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CONSTITUTION—THE FOURTEENTH AMENDMENT AND EVIDENCE IN STATE CRIMINAL PROSECUTIONS

Breithaupt v. Abram

Petitioner was involved in a highway collision in which three persons were killed. Results of a blood test taken at the request of a state trooper, while petitioner was unconscious, showed petitioner to be under the influence of alcohol. This evidence was admitted over objection and petitioner was convicted of involuntary manslaughter. Petitioner claimed he was deprived of his liberty without that due process of law guarantied by the fourteenth amendment. On writ of certiorari to the Supreme Court, held, affirmed. Conviction in a state criminal case based upon evidence obtained by an involuntary blood test does not deprive accused of liberty without due process of law.

Two arguments were considered by the Supreme Court. First, it was argued that the conviction was based on evidence which was the result of an unreasonable search and seizure violative of the fourth amendment, and that use of this evidence compelled petitioner to be a witness against himself in violation of the fifth amendment. Petitioner claimed that the protections of these amendments were extended to his case through the due process of law clause of the fourteenth amendment. Second, it was argued that petitioner was deprived of due process of law as the clause was defined and applied in Rochin v. California.

While the Court summarily rejected petitioner's first argument, relying on Wolf v. Colorado, it will be interesting to consider briefly the history of this theory for the light it sheds on the Court's consideration of petitioner's second argument. It was early decided that the first eight amendments restrain only the power of the federal government and are not applicable to the states. With the ratification of the fourteenth amendment the argument was advanced that the privileges or immunities clause extended federal protection to those civil rights formerly under protection only of the states. This claim was rejected in the famous Slaughter-House Cases.

2. U.S. Const. amend. IV.
3. U.S. Const. amend. V.
8. Ratified in 1868.
9. 83 U.S. (16 Wall.) 36 (1872) (the Court felt that to uphold the argument would usurp the powers of the states). Accord, United States v. Cruikshank, 92 U.S. 542 (1875); In re Kemmler, 136 U.S. 436 (1890).
although four Justices dissented, holding that it was the purpose of the fourteenth amendment to provide national security against state violations of civil rights. Thus encouraged, the argument was changed to say that the privileges or immunities clause extended federal protection against state encroachment, for the civil rights specifically enumerated in the first eight amendments. This argument was rejected in Maxwell v. Dow.

Three years prior to the Maxwell case, it was held that the word "liberty" as used in the due process of law clause might be interpreted to include the liberty to contract. The decision is significant for the broader interpretation it gave to the word "liberty," which had previously been interpreted as the mere absence of physical restraint. In the same year it was decided that the taking of private property for public use without just compensation, as prohibited against the federal government by the fifth amendment, was prohibited against the states by the due process of law clause of the fourteenth amendment. In Twining v. New Jersey, the Court said that a denial by the states of some of the rights of the first eight amendments may amount to a denial of due process of law, but then held that the fifth amendment guaranty against self-incrimination was not within this protection of due process. Later a personal right specifically enumerated in the first amendment, freedom of speech, was recognized as within the protection of due process of law. Future decisions did find many of the personal rights guaranteed by the first eight amendments to be within the protection of the fourteenth amendment. Palco v. Connecticut held that such provisions of the Bill of Rights as were "implicit in the concept of ordered liberty" became secure from state interference by the due

10. 83 U.S. at 122.
11. Spies v. Illinois, 123 U.S. 131 (1887) (the question was passed over as not necessary for decision); O'Neill v. Vermont, 144 U.S. 323 (1892) (the Court held the question not presented, three dissenting Justices to the contrary, stating that the privileges or immunities of the fourteenth amendment include the rights guaranteed by the first eight amendments).
12. 176 U.S. 581 (1900) (one Justice dissenting).
16. 211 U.S. 73 (1908) (one Justice dissenting).
17. Id. at 99.
21. Id. at 325.
process of law clause. Later, the Court held with four Justices dissenting that the fifth amendment privilege against self-incrimination was not within this Palko definition.  

In Wolf v. Colorado, the Court decided for the first time that an illegal search and seizure was offensive to the definition of due process of law given in the Palko case. But in the next breath the Court sterilized the opinion by holding that the introduction in evidence of the results of the illegal search was not prohibited. The Court referred to Weeks v. United States, where it was held that in a federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure. The opinion in the Wolf case stated that this ruling was not an explicit requirement of the fourth amendment, but was a matter of judicial implication and so only a rule of evidence not binding on the states. This conclusion is open to criticism. A strong indication that the Court felt the use of evidence obtained through an illegal search and seizure was governed by more than a rule of evidence, is found in the language of the Weeks case. There the Court said that if such evidence can be used "the protection of the Fourth Amendment... is of no value, and... might as well be stricken from the Constitution."

Such has been the historical development of the idea that the fourteenth amendment incorporates the first eight amendments. Though continuously rejected, the vitality of the argument requires the statement "the issue is closed," appearing in Wolf v. Colorado, to be taken with some reservations.

The Court laid the basis for petitioner's second argument, in Rochin v. California where the accused was convicted on evidence forcibly "stomach pumped" from his body. Holding that the introduction of evidence so obtained violated due process of law, the Court said the method of obtaining the evidence was "brutal," offensive to a "sense of justice," and "conduct that shocks the conscience." Thus was placed a limitation on the doctrine of the Wolf case, holding in effect that the introduction of illegally obtained evidence may violate due process depending upon how the evidence was obtained. Disclaiming that this was an ad hoc judgment, the Court said determination of due process requires "an evaluation based on... a balanced order of facts... on the detached consideration of conflicting claims."

22. Adamson v. California, 332 U.S. 46 (1947). Justice Black, joined by Justice Douglas, dissented, stating that the Bill of Rights should be the standard for applying due process of law; Justice Murphy, joined by Justice Rutledge, agreed with Justice Black, adding however, that due process of law is not limited by the Bill of Rights.
23. 338 U.S. at 33 (three Justices dissenting).
25. 338 U.S. at 28. Missouri excludes such evidence, following the Weeks doctrine. State v. Owens, 302 Mo. 348, 259 S.W. 100 (1924) (en banc).
26. 232 U.S. at 393.
27. 338 U.S. at 26.
28. 342 U.S. at 173.
29. Ibid.
30. Id. at 172.
31. Ibid.
"accordian-like . . . philosophy,"32 two of the Justices in separate concurring opinions argued that adherence to the specific guarantys of the fifth amendment would insure a more permanent protection of individual liberty.33

Two years later in Irvine v. California34 the Court, after admitting that the evidence objected to was obtained in flagrant violation of the fourth amendment, said its admission did not violate due process. Distinguishing the Wolf case from the Rochin case on the aggravated circumstances in the latter case, the Court found the rule of the Wolf case still to be the law.35

Petitioner Breithaupt sought to bring his case within the language of the Rochin case. Relying on the fact that blood tests are common routine, the majority found the action not "brutal" or offensive to a "sense of justice." Can it be said that the taking of blood from an unconscious suspect, later to be used in evidence against him, is routine? Chief Justice Warren, in his dissenting opinion, refers to the Rochin case and argues, "the essential elements of the cases are the same and the same result should follow."36 Elements common to both cases were lack of consent and extraction of fluid from the body. "Only personal reaction to the stomach pump and the blood test can distinguish them," said the Chief Justice.37 The majority's application of due process was perhaps aptly described by Justice Clark, speaking on the same problem in the Irvine case, "In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned.38

By petitioner's argument the Court was forced to apply to his case the standards of the Rochin case. While it is difficult to distinguish the elements of the two cases, the Court held that the method of obtaining evidence in the Breithaupt case did not violate the definition of due process in the Rochin case.

But the significance of the decision is in the reaffirmance of the limitations imposed on the rule of the Wolf case by the Rochin case. Does this speak for a widening application of due process of law over the first eight amendments? It is difficult, after viewing the slow but persistent success of that trend, to conclude otherwise.

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32. Id. at 177.
33. Id. at 175, 179.
35. Id. at 134 (four Justices dissenting). The Court pointed out that in view of the Wolf case, holding an illegal search and seizure violative of due process, state courts may wish to re-examine the propriety of admitting evidence so obtained.
36. 352 U.S. at 440.
37. Id. at 442.
38. 347 U.S. at 138 (concurring opinion).
DEEDS—MISSOURI—NECESSITY OF ACKNOWLEDGMENT TO RELEASE MARITAL RIGHTS OF SPOUSE

McCoy v. N. W. Electric Power Cooperative

Plaintiffs, husband and wife, brought suit in equity to set aside a deed purporting to convey a perpetual easement for a right-of-way over land owned by the husband, alleging that defendant had altered the instrument by adding thereto a fraudulent acknowledgment, purported to be that of plaintiffs. Plaintiffs had never acknowledged the execution and delivery of the instrument. A decree for defendant was reversed with directions to enter judgment striking the deed from the record. The court held that the unacknowledged deed was effective to convey the husband's title but not to release the wife's inchoate dower.

It is well settled in Missouri that, while acknowledgment is a prerequisite to the recording of a deed, an unacknowledged or defectively acknowledged deed is valid and sufficient to convey title as between the parties. A deed takes effect upon delivery by the grantor, the function of the certificate of acknowledgment being to stand as prima facie evidence of its execution, supplying the place of direct proof of its signature and delivery by the grantor.

Subsequent to the enactment of the married women's act and prior to the

1. 297 S.W.2d 390 (Mo. 1957).
2. See companion case, Robb v. N. W. Electric Power Cooperative, 297 S.W.2d 385 (Mo. 1957).
3. § 442.380, RSMo 1949; Heintz v. Moore, 246 Mo. 225, 151 S.W. 449 (1912); Williams v. Butterfield, 182 Mo. 181, 81 S.W. 615 (1904), aff'd, 214 Mo. 412, 114 S.W. 13 (1908); Finley v. Babb, 173 Mo. 257, 73 S.W. 180 (1903); Hatcher v. Hall, 292 S.W.2d 619 (Spr. Ct. App. 1956); Drzewiecki v. Stock-Daniel Hardware Co., 293 S.W. 441 (St. L. Ct. App. 1927).
4. State ex rel. Crites v. Short, 351 Mo. 1013, 174 S.W.2d 821 (1943); State v. Page, 332 Mo. 89, 58 S.W.2d 293 (1933); Crites v. Crites, 225 S.W. 930 (Mo. 1920); Elsa v. Smith, 273 Mo. 396, 202 S.W. 1071 (1918); Schroeder v. Turpin, 253 Mo. 258, 161 S.W. 716 (1913); Genoway v. Maize, 163 Mo. 224, 63 S.W. 698 (1901); Wilson v. Kimmel, 109 Mo. 269, 19 S.W. 24 (1892); Chandler v. Bailey, 89 Mo. 641, 1 S.W. 745 (1886); Ryan v. Carr, 46 Mo. 483 (1870); Caldwell v. Head, 17 Mo. 561 (1853); Heirs of Strickland v. Heirs of McCormick, 14 Mo. 166 (1851); Cooley v. Rankin, 11 Mo. 642 (1848); Graves v. St. Louis, M. & S.E. Ry., 133 Mo. App. 91, 112 S.W. 736 (St. L. Ct. App. 1908).
5. Woolridge v. LaCrosse Lumber Co., 291 Mo. 239, 236 S.W. 294 (1921); Vincent v. Means, 207 Mo. 709, 106 S.W. 8 (1907); Finley v. Babb, supra note 3; Staples v. Shackleford, 150 Mo. 471, 51 S.W. 1032 (1899); Hanna v. Davis, 112 Mo. 599, 20 S.W. 686 (1892); Breckinridge v. American Cent. Ins. Co., 87 Mo. 62 (1885); Harrington v. Fortner, 58 Mo. 466 (1874); Dalton v. Bank of St. Louis, 54 Mo. 105 (1873); Ryan v. Carr, supra note 4; Stevens v. Hampton, 46 Mo. 404 (1870).
6. Ridenour v. Duncan, 291 S.W.2d 900 (Mo. 1956); Cleary v. Cleary, 273 S.W.2d 340 (Mo. 1954); Eld v. Ellis, 235 S.W.2d 273 (Mo. 1951); Klatt v. Wolff, 173 S.W. 933 (Mo. 1915); Barth v. Haase, 139 S.W.2d 1058 (St. L. Ct. App. 1940).
7. § 490.410, RSMo 1949; Baker v. Baker, 363 Mo. 318, 251 S.W.2d 31 (1952); State v. Page, supra note 4; Keener v. Williams, 307 Mo. 682, 271 S.W. 489 (1925); Harvey v. Long, 250 Mo. 374, 183 S.W. 708 (1914); Akins v. Adams, 255 Mo. 2, 164 S.W. 603 (1914); Barbee v. Farmers' Bank, 240 Mo. 297, 144 S.W. 839 (1912); Burck v. Pence, 206 Mo. 315, 104 S.W. 23 (1907).
8. § 6644, RSMo 1899.
adoption of the Missouri probate code of 1955, a feme covert could dispose of her separate estate without joinder or acknowledgment of her husband, thereby defeating his curtesy and, later, dower interest therein. The husband did not enjoy this freedom, and in order for a wife to relinquish her inchoate dower in the property of her husband, it was necessary for her to join with her husband in a deed properly acknowledged by her.

The 1955 probate code abolished dower, except that which vested prior to January 1, 1956. The code contains provisions for a forced share, exempt property, family allowance, and homestead allowance in favor of a surviving spouse. A surviving spouse is permitted to recover gifts made by the deceased spouse in fraud of marital rights. As originally enacted, the code provided that any conveyance of real estate made by a married person without the express assent of his spouse, duly acknowledged, was deemed to be in fraud of marital rights. This wording raised some question as to the form of "express assent" required. Was mere joinder in the deed sufficient to satisfy the statute, or was some express recital of assent necessary? This uncertainty was dissolved by an amendment effective June 12, 1957. In view of the settled construction of prior statutes governing release of dower, it seems clear that a proper acknowledgment is a necessary ingredient of an "express assent" by a spouse sufficient to rebut the statutory presumption that all conveyances by a married person are in fraud of marital rights.

At common law a married woman was unable, without a judicial proceeding, to release her right of dower in the real estate of her husband. Early statutes, permitting release of the wife's inchoate dower by acknowledgment of the husband's

10. Curtesy was abolished in 1921, and a dower interest identical with that of the wife was substituted therefor. Mo. Laws 1921, at 119, § 1; § 469.020, RSMo 1949.
11. Herzog v. Ross, 358 Mo. 177, 213 S.W.2d 921 (1948); Travelers Ins. Co. v. Beagles, 333 Mo. 558, 62 S.W.2d 800 (1933); Scott v. Scott, 324 Mo. 1055, 26 S.W.2d 598 (1930); Brook v. Barker, 287 Mo. 13, 228 S. W. 805 (1921); Chamberlain v. Spalding, 237 Mo. App. 1040, 170 S.W.2d 454 (K.C. Ct. App. 1943); Annot., 14 A.L.R. 347 (1921).
13. § 442.030, RSMo 1949; First National Bank v. Kirby, 269 Mo. 285, 190 S.W. 597 (1916); Genoway v. Maize, 163 Mo. 224, 63 S.W. 698 (1901).
17. § 474.150 (2), RSMo 1955 Supp.
19. § 474.150–2, RSMo 1957 Supp. ("Any conveyance of real estate made by a married person at any time without the joinder or other written express assent of his spouse, made at any time, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse (if the spouse becomes a surviving spouse) unless the contrary is shown").
20. 1 Am. Jur., Acknowledgments §§ 157, 160 (1936); Martin v. Dwelly, 6 Wend. (N.Y.) 9 (1830).
deed, required that her acknowledgment be taken upon examination separate and apart from the husband. It was thought that in order to protect the rights of the wife it should be determined that her participation in the transaction was voluntary and that her consent thereto was not obtained by coercion or compulsion on the part of her husband. This requirement of privy examination of the wife was abolished in 1883, yet acknowledgment remains essential to an effective release of marital rights by a spouse.

The reasons for the continued existence of this requirement are scarcely logical. One may pass valid title to an existing interest in land by deed, with nothing more, yet he may not dispose of what is nothing more than a contingent right without observing such formality. It appears that those who would retain the requirement are concerned with protection of the marital interests of the spouse. But, wherein lies the safeguard? As a practical matter, under modern conveyancing and notarial practices, acknowledgment imports neither the solemnity nor formality which has accompanied such declaration in the past. It may fairly be argued that with the abrogation of privy examination the real safeguard of the marital rights of a spouse, if ever there was any satisfactory protection, vanished. Today the requirement is a hollow, and frequently ludicrous, ceremony. Nothing is accomplished that would not be as completely effected by the mere joinder of the spouse in the deed of the other.

WILLIAM C. KELLY

INHERITANCE TAX—MISSOURI—JOINT TENANCY PROPERTY

_In re Gerling's Estate_

This case arose in the St. Louis probate court. The inheritance tax appraiser had included in his report in the estate of Rose M. Gerling certain real and personal property held by the decedent and her brother in joint tenancy, with right of survivorship, and exceptions were duly taken to this action. The probate court overruled the exceptions. On appeal from a circuit court order reversing the probate court and sustaining the exceptions, held circuit court ruling affirmed. The Missouri inheritance tax statutes, sections 145.010 to 145.350, Missouri Revised Statutes (1949), as amended,

21. § 680, RSMo 1879; c. 109, § 13, RSMo 1866; c. 32, § 33, RSMo 1855; c. 32, § 33, RSMo 1845; § 23, at 122, RSMo 1835; § 11, at 219–20, RSMo 1825; Powell v. Bowen, 279 Mo. 230, 214 S.W. 142 (1919); Evans v. Morris, 234 Mo. 177, 136 S.W. 408 (1911); Krieger v. Crocker, 118 Mo. 531, 24 S.W. 170 (1893); Webb v. Webb, 87 Mo. 540 (1885); Belo v. Mayes, 79 Mo. 67 (1883); Steffen v. Bayer, 70 Mo. 399 (1879); Wannell v. Kem, 57 Mo. 478 (1874); Rogers v. Woody, 23 Mo. 548 (1856); Thomas v. Meier, 18 Mo. 573 (1853); Chauvin v. Wagner, 18 Mo. 531 (1853).


1. 303 S.W.2d 915 (Mo. 1957).
do not subject jointly held property to inheritance taxation and the inclusion of the joint tenancy real and personal property in the report of the inheritance tax appraiser was erroneous.

This is a case of first impression. It is a well-established doctrine of property law that the right of survivorship passes nothing to the surviving joint tenant, rather he takes by virtue of the conveyance which created the joint tenancy.\(^2\) In spite of this general doctrine, the state contended that sections 145.020 and 145.240-1, construed together, were broad enough to subject joint tenancies to taxation as transfers taking effect in possession and enjoyment at death.\(^3\) The state relied heavily on the case of Commissioner v. Estate of Church.\(^4\) The court distinguished this case, stating that the facts were so dissimilar as to make the cases inapposite, and held that joint tenancies were not intended to be covered by sections 145.020 and 145.240-1.\(^5\)

In this connection courts have propounded the following maxims in regard to the construction of legislative enactments: It is a well-established rule that all tax statutes are to be strictly construed.\(^6\) The primary purpose of construction is, of course, to give effect to the intent of the legislature.\(^7\) It has been held that a tax cannot be imposed, however, unless there is clear and express language for that purpose; and it is often said that if the right to tax is not conferred in plain words, it is vain to invoke the spirit of the tax law.\(^8\) Missouri courts have held that where the meaning of the tax statute is doubtful, it is to be construed in favor of the taxpayer, unless there is a contrary legislative intent shown.\(^9\)

In line with the philosophy expressed by these maxims, the Missouri court's holding appears to have followed the rule that joint estates, unless covered by an

\(^2\) In re McIntosh's Estate, 289 Pa. 509, 137 Atl. 661 (1927); see Johnston v. Johnston, 173 Mo. 91, 73 S.W. 202 (1903).

\(^3\) 303 S.W.2d at 916. § 145.030-1: "A tax is hereby imposed upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom. . . . (3) When the transfer is made . . . by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor . . . or intending to take effect in possession or enjoyment at or after such death."

§ 145.040: "When property or any interest . . . shall pass to or for the use of any person . . . by the death of another by deed, instrument or memoranda or by any transfer or passage whatsoever, such transfer shall be deemed a transfer within the meaning of this chapter. . . ."

§ 145.240-1: "Where any property shall after the passage of this chapter be transferred subject to any charge, estate or interest, determinable by the death of any person . . . the increase accruing to any person . . . upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this chapter. . . ."

\(^4\) 335 U.S. 632 (1949).

\(^5\) 303 S.W.2d at 919. The court stated that Commissioner v. Estate of Church involved the taxability of the corpus of a trust in which the decedent had reserved the income for life. The court felt the cases to be easily distinguishable, although they never expressly set out in what way.


\(^7\) Bergeda v. State, 167 S.W.2d 338 (Tenn. 1943); English's Estate v. Crenshaw, 120 Tenn. 531, 110 S.W. 210 (1908).

\(^8\) Hill v. Treasurer, 229 Mass. 474, 118 N.E. 891 (1918).

\(^9\) In re Kansas City Star Co., 346 Mo. 658, 142 S.W.2d 1029 (1940) (en banc).
express provision in the statute, are not subject to taxation. In several states where the statute was quite similar to Missouri's, the courts have held that the statute did not subject joint tenancies to taxation. In a recent Michigan case, the statutes were virtually identical with sections 145.010 to 145.350 inclusive, and the court held that joint tenancy property was not taxable.

In both Missouri and Michigan, prior to adjudication of the point by the respective supreme courts, each attorney general had ruled that joint tenancies were not subjected to taxation by the local state statutes. In both jurisdictions the supreme courts felt that these rulings bulwarked their decisions. In further support of its decision, the Missouri supreme court judicially noticed that Senate Bill 243, specifically designed to include joint tenancies, was passed by the Senate in 1957 but was defeated in the House. Of course, it can be argued that this legislative history meant the representatives felt joint tenancies were already covered. However, as far as this writer can determine, the court's view of the reasons was correct.

In conclusion, it would seem that the court has taken a wise stand. A survey of the laws of the forty-eight states shows that all states but one which tax joint tenancies have specific provisions in their statutes requiring such taxation. The single exception is Texas. Although the Texas statute does not specifically cover joint tenancies, such tenancies are taxed by administrative practice. There are apparently no Texas court decisions on the matter. Furthermore, the federal statute has specifically included joint tenancies since its inception. In the light of this background and of court decisions in other states it appears that the court's decision was an appropriate one.

The problem which remains to be answered is whether tenancies by the entireties are taxable. Again a review of the laws of the forty-eight states reveals that the majority of them have specific provisions governing the taxation of tenancies by the entireties. Since, with respect to tenancies by the entireties, as in joint tenancies, nothing passes on death within the purview of the rules of property law, and since the Missouri statutes do not cover tenancies by the entireties specifically, it seems reasonable to conclude, in the light of the reasoning of the instant case, that tenancies by the entireties are not subject to taxation.

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13. Ibid. (Michigan); In re Gerling's Estate, 303 S.W.2d 915, 920 (Mo. 1957).
14. 303 S.W.2d at 920.
15. This statement is based on information gathered from conversations with local representatives.
16. It is interesting to note that only Michigan and Missouri do not have specific provisions for taxing joint tenancies. Wyoming specifically excludes them by statute. Michigan and Missouri exclude them by court decision.
REAL PROPERTY—MISSOURI—OPTION TO PURCHASE
BY TENANT—SPECIFIC PERFORMANCE

Barling v. Horn¹

A lease gave an option to renew on like terms for a five year period on condition that the lessor did not before its expiration notify the lessee in writing of his desire to sell the property, in which event the lessee was to have the first opportunity to purchase. Before the expiration of the lease the lessor notified the lessee of his desire to sell, advised him that the purchase price was thirty thousand dollars, and that the property would immediately be offered for sale to others if lessee was not interested. This offer was not accepted by the lessee and the property was advertised. Thereafter it was sold to another for twenty-six thousand dollars less the deposit of prepaid rent and the unpaid balance of a secured note. The trial court found the purchaser had notice of the terms of the lease, that the lessee was ready and willing to purchase on terms equal to those completed but that he was not given the opportunity to do so. It denied specific performance on the ground that no price or method of determining the price at which plaintiffs were to have the right to purchase was provided for in the lease. The Missouri supreme court reversed, holding that the clause gave lessee a right of pre-emption and that lessee should have been given an opportunity to purchase the property under the same conditions as it was sold.

The lessees option to renew the lease by express agreement could be defeated by notification in writing of a desire to sell by lessor prior to the expiration of the existing term of the lease. A question arises whether the lessee would lose his option to renew only if the lessors desire to sell is manifested in an offer to sell at a reasonable price. It is arguable that the option to renew is terminated only by the lessees rejection of an offer comparable to an offer obtained by the lessor from some third person. In Tamura v. De Iulis,² the lessee had a similar option to renew at the expiration of the lease unless the lessor elected to sell the premises in which event the lessee was to have the first option to buy. Notice was given of election to sell at a price four times the market value and the price offered by the lessee. The Oregon court held that the option to renew was not terminated by notice of election to sell at the named price; that it could be terminated by the obtention of an offer from some third person. None was received and lessee, having exercised the option to renew, was given a decree for specific performance.

In the instant case lessee also had a contract for an option to purchase the leased premises.³ The contract was conditional or dependent upon the desire or purpose

1. 296 S.W.2d 94 (Mo. 1956).
2. 203 Or. 619, 281 P.2d 469 (1955).
3. The court holds that this is not a contract of purchase and sale but rather an agreement of pre-emption. A pre-emption differs from an option. 6 AMERICAN LAW OF PROPERTY § 26.64 (Casner ed. 1952). This distinction is recognized in Missouri. Beets v. Tyler, 290 S.W.2d 76 (Mo. 1956) (en banc); Kershner v. Hurlburt, 277 S.W.2d 619 (Mo. 1955). Perhaps the relationship between the parties is better defined in terms of contract rather than calling this a pre-emption. 1 CORBIN ON CONTRACTS § 261 (1950).
of the promisor to sell.\(^4\) When the lessor notifies lessee in writing that he desires to sell, the option to purchase is created. In the usual case the optionee is expressly given the privilege of purchasing either at an agreed price or at a price offered by another person.\(^5\) In the instant case, however, there was no agreement as to price; all reference to price was omitted. Without agreement as to price the contract for option may be no more than an agreement to agree on terms yet to be reached. It can be argued that the parties did not intend this method of choosing the sale price. It is questionable whether the agreement contemplates an offer of sale to another as a mode of ascertaining the price at which the lessor will sell to the lessee. The court by imposing such a contractual term on the parties may be making the essence of the contract, and then decreeing its performance. The result reached in the instant case is not followed in all jurisdictions.\(^6\)

Such a contract has been held sufficiently certain and specifically enforceable against both the optionor and a purchaser from him with notice, even though no mention is made either of price or a means of determining price.\(^7\) The lessor had a duty, it is said, not to sell at a price without first offering the property at that price to the lessee.\(^8\) This duty is not terminated merely by making an offer to the lessee at a price higher than the price for which a sale is subsequently made.\(^9\) The lessee’s refusal to buy at the higher price does not extinguish his right to have performance over other buyers at any lower price.

It is submitted that a reasonable meaning of such a clause as in the principal case has been adopted by the Missouri court. Conflict may arise in construing particular language and terms that properly may be implied but other narrow constructions would tend to make this clause ineffectual and amount to nothing more than a mere futility. An effective meaning appears to have been within the reasonable contemplation of the parties.

**William Andrew Rusk Dalton**

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5. City of East Orange v. Gilchrist, 41 N.J. Super. 362, 125 A.2d 225 (App. Div. 1956) (option to purchase for $12,000.00 upon vendor’s no longer desiring to use and occupy); Gilbert v. Van Kleeck, 294 App. Div. 611, 132 N.Y.S.2d 580, (3d Dep’t 1954); appeal dismissed, 308 N.Y. 882, 126 N.E.2d 383 (1955) (lessee to have option to purchase at price and terms offered by prospective purchaser); Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954) (option to rebuy at $5,000.00 upon desire to sell); Humphrey v. Wood, 256 S.W.2d 669 (Tex. Civ. App. 1953) (price equal to bona fide offer which lessor is willing to accept).