. Hannibal & St. Joseph R.R., 174 Mo. 558, 74 S.W. 854 (1903); Rychlicki v. City of St. Louis, 98 Mo. 497, 11 S.W. 1001, 4 L.R.A. 594 (1889); Jones v. St. Louis, Iron Mountain & Southern Ry., 84 Mo. 151 (1884); Stewart v. City of Clinton, 79 Mo. 603 (1883); Casanover v. Villanova Realty Co., 209 S.W. 2d 556 (Mo. App. 1948); Tackett v. Linnebrink, 112 S.W. 2d 160 (Mo. App. 1938); Place v. Union Tp., 66 S.W. 2d 584 (Mo. App. 1933) \textit{(dictum)}; Funke v. St. Louis-San Francisco Ry., 225 Mo. App. 347, 35 S.W. 2d 977 (1931); Kiger v. Sanko, 1 S.W. 2d 218 (Mo. App. 1927); Farrar v. Shuss, 221 Mo. App. 472, 282 S.W. 512 (1926); Gibson v. City of St. Joseph, 216 S.W. 50 (Mo. App. 1919); Johnson v. Leaseneby, 202 Mo. App. 232, 216 S.W. 49 (1919); Jesel v. Benas, 177 Mo. App. 708, 160 S.W. 528 (1913); Weishar v. Sheridan, 168 Mo. App. 181, 153 S.W. 64 (1912); Walther v. City of Cape Girardeau, 166 Mo. App. 467, 149 S.W. 36 (1912); Thoele v. Marvin Planing Mill Co., 165 Mo. App. 707, 148 S.W. 413 (1912); Grant v. St. Louis, Iron Mountain & Southern Ry., 149 Mo. App. 306, 130 S.W. 80 (1910); Thompson v. Chicago, Milwaukee, & St. Paul Ry., 137 Mo. App. 62, 119 S.W. 509 (1909); Mehornray v. Foster, 132 Mo. App. 229, 111 S.W. 882 (1908); Beauchamp v. Taylor, 132 Mo. App. 92, 111 S.W. 609 (1908); Applegate v. Franklin, 109 Mo. App. 293, 84 S.W. 547 (1904); Burke v. Missouri Pacific Ry., 29 Mo. App. 370 (1888); Schneider v. Missouri Pacific Ry., 29 Mo. App. 68 (1888); Martin v. Benoist, 20 Mo. App. 262 (1886) \textit{(dictum)}; Hoester v. Hemsath, 16 Mo. App. 485 (1885).
\item Hosher v. K.C., St. Joseph & C.B. R.R., 60 Mo. 329 (1875); McCormick v. Kansas City, St. Joseph & Council Bluffs R.R., 57 Mo 433 (1874); Young v. Moore, 236 S.W. 2d 740 (Mo. App. 1951); Lee v. Inter-River Drainage District, 226 S.W. 280 (Mo. App. 1920); Schalk v. Inter-River Drainage District, 226 S.W. 277 (Mo. App. 1920); Beauchamp v. Taylor, 132 Mo. App. 92, 111 S.W. 609 (1908); Goettetetroeter v. Kappelmann, 83 Mo. App. 290 (1899); and 88 Mo. App. 449 (1901); Freundenstein v. Heine, 6 Mo. App. 287 (1878).
\item Supra n. 15.
\item 132 Mo. App. 96, 111 S.W. 609, 611 (1908).
\item 202 Mo. App. 232, 216 S.W. 49 (1919).
\end{enumerate}
the principal case announced the law in terms of the common enemy rule with the reasonableness qualification, but only by *dictum.* Just what the law in Missouri is must await a more precise decision.

The holding of the court in the principal case that one cannot collect and discharge surface water in increased quantities upon the servient estate to its injury follows the majority, if not unanimous, law in this country, and the previous Missouri cases. However, this was somewhat modified in the case of *Thompson v. Chicago, Milwaukee & St. Paul Ry.*, where the court says that the collection and discharge rule does not apply when it is incidental to improvement of the dominant land in a proper manner—i.e., there is no negligence or wanton recklessness in the improvement of the land.

It should be noted that if the defendant city, in the principal case, had violated none of the surface water rules discussed *supra*, the plaintiff still had a valid cause of action. While this point was not discussed by the court, the owner of the dominant estate may not lawfully pollute surface water, and then allow it to flow onto the servient estate in the polluted condition. As stated by Tiffany: "An owner of land has no right to pollute surface water on his land and to allow it to flow in a polluted condition on the land of an adjoining owner. Such action on his part, in so far as it interferes with the possible enjoyment of the adjoining land, involves the maintenance of a nuisance." By discharging the sewage and

20. 241 S.W. 2d 100, 104 (Mo. App. 1951).
21. *Supra* n. 5.
22. Polich v. Hermann, 219 S.W. 2d 849 (Mo. App. 1949); Casanover v. Villanova Realty Co., 209 S.W. 2d 556 (Mo. App. 1948); Vollrath v. Wabash Ry., 65 F. Supp. 766 (W.D. Mo. 1946); Funke v. St. Louis-San Francisco Ry., 225 Mo. App. 347, 35 S.W. 2d 977 (1931); Zook v. City of Louisiana, 12 S.W. 2d 518 (Mo. App. 1929); Bodam v. City of New Hampton, 290 S.W. 621 (Mo. App. 1927); Kiger v. Sanko, 1 S.W. 2d 218 (Mo. App. 1927); Tucker v. Hagan, 300 S.W. 301 (Mo. App. 1927); Farrar v. Shuss, 221 Mo. App. 472, 282 S.W. 512 (1926); Bielman v. City of St. Joseph, 260 S.W. 529 (Mo. App. 1924); Lynch v. St. Louis, Kansas City & Colorado Ry., 180 Mo. App. 169, 168 S.W. 224 (1914); Weishar v. Sheridan, 168 Mo. App. 181, 153 S.W. 64 (1912) (malicious collection and discharge); Lewis v. City of Springfield, 142 Mo. App. 84, 125 S.W. 824 (1910); Mehonray v. Foster, 132 Mo. App. 229, 111 S.W. 882 (1908); Reedy v. Missouri Pacific Ry., 98 Mo. App. 467 (1903); Reedy v. St. Louis Brewing Ass’n, 161 Mo. 523, 61 S.W. 859, L.R.A. 805 (1910); Cannon v. City of St. Joseph, 67 Mo. App. 367 (1896); Carson v. City of Springfield, 53 Mo. App. 289 (1893); Rychlicki v. City of St. Louis, 98 Mo. 497, 11 S.W. 1001, 4 L.R.A. 594 (1889); Schmidt v. Rowe, 35 Mo. App. 288 (1889); Stewart v. City of Clinton, 79 Mo. 603 (1883); Benson v. Chicago & Alton R.R., 78 Mo. 504 (1883); McCormick v. K.C., St. Joseph & C.B. R.R., *supra* n. 15.
24. Brown & Brothers v. Illius 27 Conn. 84 (1858); City of Jacksonville v. Lambert, 62 Ill. 519 (1872); Niagra Oil Co. v. Jackson, 48 Ind. App. 238, 91 N.E. 825 (1910); Livelyzey v. Schmidt, 96 Ky. 441, 29 S.W. 25 (1895); Thomas v. Concordia Cannery Co., 68 Mo. App. 350 (1897); Carpenter v. City of Versailles, 65 S.W. 2d 957 (Mo. App. 1933); Gawtry v. Leland, 31 N.J. Eq. 385 (1879); Adams v. Clover Hill Farms, 86 Ore. 140, 167 Pac. 1015 (1917).
25. TIFFANY, REAL PROPERTY § 745 (3rd ed. 1939). See also GOUlD, LAW OF VENTS, § 297 (3rd ed. 1891); GOUlD, LAW OF NUISANCES § 115 (2d ed. 1883).
surface water onto the plaintiff's premises, the defendant city's action constituted
the maintenance of a nuisance, for which it would be liable for damages to the
plaintiff.                                       John E. Young

TORTS—CONTRIBUTORY NEGLIGENCE—SPEED AND THE ASSURED CLEAR DISTANCE RULE

Halfacre v. Hart

The plaintiff was driving his car on a road, 18 to 20 feet wide, at a speed of
45 to 50 miles per hour. Plaintiff was driving downhill on the inside of a curve so
sharp as to limit his forward vision to 60 to 70 feet. While in such a position
the plaintiff was confronted with defendant's car approaching him on the wrong
side of the road by one and a half to two feet. Plaintiff, finding himself in this
situation guided his car to his right without applying his brakes. This caused
plaintiff's right front wheel to edge onto the soft shoulder, and sent the plaintiff's
car skidding back across the highway and over a steep bank, resulting in the
present suit for damages and injuries suffered. At no time did the two automobiles
contact each other. At the close of the plaintiff's evidence, the court sustained the
defendant's motion for a directed verdict on the ground that the plaintiff, in driving
his car around this sharp curve at the speed mentioned and with such limited
vision ahead, was guilty of negligence which proximately contributed to the acci-
dent. The Circuit Court of Appeals of Tennessee reversed and remanded the case,
holding that the question of the plaintiff's negligence was a question for the jury
to decide. The Supreme Court of Tennessee denied the petition for certiorari.

The question here presented is whether it is negligence as a matter of law for
one to drive an automobile at such speed as to be unable to stop within the distance
measured by the driver's range of vision. Those cases which have held that it
is negligence as a matter of law to drive at such speed that it is impossible to stop
within the range of vision have come to be known as the "assured clear distance"
rule. The earlier Missouri view seems to have been in accord with this rule.

Many courts, however, have been forced to retreat from this developed mechanical
rule of law, which may have been a valid rule in the early day of the automobile,
but would seem to be unrealistically restrictive of the speed of the present day
automobile.

1. 241 S.W. 2d 421 (Tenn. 1951).
2. Haines v. Carroll, 126 Kan. 408, 267 Pac. 986 (1928); Russell v. Szczawinski,
   268 Mich. 112, 255 N.W. 731 (1934); 23 Cal. L. Rev. 498 (1935); 27 Ill. L.
   Rev. 570 (1933); 22 Minn. L. Rev. 877 (1938); 4 Rocky Mt. L. Rev. 156 (1932);
   97 A.L.R. 546 (1935); 87 A.L.R. 900 (1933); 58 A.L.R. 1493 (1929); 44 A.L.R.
   1403 (1926).
3. Solomon v. Duncan, 194 Mo. App. 517 (1916), where the court sets
   out the doctrine of the "assured clear distance rule" taken from Lauson v. Fond
   (1909): "If his light be such that he can see objects for only a distance of ten
   feet, then he should so regulate his speed so as to be able to stop his machine
   within that distance; and if he fails to do so, and an accident results from such
   failure, no recovery can be had. This, it seems to us, is the minimum degree
   of care that should be required."
4. 4 PROSSER, TORTS 286 (1941).
Most of the applications of this rule have arisen in the situation where the plaintiff is driving at a speed where he cannot stop when an unanticipated defect or obstacle suddenly appears on an apparently safe highway. In one state this "assured clear distance rule" was adopted by statute, but the courts of that state found it necessary to introduce modifications.\(^5\)

In the Missouri case of Sirounian \textit{v.} Terminal R.R. Ass'n of St. Louis,\(^6\) the court clearly renounces the view that it is always negligence as a matter of law to drive at such speed that one cannot stop within the distance that he can see ahead of him. While this case deals with the case of the range of vision of one's headlights, that situation would seem analogous with the "blind curve" type of situation in the instant case.

The Tennessee court pointed out that the plaintiff had the right to assume that the approaching automobile, if there were one on the other end of the "blind curve," would be obeying the mandate of the law and only be occupying its right side of the highway. A Missouri court has held that a driver of a truck is not required to search the highway for unlighted vehicles, but rather could assume that other automobiles would be provided with tail lights as required by statute.\(^7\) Also, the driver of a vehicle may presume that the other drivers on the road will exercise the highest degree of care in operating their vehicles.\(^8\)

\textit{Manuel Drumm, III}

\textbf{TORTS—INJURY TO INVITEE—OCCUPIER'S DUTY TO CONTROL THIRD PERSON}

\textit{Oliver v. Oakwood Country Club}\(^1\)

Plaintiff, aged 13, was injured when a companion shot him in the eye with an air gun as the two and others were approaching the "caddie house" on defendant's golf course to present themselves for employment as caddies. The trial court directed a verdict for the defendant country club at the close of plaintiff's evidence. On appeal it was held that although a duty was owed to plaintiff as an invitee to exercise reasonable care in controlling third persons on the premises so they do not injure him, no breach of that duty by the defendant was shown since defendant

6. 236 Mo. App. 938, 160 S.W. 2d 451 (1942). Here the court at page 455 states: "We are not unaware that as a general proposition of law, a motorist is not in all events and under all circumstances to be held guilty of contributory negligence as a matter of law merely because he drives at such a speed that he cannot stop within that distance that his headlights shine out ahead of him. On the contrary, if there is conflicting evidence on the vital questions touching the plaintiff's negligence, and the attending circumstances are such that reasonable minds might well differ as to whether he was to be excused for driving at such speed as to make it impossible for him to stop within the range of his headlights, the question of his contributory negligence is properly held to be an issue for determination by the jury."
7. Smith \textit{v.} Producers Cold Storage, 128 S.W. 299 (Mo. App. 1939).

1. 245 S.W. 2d 37 (Mo. 1951).
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neither knew nor should have known that the exercise of control of the third person was necessary to prevent harm. There was no evidence of knowledge of the possession or use of firearms or air rifles by anyone on the premises.

The court determined that plaintiff was an invitee in this situation inasmuch as he was going on defendant's premises for their mutual business benefit and had been invited to do so on previous occasions. Plaintiff was approaching the caddie house by a path through some woods, which was the shortest route from the car line. The court did not directly discuss the question of whether he was on a part of the premises where he was expected and had a right to be as an invitee, although it must have so assumed in holding a duty was owed him as an invitee rather than as a licensee or trespasser.

An occupier of land owes a duty to invitees to use due care to protect them from injury on his land, both from dangerous conditions and from affirmative acts of negligence on the part of the occupier. This general rule is said to apply both to the private occupier and the occupier holding his land open to the public. The basis is often stated to be the occupier's superior knowledge of the dangers, coupled with the notion that a business guest ought to be able to feel that the premises have been in some manner made safe for him.

This duty has been extended in the case of property held open to the public to include protection to invitees from dangerous third persons on the premises other than servants of the occupier. The duty to control the conduct of a third person to protect invitees has long been found in such businesses as theatres and shows, carriers, restaurants and taverns, ball parks, public picnics, inn-

2. Porchey v. Kelling, 353 Mo. 1034, 185 S.W. 2d 820 (1945); Glaser v. Rothschild, 221 Mo. 180, 120 S.W. 1, 22 L.R.A. (N.S.) 1045, 17 Ann Cas. 576 (1909); 65 C.J.S. Negligence § 43 (4) (c).
3. Piggly Wiggly, Macon, Inc. v. Kelsey, 83 Ga. App. 526, 64 S.E. 2d 201 (1951); Prosser, TORTS § 79 at p. 640 (1941); 65 C.J.S. Negligence § 48(a); 22 Mo. Dig. Negligence § 32 (3).
4. Berberet v. Electric Park Amusement Co., 319 Mo. 275, 3 S.W. 2d 1025, 61 A.L.R. 1269 (1928); Prosser, TORTS § 79 (1941); McCleary, Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45 (1936).
5. Prosser, TORTS § 79 at p. 636 (1941).
6. Cameron v. Small, 182 S.W. 2d 565 (Mo. 1944); Murray v. Ralph D'Oench Co., 347 Mo. 365, 147 S.W. 2d 623 (1941).
7. RESTATEMENT, TORTS § 348 (1934); Harper and Kime, The Duty to Control the Conduct of Another, 43 YALE L. J. 886 (1934).
keepers, public parks, skating rinks, banks, department stores, poolrooms, and swimming pools.

The duty to control the conduct of a third person on one's premises falls somewhere in between the duties with respect to dangerous conditions and affirmative negligence on the part of the occupier. It more resembles a "condition" in that there is no affirmative act on the part of the occupier, but only passive negligence in failing to act with respect to the danger. It does resemble an affirmative act, however, in that it "comes at" the invitee, rather than the invitee walking into it. Because of the similarity to a dangerous condition, many courts lump the duty with respect to dangerous third persons under the duty concerned with conditions.

The principal case is believed to be the first in Missouri finding this duty in the case of a private occupier, and as such is one of the few in this country.

(1903); Thompson v. St. Louis Public Service Co., 242 S.W. 2d 299 (Mo. App. 1951); Lige v. Chicago B. & O. R.R., 275 Mo. 249, 204 S.W. 508, 1918F L.R.A. 548 (1918); Utterback v. St. Louis & S.F. Ry., 189 S.W. 1171 (Mo. 1916); Hillsbrecht v. Pittsburgh Rys., 55 Pa. Sup. Ct. 204 (1913); Harper and Kime, The Duty to Control the Conduct of Another, 43 Yale L. J. 886 at 901 (1934); 13 C.J.S. Carriers § 695; other Mo. cases collected 6 Mo. Dig. Carriers § 284; 1918F L.R.A. 555; 15 A.L.R. 868 (1921), supplemented by 42 A.L.R. 168 (1926), 43 A.L.R. 1035 (1926) (annotations on carrier liability); 2 A.L.R. Dig. Carriers §§ 203-207 (annotated cases collected).

Missouri cases generally hold that a carrier must use the highest degree of care to protect passengers from fellow passengers. Abernathy v. Missouri Pacific R.R., 217 S.W. 568 (Mo. App. 1920). But the carrier must only use ordinary care to protect passengers from violence at the hands of strangers not in the carrier's control. Williams v. East St. Louis & S. R.R., 207 Mo. App. 233, 232 S.W. 759 (1921).


11. Hughes v. St. Louis National League Baseball Club, Inc., 359 Mo. 993, 224 S.W. 2d 989, 16 Mo. L. Rev. 189 (1949); 16 A.L.R. 2d 904 (1951) (collected amusement cases); 20 A.L.R. 2d 8 (1951) (collected cases on pushing).


13. 106 A.L.R. 1003 (1937) (cases collected on this point).


15. 168 A.L.R. 899 (1947) (injury to one skater by another); 20 A.L.R. 2d 8 (1951) (collected pushing cases).


20. Only one other case has been found in the United States finding this duty in the case of a private occupier. In re Sabbatino & Co., 150 F. 2d 101 (2d Cir. 1945). In that case plaintiff's decedent was shot by the vice-president of defending corporation in the "duties once" of the corporation. The corporation was
The reason for this is probably that the necessary factual situation would almost never arise on private property, where few people gather at one time. It is to be noted that the defendant here, although a private occupier, still had large numbers of people on its land in members and employees. Almost all the cases involving dangerous third persons have arisen in situations where the property has been held open to the public to enter as patrons. Since the supreme court has found a duty in the instant case on the part of the private occupier, it would seem that these cases involving business premises would apply by analogy although club members are a more limited group of patrons.

Assuming now that there is a duty to use reasonable care with respect to dangerous third persons for the benefit of invitees, how is that duty discharged? With respect to ordinary dangerous conditions it is usually said to be sufficient to warn the invitee so that he may avoid the danger, unless (1) the warning would clearly not be sufficient to allow the invitee to protect himself, or (2) unless the only way to avoid the danger would be by giving up a right which the invitee had. In the case of the common carrier, for instance, warning of a dangerous condition is not sufficient if the invitee must give up his right to use the carrier in order to avoid the danger. This same general principle seems to have been applied to cases involving dangerous third persons on business premises. A warning is usually sufficient if the invitee can then avoid the danger by leaving the premises. If, however, after being warned, there is no opportunity for the invitee to leave safely, the occupier may be held to use further means to protect his invitee. Again in the case of the common carrier, steps must be taken to protect the passenger if his only means of avoiding the dangerous person is giving up the right to use the carrier.

There is one further possibility, seemingly not specifically dealt with by the dangerous third person cases: suppose the dangerous third person “carries his own warning”? In the case of a condition on land, there is not even a duty to warn if

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found negligent inasmuch as the president, who was present, knew the vice-president was drunk, and knew that he got a gun out of the company safe in time for the president to have acted to prevent the injury. Although the matter was not discussed, this “inner office” was apparently a private part of the premises not open to the public.

It is possible that there are a few other similar cases. Because of the courts’ tendency to speak of the dangerous third person as a “condition” it is not always possible to tell from a digest paragraph what type of “condition” the digested case is about.

21. Prosser, Torts § 79 at pp. 642-643 (1941); Restatement, Torts § 343 (1934).
22. Prosser, Torts § 79 p. 642, n. 89 (1941); Restatement, Torts § 343 (1934).
23. Terre Haute, Indianapolis & Eastern Traction Co. v. Scott, 91 Ind. App. 690, 170 N.E. 341 (1930); Prosser, Torts § 79 at pp. 643-644 (1941); Restatement, Torts § 346 (1934); Harper and Kime, The Duty to Control the Conduct of Another, 43 Yale L. J. 886 at p 904 (1934); cases on warning in general collected 65 C.J.S. Negligence p. 528, n. 98, and p. 533, n. 21.
24. Prosser, Torts § 79, p. 642, n. 89 (1941); Restatement, Torts § 348 (1934); Harper and Kime, The Duty to Control the Conduct of Another, 43 Yale L. J. 886 (1934).
the condition is apparent and will be seen and avoided by the invitee if he uses due care. It would seem then in the case of a dangerous third person, if a warning would be sufficient in a particular situation, no warning would be necessary if the third person “carried his own warning” so that the invitee could observe the danger and take steps to protect himself, as by leaving the premises. This theory has not been advanced in any of the cases found.

DONALD G. STUBBS

WILLS AND ADMINISTRATION—STATUTORY ALLOWANCES FOR THE SURVIVING SPOUSE—PROCEDURE

In re Polizoe’s Estate (Sclavo v. Spelbrink)¹

When H and W were married W owned certain household furnishings. Later W died and H was appointed administrator of her estate. H did not list the furnishings on the inventory of W’s estate, for he believed that under § 462.450 of the Missouri Revised Statutes (1949), they became his absolute property and as such were not part of W’s estate for purposes of administration. He rented the furnishings to others, and continued to do so until his death. After his death, Spelbrink was appointed executor of H’s estate. Spelbrink continued to rent the furnishings and listed them as part of the estate of H at a valuation of $200. W’s estate was still not closed, so Spelbrink filed a settlement therein and was appointed administrator de bonis non of her estate. Thomas, a son of W by a former marriage, filed a petition under § 462.400, Missouri Revised Statutes (1949), to compel Spelbrink as executor of the estate of H to appear and account to the estate of W for the furnishings and proceeds from the rental thereof. The probate court ordered Spelbrink as administrator de bonis non of W’s estate to inventory the furnishings for the estate of W; and as executor of H’s estate to pay over to the estate of W the rents he had collected; and further, as administrator de bonis non of W’s estate to continue to rent said furnishings for the estate of W. Spelbrink appealed to the circuit court contesting the order to pay to the estate of W all rentals he had collected as executor of H. This was the sole question on that appeal, and the circuit court affirmed the order of the probate court. Spelbrink then appealed in proper form to the St. Louis Court of Appeals, which again affirmed the order.

This decision is of considerable importance, especially as a guide to administrators and executors. Since almost every decedent’s estate contains household furnishings and other personalty covered by § 462.450, the procedure under that statute is in constant use. The court’s construction of the statute in this case makes the procedure quite clear, so that in the future administrators and executors will be certain as to their duties with regard thereto.

A brief analysis of the issue involved and the manner in which the court handled it would seem to be in order. The claim of Thomas that the furnishings and proceeds thereof be returned to the estate of W could only be supported if the

¹ 246 S.W. 391 (Mo. 1952), transfer to Missouri Supreme Court refused

May 14, 1857.
furnishings did not properly belong to $H$. Under § 462.450, Missouri Revised Statutes (1949), the furnishings became the "absolute property" of $H$ as the surviving spouse of $W$ at her death. At first glance it would seem that if they became the absolute property of $H$ then they would no longer be part of $W$'s estate and would not have to be inventoried as part of her estate. However, the statute places a $500 maximum on the amount of furnishings that become the absolute property of the surviving spouse. Who is to determine when the $500 limit has been reached? If the furnishings are not required to be inventoried, then it would be left to the surviving spouse to so determine the value of the furnishings he or she kept under the statute as his or her absolute property. This would not only open the door to fraud, but would be an excellent place for honest mistakes in judgment. It is certainly against public policy to allow beneficiaries and distributees to be subjected to possible prejudices against their interests without a court approval. For instance, if no inventory were required of the household furnishings under § 462.450, then the court would not be able to determine whether the furnishings claimed thereunder were actually worth $500 (which is allowed) or $1500. Thus, a surviving spouse could keep any amount of furnishings by merely claiming their value was only $500. This practice, of course, should not be allowed, and this decision prevents it. By construction, the court held that under this statute the furnishings had to be inventoried by the administrator or executor, then, on application to the court, the surviving spouse could have $500 worth of said furnishings set aside prior to administration as his or her absolute property. Thus, the requirement of inventory does not subject the property to probate or administration nor does it subject the surviving spouse to any inconvenience, for the court further held that such furnishings were not to be taken into possession by the administrator or executor as is the case with other personality of the estate.

The general policy of the statute is obvious. It was the legislature's intent that the surviving spouse and family of a decedent be temporarily provided for after his death and before completion of the administration of his estate. Ordinarily the estate is tied up pending final settlement, and the surviving spouse would be deprived of the use of any property until the estate was finally probated. This inconvenience and hardship is alleviated by several statutes of which this is one. The statute allows the surviving spouse to remain in possession, and provides that certain furnishings become the absolute property of said spouse. However, the court in this case has by construction required that before the furnishings become the absolute property of the survivor, they must be listed on the inventory to the probate court and then, on application, set aside to the survivor. All this case does is provide a procedure under the statute which allows the court to supervise the transaction to assure fair dealing by all parties. This construction

3. See Monahan v. Monahan's Estate, 232 Mo. App. 91, 89 S.W. 2d 153 (1936); Waters v. Herboth, 178 Mo. 166, 77 S.W. 305 (1903).
4. See McDonnell v. Oxler's Estate, 235 S.W. 2d 568 (Mo. 1951); Jaeglin v. Moakley, 236 Mo. App. 254, 151 S.W. 2d 524 (1941); In re Bernay's Estate, 334 Mo. 138, 106 S.W. 2d 200 (1937).
does not do the statute violence, nor does it contravene the policy, for the survivor still remains in possession and is required only to apply to the court to have the furnishings allotted to her before the estate is administered.

The construction placed on this statute is believed to be not only sound and fair, but in line with the construction and policy of the companion statutes which provide for allowances to the surviving spouse and family.

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5. Sections 208 and 214 of KELLEY'S PROBATE GUIDE (4th ed. 1913) state that even though some of the Missouri Statutes declare certain articles to be the "absolute property" of the surviving spouse, it is better practice to include those articles in an inventory presented to the court. This makes possible an appraisal and an order of court based thereon that certain named goods be set aside as the absolute property of the surviving spouse. This comment refers to goods which are limited by a certain total value, and not to articles specifically named in the statute which are given absolutely regardless of value. This early comment by Kelley as to what is the better practice is made mandatory by this case.

6. Mo. Rev. Stat. § 462.010 (1949) provides that the executor or administrator must take all of the property into possession except that which is the absolute property of the surviving spouse. Then § 462.020 requires the executor or administrator to inventory and appraise all the property without mentioning any exceptions. See Hiler v. Cox, 210 Mo. 696, 109 S.W. 679 (1908); Lewis v. Carson, 95 Mo. 587, 6 S.W. 365 (1887); McCarty v. Frazer, 62 Mo. 263 (1876); In re Van Fossen, 13 S.W. 2d 1076 (Mo. App. 1929).

Section 462.460 is a statute similar to the one involved in this case, and has been construed as requiring inventory and appraisal by the executor or administrator plus a setting aside by the court. See: Griswold v. Mattix, 21 Mo. App. 282 (1886); State ex rel. Meyer v. Arnold, 220 S.W. 2d 942 (Mo. 1949).

Section 461.640 is another similar type statute and requires inventory and appraisal before the court can set aside the absolute property of the surviving spouse and children under 18 years. See: Odom v. Langston, 351 Mo. 609, 173 S.W. 2d 826 (1943); Pidcock v. Buffam, 61 Mo. 370 (1875); Craslin v. Baker, 8 Mo. 437 (1844).