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Comments

ADMISSIBILITY OF HOSPITAL RECORDS AS EVIDENCE IN MISSOURI

The importance of hospital records and the questions arising out of their use in evidence is not to be underestimated. This is demonstrated by the many Missouri
cases in which their admission or exclusion, and their effect when admitted have played a vital role in the outcome of the case. No attempt is made in this Comment to discuss the wide variety of information contained in such records. This is not to minimize, however, the significance of the particular types of data in the record in question in a given case. The objective of this Comment is to analyze the present Missouri law on the questions of: (1) admissibility, (2) privilege, and (3) weight to be given the records assuming they are admitted in evidence.

I. ADMISSIBILITY

A. In General

Hospital records are, of course, a form of hearsay evidence and it is therefore necessary to bring them within one of the exceptions of the rule against the admission of hearsay evidence if they are to be introduced in evidence. A consideration of the various exceptions as applied to hospital records may be helpful in evaluating the present approach employed in Missouri.

B. Business Entries Rule

One hearsay exception is the “business entries” rule. An understanding of this method would appear especially helpful in that it has been said that the business records as evidence law presently in force in Missouri “crystallized” the business entries exception. The common law business entries exception developed under the theory that records kept in the regular course of a going business should ordinarily have a high degree of trustworthiness and accuracy. This would be true because the success or failure of a business is to a large extent dependent upon the care and completeness with which the records of that business are maintained. There was also a substantial necessity for the admission of records in lieu of demanding the attendance of the person who compiled the records because his appearance at the trial might be inconvenient or impossible. Therefore, the elements of necessity and the presumed reliability of the records of a going business resulted in the development of this exception.

It may be readily seen that hospital records meet the standards of the business entries exception rather well. The typical hospital of today could certainly be termed a “going business,” especially in view of the large scale operations of the modern hospital. There is good reason to rely upon the accuracy of the records and doctors often base their decisions upon such reliance. Hence there is no valid reason to insist upon the physician’s personal testimony. In discussing the guaranty of truthfulness of a hospital chart, the Maryland supreme court states:

This record is one of the important advantages incident to hospital treatment, for it not only records for the use of the physician or surgeon what he

1. For a discussion of the subject matter covered by hospital records see Hale, Hospital Records as Evidence, 14 So. CALIF. L. REV. 99 (1941).
4. Ibid.
himself observes during the time he is with the patient, but also records at short intervals the symptoms, condition, and the treatment of the patient during the whole time of the physician's absence. Upon this record the physician depends in large measure to indicate and guide him in the treatment of any given case. Long experience has shown that the physician is fully warranted in depending upon the reliability and trustworthiness of such a record. It is difficult to conceive why this record should not be reliable. There is no motive for the person whose duty it is to make the entries, to do other than record them correctly and accurately. On the other hand, there is the strongest reason why he should. First, because of the great responsibility, he knowing that the treatment of the patient depends largely upon this record, and if it be incorrect it may result, and probably will result in the patient's failure to receive proper surgical or medical treatment which failure might be followed by serious consequence or even death. Second, the entrant must realize and appreciate that his position is dependent upon the accuracy with which the record is made. Third, as was stated by Tindall, C.J., in Poole v. Dicas, 1 Bing. (N.C.) 649: 'It is easier to state what is true than what is false; the process of invention implies trouble in such a case unnecessarily incurred.'

There is also a great necessity for admitting the records and not requiring the personal testimony of the physician who compiled the record. Such a requirement would work an undue hardship on the already overworked physician and, it is submitted, with little advantage resulting from such procedure. In the normal situation it is unlikely that the physician would be able to recall with any great accuracy the details of the patient's case. As a practical matter, he would have to refresh his memory from the record or some type of memorandum. His testimony would therefore be but a repetition of the information available from the hospital record in the first instance.

To come under the business entries exceptions, the record must comply with certain requirements. It must be an original entry. The entry involved must have been made shortly after the transaction it records. A further requirement which has caused some confusion is that it must be made by one with first hand knowledge of the facts entered. It is usually required in the jurisdictions admitting hospital records under this procedure that someone, often the custodian of the hospital records, identify them as records kept as a regular hospital practice and give some testimony as to the details of that practice.6

C. Official Statements Exception

Missouri courts prior to the enactment of the business records as evidence act admitted hospital records under the theory that where there was a legal obligation to keep such records, they became public records. As with the business entries exception, there is an assurance of trustworthiness connected with official records. There is a presumption that the duty imposed by the applicable statute and the responsibility of public office satisfies the requirement of accuracy. The necessity


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of using records instead of testimony of the official also exists. It would disrupt the transaction of the official's business to compel him to testify in person.7

Galli v. Wells8 is a widely cited case illustrating this approach. In this case a St. Louis ordinance required that the superintendent of the city hospital keep an individual record of each patient's

'... history, condition on admission, all examinations made, all treatments and operations, condition from time to time and at time of discharge, and reasons for discharge.'9

There was also a Missouri statute which required that a record be kept of all personal and statistical particulars of patients in such hospitals.10 The question arose in the Galli case as to the admissibility in evidence of hospital records to show the cause and extent of the plaintiff's injuries. The court held that for such records to be admissible it was not necessary that the law under which they were compiled also provide for their admission.11 It was decided that these were official public records and competent evidence of the facts which were required, by law, to be kept. The contention was made that the records of the hospital were not open to public inspection and that they therefore failed to come within the public documents exception. The court held that in view of the privileged status of the records this was ordinarily true. But where the privilege had been waived, such records did become open to the public and thereupon assumed the status of "public records."

In the case of Kirkpatrick v. Wells,12 records of a private hospital were admitted. These records had been kept in compliance with the statute involved in the Galli case. It was argued that the hospital was not a public institution and that its records were therefore not admissible within the Galli decision. The court held that "under the general rule all records required by law to be kept are admissible if properly identified."13 The records kept by a private hospital in compliance with the law were said to be of equal dignity with the records of a public hospital. The persons making entries in the records in this case were said to be performing a public duty.14 Subsequent cases have reaffirmed and clarified the Galli and Kirkpatrick holdings admitting hospital records under the official entries exception.15

9. Id. at 472, 239 S.W. at 898.
10. § 5812, RSMo 1919.
12. 319 Mo. 1040, 6 S.W.2d 591 (1928).
13. Id. at 1045, 6 S.W.2d at 593.
14. In this connection, see Brown v. Maryland Cas. Co., 55 F.2d 159 (8th Cir. 1932).
15. Borrson v. Missouri-Kansas-Texas Ry., 351 Mo. 214, 172 S.W.2d 826 (1943) (fact that hospital was not shown to be a public institution held to be of no significance in view of statutory provision requiring such records to be kept); Russell v. Missouri Ins. Co., 232 S.W. 812 (St. L. Ct. App. 1950) (repeal of statutory requirement after records had been compiled held not to affect their admissibility).
D. Admissibility Under the Uniform Business Records as Evidence Act

The Missouri supreme court in the case of Melton v. St. Louis Pub. Serv. Co.\(^\text{17}\) stated that the purpose of the act was to bring some organization into the law in regard to the admissibility of business records in evidence and that it was designed to avoid "the many antiquated and technical rules of the common law" surrounding this question. Prior to the Melton decision, the St. Louis Court of Appeals, discussing the admission of hospital records, had suggested that the act "may hereafter have some bearing upon the admissibility of such records."\(^\text{18}\) The court in the Melton case agreed with the St. Louis court and referring to the broad language employed in section 490.670\(^\text{19}\) where "business" is defined as including "operation of institutions, whether carried on for profit or not," held that hospital records did come within the terms of the act. The later case of Gray v. St. Louis-San Francisco Ry.\(^\text{20}\) refused to admit hospital records but based the refusal on the Melton decision. Stating that the act applied, the court held that in this case there had been no identification of, or testimony concerning, the record in question, and that the record was a "narrative summary" apparently prepared from other data which was not introduced in evidence, thus refusing the contention that the record was a business entry. This, said the court, reduced the record to the status of hearsay and made it inadmissible under the rule against hearsay evidence. The Gray case then would appear not to

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Sullivan v. Kansas City Pub. Serv. Co., supra note 11 (admissibility of hospital records held not to depend upon a statute so providing but upon fact they had been kept pursuant to statutory requirement); Wright v. John Hancock Mut. Life Ins. Co., 153 S.W.2d 747 (St. L. Ct. App. 1941) (city hospital records held admissible but not on same plane as governmental records and instant records were subject to impeachment); Allen v. American Life & Acc. Ins. Co., 119 S.W.2d 450 (St. L. Ct. App. 1938) (records required by law to be kept admissible where properly identified); Vermillion v. Prudential Ins. Co., 230 Mo. App. 993, 93 S.W.2d 45 (St. L. Ct. App. 1936) (records kept pursuant to statute held admissible subject to privilege where such claim is made); White v. American Life & Acc. Ins. Co., 90 S.W.2d 118 (St. L. Ct. App. 1936) (hospital records kept under statutory requirements held admissible).

16. The act reads as follows:

490.660. Short title. —Sections 490.660 to 490.690 may be cited as "The Uniform Business Records as Evidence Law."

490.670. "Business" defined. —The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

490.680. Records competent evidence, when. —A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian, or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

490.690. Interpretation and construction. —Sections 490.660 to 490.690 shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

17. 363 Mo. 474, 485, 251 S.W.2d 663, 669 (1952) (en banc).
19. Quoted supra note 16.
20. 363 Mo. 864, 254 S.W.2d 577 (1952).
limit the Melton decision but only to point out that hospital records must comply with the usual requirements for admission under the act as they are applied to other business records. 21

Granted that hospital records do come within the terms of the act, admissibility is still not a matter of course as is illustrated by the Gray case. 22 It is necessary that the records be introduced in the manner required for the admission of other types of records. Section 490.680 23 sets out these standards. The rules stated in the statute apparently have been strictly observed by Missouri courts as is illustrated by a study of the cases where records have been admitted under it. The record must contain information relative or incident to hospital treatment. 24 It must be identified and testimony must be presented as to the mode of its preparation. 25 Allen v. St. Louis Pub. Serv. Co. 26 is a case pointing out the views of the Missouri supreme court here. In this case the records of the St. Louis City Hospital were produced by the medical librarian of that hospital under a subpoena. She gave testimony identifying the records as those concerning the plaintiff; that the hospital kept them in the regular course of its business; that the entries had been made at or near the time that the patient was seen; that the doctors wrote the "history, findings, progress notes and all the diagnoses." 27 The witness did not know of her own personal knowledge whether all of the entries in question had been made immediately after examination but it was shown that she did know the procedure under which the records were normally compiled. The court held that this testimony was sufficient to qualify the record under the act. It was also stated that to require the production of additional proof would defeat the purposes of the enactment of the law. "To construe the act too strictly would be to repeal it," 28 said the court.

In Kraus v. Kansas City Pub. Serv. Co. 29 part of the hospital record was excluded because there had been no showing that the patient had given the information contained in that part. The Missouri supreme court construed section 490.680 as good grounds for the trial court to act to exclude any questionable portion of the record. 30 The record itself in this case was said to have indicated that the patient was unconscious and was therefore unable to give the information contained in the record.

In the case of Kirkpatrick v. American Creosoting Co. 31 objection to the use of

23. Quoted supra note 16.
26. 365 Mo. 677, 285 S.W.2d 663 (1956).
27. Id. at 680, 285 S.W.2d at 685.
28. Id. at 681, 285 S.W.2d at 666.
29. 269 S.W.2d 743 (Mo. 1954).
30. The section is quoted supra note 16.
the hospital record by a doctor to refresh his memory on the witness stand was sustained on the grounds that the record was not the doctor's own memorandum. The witness had determined the correctness of the record (a personal history of the patient) by comparing it with his own notes which contained the patient's history as the doctor had taken it from the patient. The court held that the history did not purport to be a record made contemporaneously with the happening it purported to relate and it was not supported by the oath of the person who had made out the record.

In *Baugh v. Life & Cas. Ins. Co.* the trial court excluded a part of a hospital record stating that the patient had said that at the age of seven he had had chicken pox and was told by a doctor that he had a leaky heart. The court held that although the act eliminated the hearsay objection so far as to dispense with the requirement that the person who made the record had to be produced in court, it does not ordi-
narily render a statement admissible which is "hearsay based on hearsay." That portion of the record was held inadmissible under the act.

These cases exemplify some of the standards set for admission of the records under the act. They also serve to emphasize that the main significance of the act is the codification of the common-law rules. All of the common-law requirements seem to have been carried over intact but the over-all result points to less confusion and doubt as to just what must be done to render a record properly admissible.

II. PRIVILEGE ARISING OUT OF THE PHYSICIAN-PATIENT RELATIONSHIP

A. In General

A very important problem to be considered is whether or not the hospital record may be inadmissible because of the privilege resulting from the physician-patient relationship which surrounded the compilation of the record. This privilege is specifically provided for by statute in Missouri. There is no doubt that the privilege does apply to the use of hospital records. The record is inadmissible under approximately the same circumstances under which the physician would be held to be incompetent to testify. In the case of *Rush v. Metropolitan Life Ins. Co.* it was said:

... but here the evidence was incompetent for any purpose, absent a waiver of privilege, and consequently its exclusion by the court was proper, irrespective of the extent to which it might have contradicted any evidence for plaintiff.

The statutory privilege is directed toward encouraging confidence in the patient so that he will thereby make a full disclosure to the physician of his condition. With this understanding of the reason for the existence of the privilege it is somewhat easier to anticipate when it will apply.

It has been held in Missouri that the burden of proof is on the party seeking

32. 307 S.W.2d 660 (Mo. 1957).
33. § 491.060, RSMo 1949.
34. 63 S.W.2d 453, 456 (St. L. Ct. App. 1933).
to introduce the records to show that the privilege does not apply, once a prima
facie showing of the existence of the privilege has been made.36 The privilege exists
only where the records or the information therein come within the requirements
of the statute. For example, a history given by the patient to the person compiling
the record to the effect that the patient had had syphilis prior to his treatments in
the hospital where the record was being taken, was held to be confidential and
inadmissible.37 The information, for the privilege to apply, must have been acquired
from the patient by the physician or surgeon while attending the patient in a
professional capacity and the information must have been needed to enable the
physician or surgeon to treat the patient.38 If the information is acquired in this
manner and then copied into the record, the record is then inadmissible if the
patient asserts the privilege and does not later waive it.39 But where the doctor does
not occupy a position of "confidence" to the patient then the information is not
privileged. Illustrating this is the case of Bougligny v. Metropolitan Life Ins. Co.40
The physician in this case had been employed by the defendant insurance company
to examine the patient for the purpose of determining whether or not he was a good
insurance risk. It was held that information acquired under these conditions was not
subject to the privilege, there being no confidential relationship existing between
the doctor and the patient.

B. Waiver of the Privilege

It has long been established in Missouri that the physician-patient privilege is
not absolute but that it may be waived by the patient at his election.41 It was stated
in Chamberlain v. Chamberlain that:

In the case of husband and wife and physician and patient it is the relation-
ship which bars the communications as evidence. A waiver goes to the relation-
ship and where exercised as to some confidences which could otherwise
be excluded it opens the door for proof of other communications.42

It has been held, and logically so, that the waiver of the privilege as to the testimony
of the physician also operates as a waiver of the privilege as to the hospital records.43
It is difficult to generalize in this area but clearly the waiver must be (1) voluntary,
(2) intentional, and (3) with full knowledge of the contents of the record to which
the privilege is to be waived. Thus, in the case of Rush v. Metropolitan Life Ins. Co.44

App. 1936).
App. 1939).
39. Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907) (en bane); Marx v.
Parks, 39 S.W.2d 570 (St. L. Ct. App. 1931).
40. 133 S.W.2d 1094 (St. L. Ct. App. 1939).
41. Carrington v. City of St. Louis, 89 Mo. 208, 1 S.W. 240 (1886).
42. 230 S.W.2d 184, 189 (St. L. Ct. App. 1950).
44. 63 S.W.2d 453 (St. L. Ct. App. 1933); accord, Gilpin v. Aetna Life Ins. Co.,
supra note 37, (patient gave testimony concerning information on records on cross
examination and on redirect; held, no waiver).
it was held that information obtained from the plaintiff on cross examination as to
the treatment he had received did not constitute a waiver so that the defendant
was entitled to introduce in evidence the hospital records of that treatment. It was
said to have been involuntarily given and was therefore not a waiver which removed
the protection of the privilege. Similarly, when the beneficiary of an insurance
policy who was illiterate signed a paper giving the insurer permission to examine
the hospital records of the insured, it was held to be a jury question as to whether
or not the beneficiary had consciously waived the privilege.45 Merely filing a
doctor's certificate as proof of death did not operate to waive the privilege of the
hospital records.46 But when the patient called three doctors and permitted them
to testify freely as to the patient's condition and gave his own testimony concerning
his condition, all of which was done voluntarily, it was held the patient did waive
the privilege.47

Graham v. Guarantee Trust Life Ins. Co.48 presented the question of whether
a waiver, once made, can later be withdrawn. In this case insured answering a
question of the proof of loss form used for disability claims, as to whether the
insured had ever had certain diseases stated, "Get statement from hospital." After
the insurer had examined the records at the hospital, it rejected the claim. Suit was
brought by the insured and on the insurer's attempt to take depositions at the
hospital, the insured notified the hospital to keep the records confidential. The court
held that the insured had waived the privilege by telling the insurer on the proof
of loss form to get the statement. It was further decided that, although a waiver can
be withdrawn under proper circumstances, it cannot be withdrawn after it has been
acted upon. That it had been acted upon here was obvious since the insurer appears
to have based its rejection of the claim on the information it had obtained from
the hospital records.49

III. CONCLUSIVENESS

A recurring question in Missouri has been what effect or weight to give to
hospital records which are admitted in evidence and remain uncontradicted and
unimpeached by the other party. Until very recently, there was substantial authority
for the view that where the records are uncontradicted and unimpeached they
are then conclusive of the facts recited therein. This doctrine seems to have originated
in the St. Louis and Kansas City courts of appeal. A new approach was taken in
Shaw v. American Ins. Union.50 The St. Louis court held that where the records
were contradicted by parol evidence the record was not conclusive as to the question
of the patient's alleged misrepresentation of her health which was involved in this
case. The court said:

49. See also Toler v. Atlanta Life Ins. Co., 248 S.W.2d 53 (St. L. Ct. App. 1952).
50. 33 S.W.2d 1052 (St. L. Ct. App. 1931).
for a writing to be conclusive as to the facts stated therein, it must be
an instrument or record having legal efficacy, to which the person to be
bound is in some way a party, or the truth of which he vouches for or is
estopped to deny.\textsuperscript{51}

The records in this case were said to be prima facie evidence of the information
therein. But the court held that the written evidence was merely evidence to be
"weighed" along with the other evidence. The fact that the records were written
and the rebutting evidence was oral was held to affect only the weight and not the
conclusiveness of the record over the oral evidence introduced in contradiction of
the record. It was noted by the court that the records were \textit{ex parte} and largely
hearsay with no opportunity for cross-examination afforded the other party. The
St. Louis court in the case of \textit{Mach} \textit{v. Western & So. Life Ins. Co.} stated:

The declaration of physicians respecting the insured's state of health set
down in these hospital records are convincing, but, unless undisputed, are
not conclusive.\textsuperscript{52}

The \textit{Mach} case gives an indication of the trend at that time toward holding that the
records when not denied would be conclusive. A case from the Kansas City Court of
Appeals, \textit{Smith} \textit{v. Missouri Ins. Co.},\textsuperscript{53} repeated the holding in the \textit{Mach} case, stating
that unless impeached or contradicted the records were prima facie evidence of the
facts recited and the jury could not disbelieve them. The records were attacked by
the testimony of witnesses to the effect that the insured had appeared to them to be
in good health contrary to the inference to be drawn from the records. The St. Louis
Court of Appeals in \textit{White} \textit{v. American Life & Acc. Ins. Co.}\textsuperscript{54} held that the hospital
records were conclusive when the contradictory testimony was from lay witnesses
"confessedly" unfamiliar with the symptoms of the disease involved. A case which
at first glance seems inconsistent with the \textit{White} decision is \textit{Allen} \textit{v. American Life &
Acc. Ins. Co.}\textsuperscript{55} The records in the \textit{Allen} case were held \textit{not} conclusive even though
the contradiction was only from lay testimony. The case may be distinguished on
its facts. The patient in this case did not give the information contained in the
records herself as she was in a dying condition upon her entry into the hospital.
The court said the information on the records was merely cumulative and purely
hearsay evidence of admissions against interest. Another more significant feature
of the case for present purposes was that the conditions described by the records
were such that they would surely have been noticeable by lay witnesses even though
such witnesses were unfamiliar with the precise symptoms of the disease involved.
This would serve to distinguish the case from the \textit{White} decision. These and other

\begin{itemize}
  \item \textsuperscript{51} \textit{Id. at} 1055.
  \item \textsuperscript{52} 55 S.W.2d 1108, 1109 (St. L. Ct. App. 1932).
  \item \textsuperscript{53} 60 S.W.2d 730 (K.C. Ct. App. 1933).
  \item \textsuperscript{54} 90 S.W.2d 118 (St. L. Ct. App. 1936); cf. \textit{Smiley v. Bergmore Realty Co.,
    Inc.}, 229 Mo. App. 141, 73 S.W.2d 936 (K.C. Ct. App. 1934) (records held not
    conclusive where there was contradiction in the form of expert testimony).
  \item \textsuperscript{55} 83 S.W.2d 192 (St. L. Ct. App. 1935); cf. \textit{Hendricks v. Nat'l Life & Acc. Ins.
    Co.}, 240 Mo. App. 557, 210 S.W.2d 706 (K.C. Ct. App. 1948) (testimony of doctor who
    had not seen patient for almost one year prior to her death held insufficient to
    overcome inference from hospital records).
\end{itemize}
Missouri cases developed the doctrine to the point that it became well established, at least so far as the two courts of appeals were concerned. In view of the holding in the Shaw case it is difficult to explain how this doctrine could develop and in part at least in the same court from which the Shaw case originated. Goodwin v. Kansas City Life Ins. Co.,56 was decided after the enactment of the business records as evidence law. The court held that the records involved were conclusive in the absence of contradictory or impeaching testimony, indicating the above doctrine governed even under that statute.

A recent case has caused a complete reversal of the trend sketched above. This is the case of Baugh v. Life & Cas. Ins. Co.,57 a most significant decision so far as the question of the use of hospital records in evidence is concerned. The Missouri supreme court held in this case that for documentary evidence to be conclusive it must have "legal efficacy to which the one sought to be bound is in some way a party, or the truth of which he vouches for, either expressly or in legal effect or is estopped to deny."58 This rule is the Shaw rule restated. The records in the Baugh case were said to be merely the findings of the doctors and their opinions and therefore did not come within the requirements set out by the court. The court examined the cases where it had been held by the St. Louis and Kansas City courts of appeals that the rule of conclusiveness extended to hospital records. No sufficient basis was found for the extension. The court suggested that the cases might have been the result of an inept application of the general rule. The statutory provision requiring hospitals to keep rather extensive records was also thought to have a possible bearing. This section is now repealed and hospitals are now required to keep only records of statistical data. Perhaps the old section may have caused the courts to give undue importance to hospital records kept under it. The court in the Baugh case stated that, irrespective of the situation under the old statute, it is:

... now well settled that the admissibility of hospital records is presently governed by the provisions of the Uniform Business Records as Evidence Law.59

It was noted that the law made no provision for the weight to be afforded the records admitted under it. Also, hospital records are not specifically mentioned in the act. The court found, therefore, that the general rule applies: unless the record is of the type considered binding, it is for the jury to consider it along with the other evidence offered and believe or disbelieve the facts before it. The only value of written evidence over oral evidence, said the court, is that the written evidence is usually considered to be more reliable because of the "frailties of human memory." But this distinction has no bearing on the conclusiveness of the evidence since both the written and the oral evidence are the products of a human agency. It was pointed out that had the physicians who made the entries testified at the trial and given their opinions in that manner such testimony would not have been conclusive. The

57. 307 S.W.2d 660 (Mo. 1957).
58. Id. at 664.
59. Id. at 665.
court found no reason to treat the written opinion any differently from the oral opinion. It was suggested that the person who compiles the record is not under oath and might not give as serious consideration to the opinion which he expresses on the record as to the one he gives on the witness stand when he is called to testify in person.

The Goodwin case decided after enactment of the act and referred to above was, of course, completely inconsistent with the Baugh decision. Therefore the Goodwin case and the others voicing the same view were overruled so far as they held that uncontradicted and unimpeached hospital records are to be taken as conclusive.

Prior to the Baugh decision there was good reason to assume that hospital records were to be treated somewhat differently from other records admitted under the business records as evidence act. Unlike the ordinary business record, hospital records were held to be conclusive when uncontradicted or unimpeached. It is felt that the Baugh case is therefore, a valuable contribution in this area of the law because it has brought hospital records back in line with other records of equal dignity. It should enable the attorney to have a more distinct interpretation of the act as it applies to this question. Analogies may be drawn to other types of records with a greater degree of accuracy than before. It is submitted that, as the court in the Goodwin case said, there appears to be no reason to treat hospital records any differently than other business records. Holding them to be conclusive had the effect of giving an undue advantage to the party relying upon them. Under the old rule, it was more desirable to introduce the record than to introduce the doctor even if he were readily available. As stated earlier, the record evidence might be somewhat more reliable than the physician's testimony but this should not detract from the fact that the record is not open to cross examination while the personal testimony is subject to cross examination. But, as the Baugh case holds, the relative reliability of the written evidence over the oral evidence should have no significance so far as the conclusiveness of either is concerned. This should be only one fact for the jury to consider.

IV. Conclusion

In general it may be stated that hospital records come within the business records as evidence act. Under that law they are subject to the physician patient privilege should it exist in a given situation. Under appropriate circumstances, the privilege can be waived. Upon admission hospital records are not conclusive but are merely to be weighed, along with other evidence introduced, by the jury.

William J. Eseley

CREATION AND ENFORCEABILITY OF RESTRICTIVE COVENANTS AT LAW

Creation—in General

In order to restrict the enjoyment of a fee, a covenant may be used. This can be termed an equitable easement or a servitude or a restrictive covenant. In order to
create an enforceable covenant at law the covenant must be in writing. The covenant must also touch and concern the land, and satisfy the privity requirement of the jurisdiction.

**Writing**

The Missouri court in *Chiles v. Fuchs* stated:

A covenant must be in writing, and the written words used must be such as will clearly authorize the inference or imputation in law of the creation of a servitude or restrictive covenant.

A covenant was not considered created where broken lines were placed on a plat marked "building lines." However, a building line may be established by express language in the legend of a recorded plat.

The court should keep in mind the purpose of covenants when they are being construed; however, where there is reasonable doubt as to the purpose of the covenant, the covenant should be construed against the grantor in favor of the free use of the property.

**Touch and Concern**

In order to maintain an action at law, the complainant, in addition to satisfying the requirement of a writing, must be able to show that the covenant touches and concerns the land and that there is privity of estate between the two litigants.

In the celebrated *Spencer's Case* it is said, "yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged." This has been accepted everywhere today. An early Missouri case discusses this problem. *P* owned Blackacre and Whiteacre in fee simple. He constructed a net work of ditches to drain the water from his land into a lake and had a flume to carry away water and prevent it from backing upon his land when heavy rains fell. This flume was constructed on Blackacre. *P* conveyed Blackacre, subject to his rights in the ditches, to *A* who conveyed to *B*, who conveyed to *C*, who then conveyed to *D*. The deed between *P* and *A* was not recorded and had burned. *P* conveyed a portion of Whiteacre, subject to his rights in

4. 365 Mo. 114, 118, 249 S.W.2d 454, 456 (1952).
the ditches, to B, who conveyed to C, who conveyed to D. D did not maintain the ditches and as a result the portion of Whiteacre that P retained was damaged. There was a question of whether the covenant, P's rights in the ditches, touched and concerned the land. The Missouri court held that the covenant touched and concerned the land, since the covenant affected the land, thus following Spencer's Case. The court regarded the covenant as a dependent covenant since it required something to be done. The court said, "in such case it becomes appertenant, and runs with the land."11

The court in Withers v. Wabash Ry., distinguishes collateral and dependent covenants as follows:

A collateral covenant is such as appears to be foreign from the instrument, not touching the land or its value, or the value of its reservation, or of the term, but a distinct matter put in by the parties, which does not appear necessarily to influence the demise or grant . . . [A] dependent covenant is such as requires something to be done or omitted which represents the theory on which it depends. In such cases it becomes appertenant and runs with the land.12

This means the agreement must affect the promisee or the promisor in respect to his interest in the land. If this is not met, then the benefit or the burden is said to be collateral.13

PRIVITY

Even though the covenant is in writing and touches and concerns the land, there also must be privity of estate between the litigants before an action at law can be maintained. In an equitable suit for the enforcement of the covenant privity of estate in a technical sense is not required. Equity only requires that the servient owner take with notice. In dealing with what satisfies the privity requirement at law, the courts are far from being in agreement. It seems that in considering this problem the courts have followed one of three approaches. One view considers the privity requirement satisfied if one shows that he is a successor to one of the parties to the covenant.14 Another view is that the covenant must be made in connection with the conveyance of one of the parcels of land.15 A third view is that of substituted privity, where there is a relation of dominant and servient estates by reason

11. Id. at 212.
of an existing easement and the covenant is in aid of the easement. In discussing the privity problem, the three views will be taken up in order.

The first view considers the privity requirement fulfilled if a person be a successor to one of the parties to the covenant, and this would seem to be the Missouri view. Mr. Justice Holmes has stated that this view is the original sound common law view:

It is a consequence . . . of confounding covenants of title, and the class last discussed, under the name of covenants running with the land. According to the general view there must be privity of estate between the covenantor and covenantee in the latter class of cases in order to bind the assigns of the covenantor. Some have supposed this privity to be tenure; some, an interest of the covenantee in the land of the covenantor; and so on. The first notion is false, the second misleading, and the position to which they are applied is unfounded. Privity of estate, as used in connection with covenants at common law, does not mean tenure or easement; it means succession to a title. It is never necessary between covenantor and covenantee, or any other persons, except between the present owner and the original covenantee. And on principle it is only necessary between them in these cases—such as warranties, and probably covenants for title—where, the covenants being regarded wholly from the side of contract, the benefit goes by way of succession, and not with the land.

In Withers v. Wabash Ry., an early Missouri case, D, a railroad, entered into a contract with A covenanting that D would build and maintain a ditch along its right of way for the benefit of A and his heirs, administrators, successors and assigns, if A would relinquish all claims against D. P purchased a portion of A's land. D did not maintain the ditch and as a result P's land was damaged. The court said, "I think that the performance of this covenant in this case, in the events that have occurred, would always have been beneficial to the owner, and therefore, that it is a covenant that runs with the land."

The Withers case was cited with approval in McCoy v. Wabash Ry. In the McCoy case, A owned Blackacre and entered into an agreement with R that R would build and maintain ditches on R's right of way. A sold to P and R to D. P sued D for not maintaining the ditches. The court said, "In order to thus enforce a covenant running with the land it is necessary that it should be alleged in the petition, and proof should be made showing a privity of estate between the parties to the contract and the parties to the litigations wherein such enforcement is sought." It would seem from the above cases that Missouri considers the privity requirement fulfilled if a person be a successor to one of the parties to the covenant.

The second view is that the conveyance of an interest in land must be made at
the time the covenant is made. This view originated in Webb v. Russell,21 an English case decided in 1789. In this case the real question was whether or not the covenant was collateral because it was made to a stranger to the legal title. The covenant was made to M by T in a lease made by M and E. In holding that such a contract was collateral, that is, that it did not touch and concern the land, Lord Kenyon stated “It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties.” Lord Kenyon then went on to say that M had no interest in the land of which a court of law could take notice, England following the title theory of mortgages with legal title in the mortgagee.

Even though this requirement seems to be more in line with the requirement of mutual relationship hereinafter referred to, nevertheless the case is said to support the doctrine that there must be a conveyance of an interest in land at the time the covenant is made.22 This requirement can easily be satisfied by the use of two conveyances: A owns Blackacre and B owns Whiteacre; A conveys Blackacre to B and B recovesys Blackacre to A, inserting the desired covenant in the deed.

The third view is that of substituted privity, where there is an existing easement and thereby an existing relation of dominant and servient estates and the subsequent covenant is in aid of the easement. This is sometimes called the Massachusetts view. Under this view there must be a succession to the estate of a party to the covenant with the superimposed requirement that there must also be a mutual relationship between the covenanting parties, each of whom must have a simultaneous interest in the land of the other. The leading case that is cited for this doctrine is Morse v. Aldrich.23 C conveyed to P’s grantor, in fee, a parcel of land, including a portion of C’s mill pond, with liberty of ingress and egress to and from any part of the described land and water, to dig out and carry away the whole or any part of the soil. After the conveyance, an agreement was made between C and P, in which C covenanted that he would, upon P’s request, draw off his pond six days in each year, in the months of August and September, for the purpose of giving P an opportunity of digging and carrying out mud. C died and his estate descended to D. The court said, “to create a covenant which will run with the land, it is necessary that there should be a privity of estate between the covenantor and covenantee.”24 This view has been followed by few jurisdictions, and about the only thing good that can be said for it that it restricts the number of covenants which run with the land, it being considered by some that covenants are undesirable encumbrances on the use of land.

In discussing the privity requirement it should be pointed out that the enforce-

22. Smith v. Kelly, 56 Me. 64 (1868); Wheeler v. Schad, 7 Nev. 204 (1871) (covenant held unenforceable because there were six days between the conveyance and the covenant being inserted therein); Lingle Water Users Ass’n v. Occidental Bldg. & Loan Ass’n, 43 Wyo. 41, 297 Pac. 385 (1931); CLARK, COVENANTS RUNNING WITH THE LAND (2d ed. 1947).
24. Id. at 453.
ment of covenants is normally a suit in equity for an injunction rather than an action at law for damages. Because of this we do not have many cases discussing the privity requirement since equity does not require privity in order to grant equitable relief.

**REMEDIES AT LAW**

Once a covenant enforceable at law has been created, the next problem that is presented is the effect of a breach of the covenant. The complainant can maintain an action at law for damages for the breach.25 Furthermore the complainant can maintain an equitable suit for an injunction.26

Even assuming that the Missouri court will not give equitable relief, nevertheless an action at law can still be maintained for the breach.27 In fact the Missouri cases says that the complainant does not lose his action at law for damages just because equitable relief is denied.28

Once a covenant has been created by complying with the formal requirements, then the complainant in Missouri will be able to maintain an action at law for damages even though the covenant, at the time of the breach, is serving no useful purpose. However, this is not necessarily so when equitable relief is sought.

**CHARLES G. HYLER**

**DELEGATION OF CONGRESSIONAL LEGISLATIVE POWER TO OTHER LEGISLATURES**

The allegation that an act of Congress is invalid because it amounts to an unauthorized delegation of legislative power is often made; but it is an allegation which, though recognized by the federal courts, is seldom held to be a valid reason for declaring an act unconstitutional.

Prior to Panama Refining Co. v. Ryan1 and Schechter Poultry Corp. v. United States2 the federal courts had never invalidated a congressional enactment on the basis of unlawful delegation.3 In the Panama and Schechter cases, however, the

28. Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W.2d 545 (1931); Sanders v. Dixon, 114 Mo. App. 229, 89 S.W. 577 (St. L. Ct. App. 1905).
1. 293 U.S. 388 (1935).
3. Field v. Clark, 143 U.S. 649 (1892); United States v. Grimaud, 220 U.S. 506, 507 (1911). The Grimaud case is perhaps the more outstanding of the two cases to indicate the reluctance of the court to invalidate an act on the ground of unlawful delegation. In this case the Secretary of Agriculture was to regulate the nation's forest reserves in the interest of conservation. He was to impose regulations "to improve and protect the forest within the reservation," and insure "favorable conditions of water flows, and to furnish a continuous supply of lumber for the use and necessities of citizens of the United States." Even with such nebulous guides as these the court held there was no unlawful delegation of legislative authority to the Secretary.

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Supreme Court held certain phases of the National Industrial Recovery Act void for the reason that legislative power was granted the President without adequate standards to guide his actions.

These two decisions, while not expressly overruled, have not been followed and the federal courts have not since declared a statute invalid because of an unlawful delegation of legislative power. The doctrine of unlawful delegation is based on article I, section I of the United States Constitution. This section purports to vest in the Congress exclusive power to enact federal legislation. Because of this, the contention arises that certain acts of Congress delegate this legislative power to others contravening this express provision in the Constitution. The purpose of this Comment is to discuss recent decisions where it has been alleged that Congress ignored this constitutional mandate and delegated its power to other legislatures. It will be noted in the cases subsequently discussed that in spite of allegations of unlawful delegation of legislative power to other legislatures the federal courts rarely find that delegation exists. The congressional action involved is usually distinguished from delegation.

In the first two cases discussed, the courts, in holding that delegation did not exist, relied on the almost exclusive power granted Congress by the commerce clause to legislate on matters affecting interstate or foreign commerce.

In Prudential Ins. Co. v. Benjamin, Prudential alleged South Carolina's tax on foreign insurance companies discriminated against interstate commerce in that no similar tax was levied on domestic companies. In answer it was stated that the McCarran Act, which permitted states to tax insurance companies, cured any defect that might have existed in the tax.

It was alleged that the McCarran Act was invalid because of the commerce clause which prohibited the states from regulating interstate commerce, and also on the ground that the McCarran Act delegated legislative power to the states. The Supreme Court summarily disposed of the delegation argument and sustained the validity of the McCarran Act. It held the commerce clause was not a limitation on the power of Congress over interstate and foreign commerce, and the action of Congress under it did not amount to delegation.

In Hemans v. United States the court also relied on the commerce clause to sustain congressional action over the allegation of unlawful delegation. The statute involved made it unlawful for anyone to travel in interstate or foreign commerce.

5. 328 U.S. 408 (1946).
6. 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-15 (1952). The pertinent portions of the act are: "... the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."
7. 163 F.2d 228 (6th Cir. 1947).
8. Fugitive Felon Act, 1932, ch. 271, § 1, 47 STAT. 326, as amended.
with the intent to avoid prosecution or confinement for certain enumerated crimes, or to avoid giving testimony in any criminal proceedings in a state where the commission of a felony is charged.

Hemans alleged the act was void in that the legislative power of the United States to make federal crimes was delegated to the states. The court of appeals felt that no delegation was involved. In so holding it relied on the plenary power granted by the commerce clause which it felt gave Congress the authority to prohibit travel in interstate commerce under these conditions. The following statement from Barrow v. Owen, concerning the act in question, was quoted by the court in the Hemans case:

The statute is certainly not void on its face. Indeed, so viewed, it appears to be a reasonable exercise of federal authority in aid of enforcement of state laws.9

These two cases resulted in a finding by the Supreme Court and the court of appeals that delegation did not exist, relying on the plenary power granted Congress by the commerce clause. Acting under this exclusive power, action by Congress in regulating interstate commerce is congressional action only and no element of delegation exists.

Nilva v. United States10 presents another permissible method of legislation as distinguished from delegation. In this case convictions were obtained under the Johnson Act,11 which prohibited the interstate shipment of gambling devices, with the provision that a state, by enacting its own legislation, could exempt itself from these provisions. The particular section in question reads:

Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.12

The defendants contended this provision amounted to a delegation of federal legislative power to the states, and as such was unlawful. No constitutional question was presented as no state involved had enacted applicable legislation; however, the court of appeals stated even if such legislation were present no delegation would be involved:

We think it has been established by controlling authority that Congress may legislate contingently upon the existence or non-existence of certain facts which will bring into force the declared policy of Congress.13

Gauley Mountain Coal Co. v. Director of United States Bureau of Mines14

9. 89 F.2d 476, 478 (5th Cir. 1937).
13. 212 F.2d at 120.
14. 224 F.2d 887 (4th Cir. 1955).
presented the question of whether or not the Federal Coal Mine Safety Act\(^{15}\) resulted in an unlawful delegation of legislative power to the states. The provision of the act involved in the litigation provided that certain precautions be taken before electrical equipment could be operated in a "gassy" mine. Whether a mine was or was not "gassy" was to be determined in accordance with the laws of the particular state.

The court of appeals held this provision did not amount to delegation, but was merely the acceptance by Congress of state action as the condition on which their exercise of power was to become effective. The court stated such legislation was permissible having been done by Congress in other fields. The court cited several examples, including the Federal Torts Claims Act.\(^{16}\)

The Hiloa and Gauley cases show another distinction, that is, conditional legislation. Conditional legislation results when the statute is enacted by Congress with its operation contingent on some outside occurrence—in these cases, state action. As was pointed out, such legislation is not delegation and is a permissible method of legislating by Congress. Although it was sustained on the basis of being contingent on action of the states, it is evident that the power of Congress under the commerce clause was, as in the Prudential and Hemans cases, sufficient to sustain this legislation.

Two distinctions have been made in the preceding cases from the delegation that was alleged to exist. In the following cases other permissible methods of legislating were found to be present rather than the delegation alleged to exist.

In United States v. Sharpnack\(^{17}\) the contention was made, as in the Hemans case, that Congress in enacting the Federal Assimilative Crimes Act\(^{18}\) had delegated to the states the legislative power of the United States to make federal crimes. The purpose of this act was to make acts committed on federal enclaves punishable by the laws of the state in which the enclave was situated, if such crime had not been made punishable by an act of Congress. Prior assimilative acts had been upheld,\(^{19}\) but they were distinguishable from the act in question in that only state laws in effect at the time of the enactment of the federal act were adopted as federal acts. The present act provided that the then effective laws of the state were to be deemed punishable under the Assimilative Crimes Act. Sharpnack was indicted for sodomy committed within the boundaries of the Randolph Air Force Base in Texas. The

\(^{15}\) 66 STAT. 703, 30 U.S.C. § 479 (1952).
\(^{16}\) 62 STAT. 933 (1949), as amended, 28 U.S.C. § 1346 (1952) ("the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). (Emphasis added.)
\(^{17}\) 355 U.S. 286 (1958).
\(^{19}\) Franklin v. United States, 216 U.S. 559 (1910).
statute violated was enacted by the state after the enactment of the Assimilative Crimes Act. This inclusion of subsequently enacted state statutes gave rise to the allegation of unlawful delegation. The district court was impressed by this contention and dismissed the indictment against Sharpnack on the ground that Congress may not assimilate and adopt state statutes enacted subsequent to the Assimilative Crimes Act.

This holding was short lived, however, for the Supreme Court reversed on appeal holding that there was here no delegation, as the act amounted to a deliberate continuing adoption by Congress of unpre-empted offenses put in effect by the respective states for their own government. Two Justices dissented for the reason that they felt an unlawful delegation was involved. They felt Congress had delegated its policy making function to the state. The dissenting Justices felt adoption of state acts would be permissible if the Congress had established the policy and allowed the state to enact regulations within the policy limits set forth. In this case they felt, however, that by allowing the states to enact any criminal statute without guidance was a delegation of legislative power to the states.

The dissenting Justices seem to use the analysis applied where administrative agencies are concerned. Where an administrative agency is involved it is not unlawful to allow it to enact regulations within adequate standards that Congress must set forth. However, unless these standards are adequate the delegation to the agency becomes unlawful. In view of the decisions in cases where the question of delegation is thought to be involved it seems remote that the views expressed in the dissenting opinion will be followed.

The Sharpnack case appears to go farther than most previous cases which have declined to hold legislation invalid on the ground of unlawful delegation. Although the act on its face appears to allow a state to enact what actually amount to federal crimes, the majority of the court calls this assimilation of the state act "continuing adoption." Adoption of acts created by other legislatures being a permissible method of legislation by the Congress the court finds that in this case no delegation exists.

Wolf v. Phillips also resulted in a holding that no delegation was involved, although the basis for the holding differs from that in the previous cases. In this case the federal act in question provided that the statute of limitations of the State of Oklahoma was to be applicable, in matters concerning realty, to certain restricted Indians in the same manner as any other citizen of Oklahoma. It could be pleaded by any such Indian or the United States or any other party for the benefit of such Indian to the same extent as though such action were brought by or on behalf of any other citizen of the State.

The court of appeals concluded this act had as its purpose the granting of the Indians described the same right to plead the statute of limitations as if such Indian were a non-Indian citizen of Oklahoma. They felt such purpose could not be achieved unless later changes in the statutes of limitation were also made applicable. This did

20. 172 F.2d 481 (10th Cir. 1949).
not amount to adoption of state law as federal law, as all it provided was that the enumerated Indians were to be subjected to the Oklahoma statute of limitations as state law. Since the state law was made applicable to the Indians involved in relation to their transactions involving Oklahoma realty, and not adopted as federal law, no question of delegation was presented in the case.

In all the previous cases, we have seen that the courts have held, in spite of the allegations raised, that no delegation actually existed. The remaining cases, while distinguishable from those concerning delegation to other legislatures, also have the problem of unlawful delegation presented and make an interesting comparison.

In United States v. Dettra Flag Co., legislative power was alleged to have been delegated to veterans' organizations. The act questioned provided in essence that reproduction of the insignia or emblem of any veterans' association without such organization's authorization was an offense punishable by fine or imprisonment. The district court determined that inasmuch as the veterans' associations were incorporated by federal permission for the purpose of commemorating the service of some of the citizens it was proper for Congress to protect the public from frauds and imposters and to protect the agencies' identification.

The defendant, charged with violation of the act, alleged that the act was void as unlawfully delegating legislative power. This contention, however, failed as the act was held valid. The court held that in view of the many firms that may enter and leave the industry concerned, and the possible frequent changes that might be made in the insignia, it would be unreasonable to expect Congress to be a continuous fact finding body of these myriad details. Under such circumstances it was reasonable to allow these agencies to regulate such details within established standards.

Here then the court finds that some degree of authority is granted the veterans' associations, but, because of the many and varied details that must of necessity be dealt with, such delegation is the only feasible manner in which the matter could be controlled. In this case the court seems to apply the analysis used where federal administrative agencies are involved. By this analysis it is permissible for Congress to allow the agency to formulate rules and regulations, so long as they stay within the policy or standards set forth by Congress.

Alaska Steamship Co. v. Mullaney presented the question of delegation to another legislature, but here the allegation was that one federal legislature had delegated its power to Congress. Questioned here was the Alaska net income tax law which incorporated by reference the Internal Revenue Code of the United

24. Cf. Atherton v. United States, 176 F.2d 835 (9th Cir. 1949), cert. denied, 338 U.S. 938 (1950), where the element of necessity was also a factor in sustaining the legislation involved.
25. 180 F.2d 805 (9th Cir. 1950).
States "'as now in effect or hereafter amended.'" The quoted phrase gave rise to the contention that the Alaskan legislature had delegated certain of its functions to Congress, and for this reason the Alaska tax law was void. There was no constitutional question presented in the case because no showing had been made that the federal act had been changed, but the court of appeals stated that if such question had been presented the Alaskan law would have been sustained. Their reasons were that in its effort to conform the Alaskan tax law to the federal law the Alaskan legislature acted sensibly achieving a result which would simplify the problems of the taxpayer. With uniformity as the major objective it was the legislature alone acting and it was not abdicating its functions or making an invalid delegation to Congress.

There is no doubt that many states have considered adopting the federal income tax law as their own, but have hesitated doing so because of the fear that a problem such as arose in the Alaska case would result in invalidating their action. Inasmuch as the Alaska case involved a federal territory and not a state it is apparent that the holding in this case does not obviate this fear.

State v. Sims perhaps has no place in this Comment as it concerns the action of a state legislature and not federal action as in the other cases discussed. It does have an allegation of unlawful delegation, however, and indicates the action a state might take in such matters. Involved in the case was an interstate compact whereby West Virginia and seven other states were to combine efforts to control pollution of the Ohio River. Control was vested in a commission composed of members of the involved states and the federal government. The difficulty arose when the West Virginia auditor refused to allocate state funds for the commission pursuant to a legislative request. His reason for the denial was that the compact amounted to a delegation of West Virginia's legislative power to the other states and the federal government. This position was sustained by the highest court of the state, but the decision was reversed by the United States Supreme Court.

The Supreme Court found the delegation alleged to be involved was merely a conventional grant of legislative power, the compact being a reasonable and expedient method of handling the problems that were to be encountered. As such it was no more than a reasonable and carefully limited authorization for the interstate agency to promulgate regulations for the control of pollution.

It is evident that the problem presented in this case differs from the others in that federal legislation is not involved. Normally, when a state examines its legislation, its interpretation of its constitution is final and not subject to review by the federal courts. However, as in this case, where the rights of other states are involved,
the Supreme Court has the power to review state findings and in this instance reached a different result than the state court.\textsuperscript{31}

While not involving federal legislation the fact that the Supreme Court reached a different result than the state court seems to add impetus to the prevailing view that the federal courts are reluctant to invalidate legislation solely on the basis of an unlawful delegation of legislative power.

In conclusion it would seem that a general statement could be made to the effect that the possibility of a statute, wherein a federal question is involved, being invalidated on the basis of legislative power being delegated to another legislature is even less than remote. Most of the cases set forth above that present this question were found not to involve the question of delegation at all. The courts in such instances found that the statute in question did not delegate legislative power as alleged. The legislation was distinguished from delegation as being a reasonable exercise of congressional authority granted by the commerce clause, or that the statute was either conditional legislation or merely the adoption of a state act as its own.

Where the court found that some authority was granted it failed to find the grant unlawful, but sustained it as being necessary under the circumstances or to obtain the desired result.

Delegation to other legislatures by no means exhausts the field in which allegations of unlawful delegation arise. Contentions are made that legislative power is illegally delegated to the executive, the judiciary, and, as in the Dettra Flag case, to independent agencies. In these situations the contention is usually not that it is unlawful in itself to allow others to promulgate regulations, but that in granting this authority to those who are to exercise it the standards set forth to limit their actions are not specific enough, and permit arbitrary discretion to be exercised.

It is beyond the scope of this Comment to delve into specific situations arising in these other areas; suffice it to say that the trend in sustaining federal enactments in these areas is the same. Standards as general as "in his judgment," "in his opinion," "unfairly," and "inequitably" have been held by the federal courts to be adequate. The court in upholding these acts has on occasion held such vague standards adequate because the agency involved had sufficient experience in the field involved to be adequately regulated by them.\textsuperscript{32} In other situations the court may look out-

\textsuperscript{31} U.S. Const. art. I, § 10, cl 3. Generally the Supreme Court does not have the power to construe the meaning of a state's constitution, however, in the rather limited area where by compact the rights of other states and the United States are brought in issue the Supreme Court has the power to review determinations of law made by the state courts.

\textsuperscript{32} Sakis v. United States, 103 F. Supp. 292 (D.D.C. 1952). The commission herein involved was to make classification of securities. Against contentions that insufficient standards were set forth to enable the commission to classify the securities the court at page 310 stated:

The Commission has been dealing for many years with classes of stock, issuance of securities and reorganization of Railroads. It does not seem unreasonable that Congress in charging this body to determine the number of classes of stock of a carrier did not elaborate on that phrase.
side the statute to find the guidance alleged to be lacking, or consider the tenor of the times.

Though the Panama and Schechter cases have not been expressly overruled it is apparent that they have not been followed. Since they are, at least theoretically, still law, perhaps the statement that the federal courts will never invalidate an act solely on the basis of unlawful delegation is unwarranted, but the chances of their doing so are highly improbable. It is suggested that this is a desirable result. Questioned in these cases are legislative enactments. Being such their existence is dependent on Congress allowing them to remain in force. So long as the act questioned meets other constitutional requirements there is no sound reason for invalidating it on the ground of unlawful delegation, for if the application of the act veers away from the course Congress intended, Congress can pass remedial legislation to achieve the desired end or repeal the act in its entirety.

GUSTAV J. LEHR

JUDICIAL NOTICE IN MISSOURI

I. CASE LAW CONCEPTS

The Missouri supreme court has held that "judicial notice is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them." At another time the court has quoted the definition of judicial notice as "but a rule of evidence" which "does away with the formal necessity for presenting evidence, there being no real necessity for it." Another aspect of the rule is that appellate courts will take notice of whatever is admissible, even if it has been rejected by the trial court.


It is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far, as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property . . . keep always in view this purpose and object as the primary end to be attained.

34. Atherton v. United States, 176 F.2d 835 (9th Cir. 1949), cert. denied, 338 U.S. 938 (1950). In this case conscientious objectors were assigned to do work of "national importance." Their contention was that no standard was set out to determine what such work was to consist of. The court held these words, however, were a sufficient guide, it being clear that only work necessary to assist in the winning of the war would be included. They felt that even though the standard was broad it was no broader than the necessities of the times required.

4. Preisler v. Doherty, 284 S.W.2d 427 (Mo. 1955) (en banc).
There have been a variety of statements of what the courts will or should judicially notice in Missouri. The apparent result is that the courts of Missouri may take judicial notice of all facts which may be regarded as forming that part of the common knowledge of all people of ordinary understanding and intelligence. Missouri cases which have enunciated this rule have done so when taking judicial notice of the following: that elections are important and that voters have an interest in matters pertaining thereto; that automobiles are used so much in today's transportation that much more is known by the average citizen about their operation than about the operation of trains and that courts know familiar facts about the use of them; that horses are no longer as frightened by railroad trains and whistles as in previous years but that sudden noises of a startling type issuing from behind horses are quite likely to frighten them; that the knowledge of the school child is the measuring stick of public knowledge and the school child has knowledge of the laws of hygiene which aver that decomposed matter is detrimental to the public health; that a barn because of its location and construction is rendered more likely to be struck by lightning; that customarily there is no hearing of evidence in eminent domain proceedings; that the Meramec River has long been a popular fishing stream; that a highway contractor was not responsible for the location of a new highway being constructed; that the distance from the center of a Chevrolet automobile and one of its front tires was about 4½ feet; that tractors sometimes turn over when used on embankments.

It has been further stated that "courts are not presumed to be ignorant of matters about which the general public knows"; that "there is no reason why courts should pretend to be more ignorant than the rest of mankind"; that "courts ought not to proceed on the theory they do not know what everyone else does know"; that it should not be necessary to "require a solemn allegation or proof that fishes swim, or that birds fly." One of the rules universally followed by the courts of Missouri is that judicial notice may be taken of things which are beyond the actual knowledge of the judge, and that the judge, in ascertaining facts to be judicially noticed, may resort to

5. City of St. Louis v. Pope, 334 Mo. 479, 128 S.W.2d 1201 (1939) (en banc).
6. Spoeneman v. Uhri, 332 Mo. 821, 60 S.W.2d 9 (1933).
8. Valley Spring Hog Ranch Co. v. Flagmann, 222 Mo. 1, 220 S.W. 1 (1920) (en banc).
11. Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954) (en banc).
15. City of St. Louis v. Pope, supra note 5, at 493, 128 S.W.2d at 1210.
17. Henry County v. Salmon, 201 Mo. 136, 161 (1907) (en banc).
a source of common knowledge he feels would be helpful in refreshing his memory. The supreme court has qualified this rule by stating that merely because a fact may be proved by reference to dictionaries, encyclopedias, or other publications does not allow a court to judicially notice it; it must once again pass the test of being common knowledge.

Many matters of which the law requires courts to take judicial notice are matters of which in reality the court is ignorant. Although they need not be alleged or proved, they must be brought to the attention of the court. Some facts of judicial knowledge are so commonplace that they never leave one's mind; they are an inherent part of any decision where they apply. However, where the law demands that a court take judicial notice of a certain fact of which the court is ignorant, the party desiring such recognition must suggest it to the court. "The court is not bound to take judicial notice of a fact where it is not called upon to do so either by counsel or some other facts introduced in evidence and it is one to which the mind of the court would not ordinarily be directed." Furthermore, the litigant desiring that judicial notice be taken of a fact must not only suggest it to the court but should assist the court in examining proper sources for information concerning the fact.

In this connection, Wigmore states:

When the judge, pending a decision as to taking judicial notice, seeks information in order to assist him in reaching that decision, and a party cites in a brief or brings into court for that purpose certain sources of information, the party so providing them should notify the opponent, in fairness, so as to give him an opportunity of consulting the same sources or of producing others.

The Missouri supreme court has stated that "judicial knowledge of facts is measured by general knowledge of the same facts." The court applied this to the topography and products of Missouri and stated that these facts were generally known because they were taught in our schools. Another Missouri court's statement of this same rule is that "judicial notice can be taken of school history that is

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23. 23 C.J. Evidence § 2005, at 172 (1921). See also Corbett v. Terminal Ry. Ass'n, supra note 22, at 981, 82 S.W.2d at 102.
25. 9 Wigmore, Evidence § 2568(b) (3d ed. 1940). See also Corbett v. Terminal Ry., Ass'n of St. Louis, supra note 22.
common knowledge for no requirement forces courts to profess an ignorance of subjects with which all men of ordinary affairs are familiar.”

Missouri appellate courts will not take notice of the rules of a circuit court that do not appear in the record. But any court may take judicial notice from its own sessions, adjournments and vacations, and the supreme court and the courts of appeals will take notice of all of their respective records. For example, in Richards Brick Co. v. Wright, the court stated that in certain situations and within certain limits a court may take judicial notice of its own records in another and different case than the one being tried. However, in order that a proper record may be assembled for appeal, the trial court record in the other case must be introduced in evidence if the evidence therein is essential in connection with the appeal to the establishment of the cause of the party bearing the burden of proof. This is not necessary if the opposing counsel admits the contents of the trial court record. In addition, the supreme court held in State ex rel. Donnell v. Searcy that “we have the power to notice facts outside the record for the purpose of considering the moot character of the question before us.”

In that area of judicial notice which is based upon the requirement that facts to be so noticed must be generally known, courts will not take judicial notice of facts which are not matters of common and general knowledge. For example, the Springfield Court of Appeals refused to take judicial notice of an alleged fact that one would be a person of good moral character if he had won a good conduct medal.

The rule governing a court in its determination of whether to take judicial notice of a fact in a given situation was well stated by the supreme court in City of St. Louis v. Niehaus as “not a hard and fast one. It is modified by judicial discretion. . . . ‘Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and

30. Lemmon v. Continental Cas. Co., 350 Mo. 1107, 169 S.W.2d 920 (1943); Collins v. Leahy, 347 Mo. 138, 146 S.W.2d 609 (1941); State ex rel. Horton v. Bourke, 344 Mo. 826, 129 S.W.2d 866 (1939); Siemers v. St. Louis Elec. Terminal Ry., 343 Mo. 1201, 125 S.W.2d 865 (1939); Houck v. Little River Drainage Dist., 343 Mo. 28, 119 S.W.2d 826 (1938); State ex rel. Union Elec. Light & Power Co. v. Public Serv. Comm’n, 333 Mo. 426, 62 S.W.2d 742 (1933); Bushmann v. Barlow, 321 Mo. 1052, 15 S.W.2d 329 (1929) (en banc); Bennett v. Metropolis Pub. Co., 148 S.W.2d 109 (St. L. Ct. App. 1941).
31. 231 Mo. App. 946, 82 S.W.2d 274 (St. L. Ct. App. 1935).
32. 347 Mo. 1052, 1059, 152 S.W.2d 8, 10 (1941) (en banc).
the apparent justice of the case.'35 But it has also been held that the taking of judicial notice in no manner prevents the opponent from disputing the matter if he believes it disputable. As the supreme court stated in Timson v. Manufacturers' Coal & Coke Co.:

The fact that courts in the first place, and as making out a prima facie case, will take judicial notice of certain things does not preclude the opposite party from rebutting such prima facie case; and, if the facts judicially noticed are disputable, then the party is not, and should not be, prevented from disputing them, if in fact he can do so.36

The court concluded that

if there is any question about the matter of taking judicial notice of a fact, the doubt should be solved [sic] against the assumption of such fact, and the parties put upon their proof.37

Of course, the effect of judicial notice is that proof is not required of facts of which the court takes judicial notice. As was stated in Scheufler v. Continental Life Ins. Co.:

The doctrine of judicial notice originated in the maxim “that what is known need not be proved” qualified by the further maxim or principle that “it matters not what is known to the judge, if it is not known to him judicially.”38

As to the effect or weight given to facts judicially noticed, the Missouri supreme court has stated that such facts are equivalent to evidence.39 It has further held that facts judicially noticed are presented to the court as effectively as they would be if they were established by proper proof.40

The trend of the Missouri courts is definitely to enlarge upon the calendar of things of which judicial notice will be taken; and, as decisions on judicial notice continue, the number of things to which judicial notice is given is constantly increased.41

II. STATUTORY PROVISIONS

The following is a comprehensive listing of the Missouri statutes on judicial notice. Interpretations of the statutes by the Missouri courts are also enumerated and explained in the instances where such exist.

35. 236 Mo. 8, 16, 139 S.W. 450, 452 (1911) (en banc). See also Buhrkuhl v. F.T. O'Dell Constr. Co., 232 Mo. App. 957, 95 S.W.2d 843 (St. L. Ct. App. 1936), cert. quashed, State ex rel. F.T. O'Dell Constr. Co. v. Hostetter, 340 Mo. 1155, 104 S.W.2d 671 (Mo. 1937).
37. 220 Mo. at 597, 119 S.W. at 569.
38. 350 Mo. 886, 895, 169 S.W.2d 359, 365 (1943).
40. Mayes v. Palmer, 206 Mo. 293, 103 S.W. 1140 (1907).
41. State v. Missouri Pac. Ry., 212 Mo. 658, 111 S.W. 50 (1908) (en banc).
Section 71.070 provides that when provisions have been fulfilled which are required to change the name of the city, incorporated town, or incorporated village within this state, all courts of the state of Missouri shall take judicial notice of this change.

Section 73.020 provides:

When any city or town existing by virtue of the general law of the state, or by a local or special act, may elect to become a city of the first class, or any city of the first class shall be incorporated according to law, all courts of the state shall take judicial notice of the fact of the city being a city of the first class, and of all steps taken to make it such, and of the corporate limits thereof.

In Missouri, cities of the first, second, third and fourth class may become a body corporate and all courts of this state shall judicially notice such reorganization. This is also true of sanitary districts under the provisions of chapter 248.

Under similar statutes regarding cities of the third class the supreme court in City of Brookfield v. Tooey summarily dismissed the defendant's objection that the complaint was bad because the plaintiff did not aver the class of municipal corporation to which it belonged. The complaint alleged that the city was a corporation organized under the general laws of the state and that courts under the statutes of Missouri had to take judicial notice of the organization of third class cities, to which the plaintiff belonged. This the court held was correct.

In an action by the Nodaway Valley Bank, the assignee of a judgment against the defendant, City of Maryville, the bank applied to the circuit court for a writ of mandamus to levy a tax to obtain funds for payment of the judgment. The court issued the writ and the city's motion to quash was overruled. On appeal the city objected that the writ failed to allege that Maryville was an incorporated city that had the power to levy and collect taxes. The court took judicial notice of powers and duties of Maryville under the existing law.

The following cases pertaining to fourth class cities were based upon section 1579 of the Missouri Revised Statutes (1889); similar provisions are found in present day section 79.101.

In the case of City of Clarence v. Patrick where defendant was prosecuted for violation of a city ordinance, the appellate court held that judicial notice would be taken of the reorganization of cities of the fourth class.

42. All statutory references, unless otherwise indicated, are to RSMo 1949.
43. Sections 74.013, 75.010, 77.010, 79.010, RSMo 1949, apply respectively to cities of the first, second, third and fourth classes.
44. § 248.050, RSMo 1949.
45. 141 Mo. 619, 43 S.W. 387 (1897); accord, City of Trenton v. Devorss, 70 Mo. App. 8 (K.C. Ct. App. 1897).
47. 54 Mo. App. 462 (St. L. Ct. App. 1893).
When the defendant was convicted of a nuisance contrary to an ordinance of the City of Savannah, and objected that there was no allegation or proof of the incorporation of the city, the court took judicial notice of the fact that Savannah was a city of the fourth class.48

Section 81.030 provides for the taking of a census in fourth class cities, special charter cities and towns. Among other provisions, it states that after the person taking the census makes the return under oath and files the return with the city clerk, all courts of this state shall take judicial notice of the population thereof. In relation to similar earlier Missouri statutes, Missouri courts have held that the taking of a census under a section such as this is a fact of which judicial notice will be taken by the courts,49 and that such a provision requires the courts to take judicial notice but attaches no penalty for failing to do so.50 However, a court was not required to take judicial notice of a merely colorable census not obtained in a legal manner and taken for the purpose of defeating a local option law.51

Missouri courts must take judicial notice of the properly extended limits of cities of 20,000 or less having special charters;52 of extended city limits of cities now containing or which may hereafter contain more than twenty thousand and less than two hundred and fifty thousand inhabitants, organized under special or local laws,53 and of the extended city limits of constitutional charter cities of over ten thousand.54

In a suit on taxbills purported to have been issued to the plaintiff by Kansas City for paving a part of a particular street, the plaintiff stated that the lot involved was in “West Kansas, now Kansas City, Missouri.” The defendant contended that there had never been any town or city named West Kansas within Jackson County, that the court would judicially notice that fact and that the words Kansas City would not cure the defect. The court in its decision stated that it did not believe there had been any such city but would not judicially notice that there was not such an addition to Kansas City as West Kansas. It further stated that prior to February 12, 1859 the city was named “The City of Kansas” and was incorporated under that name and took judicial notice that part of it was platted as “West Kansas.”55

In Missouri the State Highway Commission, Dental Board, Real Estate Commis-

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52. § 81.080, RSMo 1957 Supp.
53. § 81.200, RSMo 1949.
54. § 82.080, RSMo 1949.
sion and Public Service Commission are required to have official seals affixed to all records and other instruments and all courts are required to take judicial notice of said seals.56

In a proceeding in mandamus the relator was the State Highway Commission of Missouri. The supreme court took judicial notice of the Constitutional and statutory provisions which vested the relator with particular powers and duties.57

Section 490.070 to 490.120 relate to judicial notice of certain law other than Missouri law, and may be cited as "The Uniform Judicial Notice of Foreign Law Act." Section 490.080 provides that all courts of Missouri shall take judicial notice of the statutes and common law of every state, territory and other jurisdiction of the United States.

In a case interpreting this statute, the supreme court stated:

It is admitted that the injury accrued in Illinois and that the substantive law of Illinois governs the case. In view of the pleadings and admissions we are required to take judicial notice of the public statutes and judicial decisions of that state.58

In another case, although neither the plaintiff nor the defendants made reference to Kansas law in their pleadings, the petition did allege that the plaintiff's injury occurred in Kansas. The Kansas City Court of Appeals concluded that the petition contained allegations sufficient to show that the substantive rights of the litigants should be governed under the law of Kansas and that it should take judicial notice thereof.59

The supreme court recently held that Illinois law which was relied upon in a Missouri case need not be pleaded, but that the Missouri courts would take judicial notice of the law of that state namely that one suing to recover for a negligent injury occurring therein must, as part of his case, prove that he was exercising ordinary care for his own safety at the time of the injury.60

Section 490.090 states that a court may inform itself of laws in a manner that it deems proper, and that the court may call upon counsel to aid it in obtaining such information.

In a case interpreting this statute, the plaintiff had brought a garnishment

56. § 226.100, RSMo 1949 (State Highway Comm'n); § 332.280, RSMo 1949 (Missouri Dental Board); § 339.130, RSMo 1949 (Real Estate Comm'n); § 386.120, (Public Service Comm'n).
57. State ex rel. State Highway Comm'n v. Allison, 296 S.W.2d 104 (Mo. 1956) (en banc).
proceeding in a Missouri court against the judgment debtor who was a resident of Nebraska. The circuit court entered judgment allowing an exemption under a Nebraska statute. The plaintiff complained that the court erred in allowing in evidence an authenticated copy of an order of a Nebraska district court in an action where the judgment creditor was not a party, and that therefore the judgment was not binding on the plaintiff. The St. Louis Court of Appeals held that, though the judgment was not binding on the plaintiff, the evidence was admissible as a means of informing the Missouri court of the Nebraska law of exemptions.\(^6\)

Section 490.100 provides that the court shall make the determination of the laws of every state, territory, and other jurisdictions of the United States and not the jury, and that, in addition, said determination shall be reviewable.

Section 490.110 states that any party may present any admissible evidence to the trial court of such laws but that reasonable notice must be given to adverse parties, either in the pleadings or in some other manner, if a party desires to offer evidence of the law of another jurisdiction or if he desires judicial notice to be taken thereof.

Section 490.120 provides:

the law of a jurisdiction other than those referred to in section 490.080 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

Section 490.700 provides:

the courts of this state shall take judicial notice, without proof, of the population of all cities in this state according to the last enumeration of the inhabitants thereof, state, federal or municipal, made under or pursuant to any law of this state or in the United States.

In compliance with this rule, the supreme court has taken judicial notice of the population of many cities throughout the state.\(^62\) Naturally, therefore, it has been held that judicial notice will be taken of the official records of the census of places within the court's jurisdiction.\(^63\)

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62. Kansas City ex rel. Barlow v. Robinson, 322 Mo. 1050, 17 S.W.2d 977 (1929) (en banc); State ex rel. Moseley v. Lee, 319 Mo. 976, 5 S.W.2d 83 (1928) (judicial notice that St. Joseph was a city of the first class); Devine v. Wells, 300 Mo. 117, 254 S.W. 65 (1923); Steinbrenner v. City of St. Joseph, 285 Mo. 318, 226 S.W. 890 (1920) (en banc); State v. McBrien, 265 Mo. 594, 178 S.W. 489 (1915) (judicial notice of the population of the city of Farmington); State ex rel. Garesche v. Drabelle, 258 Mo. 568, 167 S.W. 1016 (1914) (en banc); State ex rel. Garesche v. Roach, 258 Mo. 541, 167 S.W. 1008 (1914) (en banc) (judicial notice of the population of St. Louis); State ex rel. Attorney General v. Dolan, 93 Mo. 467, 6 S.W. 366 (1887) (judicial notice that Kansas City had over 100,000 inhabitants); Noel v. Town of Lees Summit, 166 Mo. App. 114, 148 S.W. 194 (K.C. Ct. App. 1912) (judicial notice that Lees Summit had 1455 inhabitants); State v. Doe, 150 Mo. App. 185, 123 S.W. 713 (St. L. Ct. App. 1910) (judicial notice that St. Louis had a population of over 300,000 inhabitants); Russell v. Poor, 133 Mo. App. 723, 119 S.W. 433 (K.C. Ct. App. 1908) (judicial notice that the city of Kansas City had less than 300,000 inhabitants at the last taking of the census).

63. State ex rel. Martin v. Wofford, 121 Mo. 61, 25 S.W. 851 (1894).
In particular, Missouri courts have taken judicial notice of population as follows:

Notice was taken that the city of Caruthersville in the census of 1910 was a county seat and had a population of 3,655, which made it a city of the third-or fourth class, duly authorized to pass an impounding ordinance. 64 When violation of a local option law in Holt County was alleged, the court took judicial notice that there was no town in Holt county containing 2,500 inhabitants. 65 Judicial notice was taken of the fact that Potosi was a city which had less than 2,000 inhabitants. 66 In 1890 the supreme court announced it would take judicial notice that St. Louis was the sole city in Missouri with a population of 100,000. 67

Interpreting this statute, the Supreme Court of Missouri stated in State ex rel. Dickason v. Marion County Court:

Under repeated rulings of the supreme court, it should be considered settled that judicial notice will be taken of the published official census of the United States, for the purpose of determining the population of cities of Missouri. 68

Section 509.220 states:

1. In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the place where found in the session acts or in the revised statutes, and the court shall thereupon take judicial notice thereof.

In two old cases the courts construed literally a statute which provided that one must plead a private statute by referring to its title and the day of its passage, if the court was to take judicial notice thereof. 69 There are no cases interpreting the present statute but analysis of the interpretations of the older statutes indicates that the wording of the present-day statute would be closely adhered to. This statute also provides:

2. In every action or proceeding wherein the pleading states that the law of another state is relied upon, the courts of this state shall take judicial notice of the public statutes and judicial decisions of said state. 70

Section 536.070 of the Missouri Revised Statutes (1957 Supp.) states, in connection with administrative proceedings:

agencies shall take official notice of all matters of which the courts take judicial notice. They may also take official notice of technical or scientific

67. State ex rel. Attorney General v. Miller, 100 Mo. 439, 13 S.W. 677 (1890); State ex rel. Attorney General v. Macklin, 13 S.W. 680 (Mo. 1890).
68. 128 Mo. 427, 437, 30 S.W. 103, 104 (1895), aff'd on rehearing, 128 Mo. 427, 31 S.W. 23 (1895) (en banc); accord, Heather v. City of Palmyra, 311 Mo. 32, 276 S.W. 872 (1925); State ex rel. Major v. Ryan, 232 Mo. 77, 133 S.W. 8 (1910) (en banc).
70. Cf. §§ 490.070–120, RSMo 1949.

http://scholarship.law.missouri.edu/mlr/vol24/iss1/9
facts, not judicially cognizable, within their competence, if they notify the parties, either during a hearing or in writing before a hearing, or before findings are made after hearing, of the facts of which they propose to take such notice and give the parties reasonable opportunity to contest such facts or otherwise show that it would not be proper for the agency to take such notice of them.

In a proceeding under the workmen's compensation law by a claimant for injuries sustained while working on the defendant's premises, the St. Louis Court of Appeals held that evidence was insufficient to sustain the award by the industrial commission. The court stated:

Respondent further contends that his claim for compensation should be taken as admitted, under Rule 3 of the industrial commission, for the reason that appellants' answer was filed more than 15 days after the date of the filing of the claim for compensation. The rule in question was neither pleaded nor proved at the hearing before the referee. This court does not take judicial notice of the rules of administrative agencies. If such rules are to be relied upon they should be introduced in evidence as any other fact material to the cause in issue.71

Edson Carter Botkin

SECONDARY PICKETING—COMMON AND ROVING SITUS

Picketing is a potent weapon in labor's arsenal of economic pressures and may be defined as the act of patrolling by one or more persons in connection with a labor dispute. When picketing takes place at the business location or industrial site of an employer who is a party to a dispute, it is generally known as primary picketing and is intended to place economic pressure on that employer. Secondary picketing is closely related to the secondary boycott because the purpose of it is to place pressure on a person or an employer who is not an immediate party to the labor dispute in question.

It is the purpose of this paper to explore the effects of secondary picketing and the attitudes of Congress, the National Labor Relations Board and the federal courts toward it.

A better understanding of the purposes underlying secondary picketing may be gained by an explanation of its various results. It may inform the general public of the existence of a labor dispute; induce or encourage the employees of the picketed employer to stop working; and induce an employer, as a result of work stoppage, to cease dealing with the employer with whom the union is involved in a primary labor dispute.

The publication of the dispute to the general public seems to be only incidental, and inducing the employees to quit work only a step, in the process of putting

pressure on the secondary employer to cease dealing with the primary employer with whom the union is disputing.

Secondary pressure may also be said to be placed on the primary employer when the union, in picketing the primary employer, coerces the primary employees to quit work or, in other words, cease doing business with the primary employer with whom the union has a labor dispute, but this is generally held to be permissible primary picketing.

The factor which dissociates secondary picketing from primary picketing and which changes its legal consequences is the very one which makes secondary picketing related to the secondary boycott. This factor is that secondary picketing places pressure on a stranger to the original dispute in order to induce him to cease dealing with the primary employer in the dispute. Some courts have felt that the presence of this factor makes secondary picketing in itself a secondary boycott. But, strictly speaking, the term "boycott" refers to a refusal by one person to deal with another. Picketing, however, seeks to induce a "boycott." Therefore, a strike amounts to a boycott whereas picketing is used to induce the strike.

The common law approach to secondary picketing may be best seen in the decision of the New York court of appeals in Goldfinger v. Feintuch. In this case the union had a dispute with a kosher meat company. When efforts to obtain a union agreement from the company proved unsuccessful, the defendant union decided to picket the non-union-made products at the retail stores, including the plaintiff's store. The court held that the picketing could not be enjoined so long as it was restricted to the product and not to the retailer as such. The court said:

Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and thus may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer. Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public.

The reasoning of the court in the Goldfinger case seems to rest on the common law theory that harm done to another was unlawful unless justified by some interest recognized at law. It is now generally accepted that labor has a legal right to take concerted action in furtherance of its own interest in unionization, collective bargaining, improvement of working conditions and better wages.

2. Id. at 286, 11 N.E.2d at 913.
In Weil & Co. v. Doe, the sign writer union attempted to picket a furniture store because the store owner had bought a neon sign which was allegedly the product of a non-union manufacturer. In granting an injunction against the secondary picketing, the court held that the union's interest in the condition under which the sign was produced was not extendable so far as to justify the picketing of the person who purchased the sign. The court felt that there must be some end as to who are parties to a labor dispute and that in this situation the affinity between the primary employer (manufacturer of the neon sign) and the furniture store was not direct, intimate and united sufficiently to allow this secondary picketing.

The "unity of interest" doctrine has had an unmistakable influence in the law of labor relations. This influence may be seen in section 13(a) of the Norris-La Guardia Act and also in those state statutes patterned after the Norris-La Guardia Act.

In the Norris-La Guardia Act, picketing is made unenjoinable where it occurs in a case involving a labor dispute as defined in the act. Section 13(a) of the act provides:

A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein. . . .

Thus it may be seen that section 13(a) protects picketing which occurs in connection with persons engaged in the same industry, trade, craft, or occupation, or have direct or indirect interests therein. It must be remembered that a large number of states have anti-injunction statutes which are more or less similar to the Norris-La Guardia Act and are applicable to their own courts.

The "unity of interest" doctrine has also had an important influence on the rule that picketing (as a form of free speech) is entitled to constitutional protection against invasion by state courts or legislatures. This influence may be seen in two United States Supreme Court decisions involving secondary picketing.

In Bakery & Pastry Drivers v. Wohl, the union picketed wholesale bakeries which sold goods to non-union, self-employed peddlers, and retail grocers who bought from them. The purpose was to compel the peddlers, who had seriously underminded union standards, to observe union hours and to hire union relief drivers. The New York courts enjoined the picketing on the ground that there was no "labor dispute." The Supreme Court reversed, saying:

A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents'
mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interest of strangers to the issue.\(^7\)

On the same day that it handed down the decision in the Wohl case, the Supreme Court handed down the decision in Carpenters Union v. Ritter's Cafe.\(^8\) Ritter had made a contract with a non-union building contractor to erect a building. The Carpenters Union sought to get Ritter to compel the contractor to employ union labor by picketing a restaurant which Ritter owned and operated quite separate from the new building site and some two miles distant. Texas enjoined the picketing as a violation of its antitrust laws. The Supreme Court, in a five-to-four decision, held that this injunction did not violate the constitutional guarantee of free speech. The Court pointed out that it will not allow an extension of the constitutional protection of freedom of speech to allow the Carpenters Union to picket neutrals having no relation to either the dispute or the industry in which it arose.\(^9\)

As can be seen from the above cases, the basic question is whether or not the person secondarily picketed has an interest in the dispute to justify conscripting him through picketing. Also, it may be inferred from these two cases that the "industry, trade, craft, or occupation," categories of section 13(a) of the Norris-La Guardia Act define the area within which the secondary picketing may not be prohibited but outside of which picketing is not constitutionally protected.

At this point it is well to consider the effect of section 8(b) (4) of the National Labor Relations Act, as amended.\(^10\) Under that section it is an unfair labor practice for a union to "induce or encourage" the employees of any employer to engage in a "concerted refusal" to perform services where "an object thereof" is:

1. To force or require any employer or self-employed person to join any labor or employer organization.

2. To force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

3. To force or require any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees.

4. To force or require any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees.

\(^7\) Id. at 775.
\(^8\) 315 U.S. 772 (1942).
\(^9\) Id. at 726.
5. To force or require an employer to assign work to employees in one labor organization, trade, craft, or class rather than to another, unless the employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work.

One of the salient purposes of all picketing is to induce employees and the public to take sides with the persons who are picketing. What is true of all other types of picketing would seem to be also true of secondary picketing. Secondary picketing, then, comes within section 8(b)(4) as action which will induce or encourage employees to engage in a concerted refusal to perform services if the object of the picketing is one of the above five unlawful objects. If secondary picketing comes within 8(b)(4), it follows that it is an unfair labor practice where it has any of the above five objects. The problem now presented is: since the Wohl case declares that secondary picketing was protected as a form of free speech where there is a unity of interest between the secondary and primary employers, what does 8(b)(4) do to this protection? It would seem that the very acts done by the union in the Wohl case, which the Supreme Court held to be constitutionally protected, would come almost perfectly within the terms of 8(b)(4)(A).

This constitutional question was decided in *International Bhd. of Elec. Workers v. NLRB*, where the Supreme Court, in rejecting the contention that application of section 8(b)(4) sanctions to secondary picketing would infringe upon the constitutional right of free speech, said:

The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgment of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone call emphasizing its purpose. The constitutionality of § 8(b)(4)(A) is here questioned only as its possible relation to the freedom of speech guaranteed by the First Amendment. This provision has been sustained by several Courts of Appeals. [Citing cases.] The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in the furtherance of comparably unlawful objectives. [Citing case.] There is no reason why Congress may not do likewise.

The question of the legality of secondary picketing under 8(b)(4) of the act frequently arises in connection with two other types of picketing, namely, common-premises picketing and roving-situs picketing. Common-premises picketing occurs where a labor organization pickets premises where the employees of two or more employers are working and the labor organization has a dispute with only one of the employers. Roving-situs picketing occurs when a labor organization which has a primary dispute with one employer pickets the premises of another employer when the employees of the first employer are temporarily present.

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11. *International Bhd. of Teamsters, AFL, 87 N.L.R.B. 502 (1949).*
12. *341 U.S. 694 (1951).*
13. *Id. at 705.*
As seen above, section 8(b)(4)(A) of the act makes it an unfair labor practice for a labor organization or its agents to induce or encourage employees to strike against or refuse to perform services for their employer where an object is to force him to cease doing business with another employer who has been struck. The purpose of this section of the act is to protect innocent third persons from economic loss as a result of a labor dispute in which they have no concern. The aim of the section is to outlaw secondary boycotts while at the same time permitting a union to take appropriate concerted action against a primary employer whose employees the union represents for collective bargaining purposes.

Senator Taft, who was the sponsor of the bill in the Senate and Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, said, in discussing section 8(b)(4) to show that the bill was aimed at secondary and not primary action:

This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees... [Under] the provisions of the Norris-La Guardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. (Emphasis added.)

Thus, it can be seen that the sponsor of the bill believed section 8(b)(4)(A) to be aimed at secondary and not primary action.

The courts, as well as the NLRB, have not been consistent in applying this section in cases appearing before them. A view of some of these cases may be helpful in ascertaining some of the tests used to determine if the picketing is or is not a violation of section 8(b)(4)(A).

Pure Oil was a case involving a common situs picketing situation. Pure Oil and Standard Oil operated adjacent oil refineries near Toledo, Ohio. Pure Oil maintained a pipeline from its refinery through Standard’s refinery to a dock, operated by Standard on the Maumee River some three miles from the refineries, where Standard employees loaded the oil aboard waiting ships. A strike at Standard resulted in the picketing at Standard’s plant and at the dock. Pure Oil employees refused to cross the picket line to load the oil aboard the vessels and the National Maritime Union refused to handle the cargo when Pure Oil supervisers attempted to load the vessels from Standard’s dock.

The NLRB held the union activity to be permissive and primary since the picketing was confined to the immediate vicinity of Standard’s premises.

14. NLRB v. United Bhd. of Carpenters, AFL, 184 F.2d 60 (10th Cir. 1950).
17. Oil Workers Int’l Union, CIO, 84 N.L.R.B. 315 (1949).
In refuting the contention of the general counsel that the picketing at the dock was unlawful because it induced the employees of Pure Oil to engage in a concerted refusal to handle Pure Oil products at the dock, in order to force Pure Oil to cease doing business with Standard Oil the Board said:

A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8(b) (4) (A) of the act.18

In Ryan,19 the NLRB again had a common situs picketing problem. The Ryan Construction Company was erecting an addition on the Evansville Bucyrus Plant. Bucyrus employees customarily used the main gate for purposes of ingress and egress although there were several other gates in the fence surrounding the plant. To facilitate construction operations, Ryan Construction made a gate in the fence some five-hundred feet from the main gate for use by its employees. Bucyrus employees, upon the outbreak of a strike, picketed the Ryan gate as well as the main gate with the result that Ryan employees refused to cross the picket line. The Board held that this picketing at the Ryan gate did not enlarge the area of the dispute and did not violate section 8(b) (4) (A). The Board realized that the picketing had a secondary effect as in the Pure Oil case, but stated:

... [W]hen picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called secondary even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons.20

The Board also noted that Bucyrus employees could have used the Ryan gate had they chosen to. It is interesting to note that the wording on the signs at the Ryan gate was the same as on those carried by pickets at the main gate. The Board felt, however, that the signs were directed at Bucyrus when they read, "On Strike; No contract, no shovel; On strike for security and decent wages."

Picketing of an "ambulatory" or "roving" situs was involved in Schultz Refrigerated Service21 in which the union was striking against Schultz, Inc., a trucking company with its terminal in Slackwood, New Jersey. Schultz, however, continued to operate its transportation business in New York City and for that purpose, hired employees of a New Jersey local to perform the driving duties in New York City previously performed by the striking employees. Picketing occurred at secondary premises when Schultz's trucks were at the premises. This picketing consisted of the striking employees walking around Schultz's trucks, announcing by

18. Id. at 318.
19. United Elec. Workers, 85 N.L.R.B. 417 (1949). The union involved in this case, the UE, was expelled from the CIO in 1949 on the ground that it was Communist dominated.
20. Id. at 418.
means of printed signs that members of the striking union had been locked out of their jobs by Schultz. The Board held that where the location of the employee's duties is different than that of the employer's premises, the former will be a proper situs for a primary union activity and that the picketing under the above circumstances was within primary bounds.

The Board in this case said that the identification of such picketing with the actual functioning of the primary employer's business at the situs of a labor dispute was an important test in determining the lawfulness of the picketing.22

Much the same situation was presented in Sterling Beverages23 as was presented in the Schultz case, above, but here the picketing of a secondary employer's premises took place prior to the arrival of the primary employer's trucks and continued after their departure. The Board held this to be unlawful secondary picketing since the union failed to confine its picketing to times when the trucks of the primary employer were physically present at the secondary employer's premises. The Board also said that picketing of the secondary employer's premises when Sterling trucks were not physically present failed to establish that direct and immediate relationship between the picketing and the objectpicketed necessary to a finding of purely primary picketing.

As seen from these two cases, roving situs picketing must be limited to the times that the primary employer's trucks are physically present at the premises of the secondary employer and the picketing should be limited to the immediate area of the trucks.

In 1950, the Board set down certain definite conditions that must be met before picketing of a secondary employer's premises would be regarded as permissive primary action. The Board stated in Moore Dry Dock:24

... [P]icketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.25

The case arose from an attempt by the Sailors' Union to negotiate an hours, pay and working conditions agreement with the owners of the S.S. Phopho, at a time when the vessel was undergoing repairs at the Moore Company's drydock. When contract negotiations failed, the union requested Moore's permission to picket within the premises, alongside the pier where the vessel was berthed. Moore refused, and the union thereupon picketed at the company's gate. The Board held that the

22. Id. at 505.
25. Id. at 549.
union's activities met the quoted conditions and was therefore permissive. The owners of the Phopho had no permanent location where picketing could take place.26

These Moore Dry Dock standards were applied by the Board until 1953 when the Board refused to apply them where the primary employer maintained a "principal plant" in the community as in the Washington Coca Cola27 case. There the Board held that where a primary employer maintains a principal plant in the community serviced by delivery trucks, picketing was to be restricted to the main plant area, and that picketing of trucks of primary employer while parked at retail stores constituted illegal secondary activity. The Board seemed to believe that where a "principal plant" provided adequate opportunity for effective exercise of concerted efforts by the union, the Board would refuse to permit picketing of business activities of the primary employer at the premises of the neutral employer.

The Schultz case was distinguished on the basis that there was no permanent establishment where the Schultz trucks could be picketed within the state in which the labor dispute arose. The Moore Dry Dock case was also distinguished on the basis that the owners of the Phopho maintained no permanent establishment which the union could effectively picket.

The factors given much weight by the Board in the Washington Coca Cola case were that the Coca Cola Company maintained a principal plant in downtown Washington; the drivers entered and left the plant approximately four times daily; the principal plant had been picketed since the beginning of the strike; and the roving pickets had, on at least one occasion, picketed in front of a retail store entrance which was used exclusively for deliveries.28

In a 1954 case, Pittsburgh Plate Glass Co.,29 the Board refused to apply the "principal plant" doctrine because it was felt that the common premises (a construction site) was the situs of the dispute. Here, the workers being picketed at the construction site were at the "principal plant" or main business establishment of the primary employer only twice daily, for reporting to work and checking out. Sometimes the workers did not report to the main establishment at all but reported at the construction site where they worked all day. It was pointed out that this common situs picketing was the only way the union could effectively reach the primary employees since the main establishment of the primary employer was located two and one-half miles from the center of town and union picketing had taken place there for only a short time during the strike. Thus, it can be seen that the factual situation here differed from that presented in the Washington Coca Cola case.

26. See Piezonki v. NLRB, 219 F.2d 879 (4th Cir. 1955); NLRB v. Teamsters Union, 212 F.2d 216 (7th Cir. 1954); NLRB v. Local 55, Carpenters Dist. Council, AFL, 218 F.2d 226 (10th Cir. 1954); NLRB v. Service Trade Chauffeurs Union, AFL, 191 F.2d 65 (2d Cir. 1952), enforcement granted, 199 F.2d 709 (2d Cir. 1952).
case. A prior decision in the Otis Massey case was believed not to be in conflict because there it was held that the construction site did not harbor the situs of the dispute, whereas in the present case the Board felt that the construction site did harbor the situs of the dispute.

The pickets did not make it clear from the placards carried that the dispute was with the Pittsburgh Plate Glass only and not the neutral employers at the construction site. This was held to be a violation of the fourth requirement of the Moore Dry Dock case.

In a 1954 decision involving roving situs picketing, Thurston Motor Lines, the union, having a dispute with Thurston Motor Lines, Inc., followed Thurston's trucks to pick up and delivery points and picketed the trucks at these places. Picketing at the premises of secondary employers took place only at times when Thurston's trucks were present and was limited to appropriate places. The placards carried by the pickets as they patrolled around the trucks clearly disclosed that the dispute was with Thurston. The pickets orally induced the secondary employees not to handle Thurston's goods and this activity was held to be in violation of 8(b) (4) (A).

The Board affirmed the finding of the trial examiner that the tests of the Moore Dry Dock case were to be used only in situations where it has been found that the situs of the dispute is at the premises of the secondary employer, and where the primary employer has a permanent place of business in the locality which can be picketed by the union then the "principal plant" doctrine is applicable. The Board made note of the fact that the union had picketed the two Thurston terminals since the beginning of the dispute.

After the reversal of the Board's decision in the Otis Massey case, by the fifth circuit court of appeals, the Board had another chance to gain approval of its Washington Coca Cola "principal plant" doctrine when the Campbell Coal case went to the District of Columbia court of appeals. The Campbell Coal Company, a ready-mix concrete manufacturer who sold at its plants and delivered to buyers at construction sites, discharged several union truck drivers. The union then initiated a strike against the employer and picketed the employer's plants. The pickets also followed some of the employer's trucks to the construction sites, picketing where the deliveries were made. The NLRB found this picketing to be a violation of 8(b) (4) (A) and based its decision solely on the Washington Coca Cola and Thurston Motor Lines cases.

The union repeated the argument used before the Board that it had complied...

33. 110 N.L.R.B. at 2194.
with the *Moore Dry Dock* tests, stating further that the Board had added another requirement or "fifth test" that no situs for effective picketing other than the common one be available. The court agreed, pointing out that in the *Moore Dry Dock* case it was a fact that no such separate situs was available but the Board's decision did not specify this as one of the conditions of lawful picketing at a common situs.\(^\text{34}\)

As to its own affirmation of the *Washington Coca Cola* decision, the court stated that it only agreed with the decision which the Board reached there, which rested in part upon additional findings. It did not thereby approve of the rule relied on by the Board in the instant *Campbell Coal* case.

The court also said that the existence of a common site, at which picketing will have only an incidental effect upon the employees of another employer, and whether there is another place which can be picketed are factors to be considered in determining whether a violation of 8(b)(4)(A) has occurred. Standing alone, this situation does not constitute a violation. There must be other evidence to overcome section 13 of the act, which preserves the right to strike except as specifically provided in other sections of the act. Said the court of appeals, "No rigid rule which would make these few factors conclusive is contained in or deducible from the statute."\(^\text{35}\) The court remanded the case to the Board for further consideration. The Board reconsidered the case and issued a supplemental decision and order.\(^\text{36}\)

It is to be remembered that the court had said in its original decision that the single factor that the primary employer had plants where the union could picket did not, standing alone, make common situs picketing a violation. The court, upon hearing argument as to whether the supplemental order should be enforced, upheld the Board and said that if an object of the picketing, although not the sole object, was proscribed by 8(b)(4)(A) then the picketing was unlawful.\(^\text{37}\) The combination of circumstances could be considered by the Board in determining whether an object of the picketing came within the objects condemned by the secondary boycott section of the act. Also, the union must take affirmative action and inform the neutral employees that the picket line was not aimed at the neutral employer even though it seems that fact was plain from the placards. Facts of the case revealed that picketing only occurred at a common situs when the union's verbal request to the neutral employer not to accept delivery from the primary employer was refused. This is an additional factor which the court said may be considered by the Board.

Thus it may be seen that from the time of the original hearing on the *Campbell Coal* case until its final determination, the Board and the District of Columbia court of appeals have changed in their approach to the common or roving situs cases and have seemingly developed a new criteria to be used to determine the legality of this secondary picketing.

\(^{34}\) 229 F.2d at 516.

\(^{35}\) 229 F.2d at 517.

\(^{36}\) 116 N.L.R.B. 1020 (1956).

\(^{37}\) 229 F.2d at 514. See also NLRB v. Denver Bldg. Trades Council, 341 U.S. 675 (1951).
It is interesting to note that, as we have seen in this Comment, it was or is common understanding that picketing is meant to encourage others to take sides in a labor dispute. We shall examine this later on.

The original decision in the Campbell case seemed to deal a severe body blow to the Board's Washington Coca Cola rule. The Board, however, has doggedly held on to the doctrine but has placed the illegality of secondary picketing on alternate grounds in some of its subsequent decisions. The Board's decisions in Southwestern Motor Transport Co.,\(^3\) W. H. Arthur Co.,\(^3\) and Ready Mixed Concrete Co.\(^4\) all involved the "fifth rule" or "principal plant" doctrine together with other evidence tending to show union actions violative of section 8(b) (4) (A).

The Board gave notice of its firm stand on its Washington Coca Cola rule when it decided Southwestern Motor Transport Co. Much time was given by the Board in writing its decision in fully explaining its stand and reasons therefore. In applying section 8(b) (4) (A) the Board said it had attempted to strike a balance between "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures and controversies not their own."\(^4\)

Thus, picketing at the situs of the primary employer's operations is not prohibited by section 8(b) (4) (A) when objectives of Congress are put into balance. Picketing at the situs of some other employer's operations, as a general rule, does come within the prohibition. The reason for this is the picketing at a place where none of the employees of the primary employers are working must necessarily be directed only at the employees of some other employer. There are however certain situations, as in Schultz and Moore Dry Dock, in which the Board permits an exception to the general rule by allowing the union to picket at the premises of a secondary employer. This exception is for the sake of effectuating the congressional intent. The union must comply with the conditions of Moore Dry Dock and the reason is that it must minimize the adverse effect of the picketing on the neutral employer. But even after the union has complied with all the conditions, it is entitled only to a rebuttable presumption that it is seeking to appeal only to the employees of the primary employer.

The Board then justified its Washington Coca Cola case by saying that if a union can reach the employees of the primary employer at the primary employer's premises, then it cannot accomplish more by appealing to those same employees again at a secondary employer's premises. In that situation the only reasonable inference is that the picketing is directed at the employees of the secondary employer. And of the reversal of their holding in the Campbell Coal case the Board said:

\(^{38}\) Local 657, Int'l Bhd. of Teamsters, AFL-CIO, 115 N.L.R.B. 981 (1956).
\(^{39}\) Sheet Metal Workers, 115 N.L.R.B. 1137 (1956).
\(^{40}\) International Bhd. of Teamsters, AFL-CIO, 116 N.L.R.B. 461 (1956).
\(^{41}\) NLRB v. Denver Bldg. Trades Council, \textit{supra} note 37, at 692.
\(^{42}\) 115 N.L.R.B. at 983.
[W]ith all due respect for the opinion of the court of appeals in the Campbell Coal case, we do not adopt the conclusion of that court that the type of picketing involved therein is not unlawful.43

A very interesting decision was delivered by the NLRB in Retail Fruit Dealers.44 Retail Clerks Local 648 had a dispute with J. M. Long and Co., owner of Crystal Palace Market. The Long Co. operated only four of the sixty-four stands or shops in the market and leased out the others to independent contractors. When the union picketed members of the grocers' association, to which some of Long's shops were connected, Long closed down those shops. Other of Long's shops remained open as did the leased shops in the market. Long gave the union permission to come inside the market, if it so desired, and picket the stands involved in the labor dispute; that is, the stands that had been closed down. The union, instead, remained outside and picketed the entire market. After rejecting the union's contention that the lessees were allies of Long, the Board proceeded to the common situs picketing problem.

The main opinion begins by stating that if the Moore Dry Dock standards are observed, common situs picketing is lawful and any incidental impact on neutral employees at the common situs will not render it unlawful. The "controlling consideration" in the development of these standards has been to require that the picketing be conducted so as to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees.45 The Board also stated in the decision that the union must make a "bona fide" effort to minimize the harmful effect of the picketing on the operations of neutral employers:

We believe . . . that the foregoing principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer. We can see no logical reason why the legality of such picketing should depend on title to property. The impact on neutral employees of picketing which deviates from the standards outlined above is the same whether the common premises are owned by their own employer or by the primary employer.46

The above quotation is a change of view from the Board's earlier decisions in the Ryan and Pure Oil cases. The Board has now added a "bona fide" rule to the requirements of legal common or roving situs picketing. This rule may possibly be a further step by the Board as shown in the Southwestern Motor Transport case, that a union only gains a rebuttable presumption of legality by compliance with the Moore Dry Dock rules. Thus the rules set out by the Board in the primary premises situations have been changed to further limit the permissible scope of union activity.

43. Id. at 985 n.11.
44. Local 1017, Retail Clerks' Union, AFL-CIO, 116 N.L.R.B. 856 (1956).
45. Id. at 859.
The Board scored a victory for its Washington Coca Cola doctrine when the first circuit court of appeals affirmed the Board's decision in the Barry Controls case. There the union was the certified bargaining representative of a unit of workers employed by the company. The union called a strike and picketed the employer's plant. In addition, union pickets followed one of the non-striking truck drivers and picketed the truck at stops made for picking up supplies and making deliveries.

The Board followed its prior decisions of Washington Coca Cola and Southwestern Motor Transport cases and made it clear that it did not rely on the conclusion of the trial examiner that the picketing on neutral employer's premises was to be tested by the rules of Moore Dry Dock. The court of appeals agreed with the Board in its holding that the Moore Dry Dock doctrine has no application in this case, pointing out that here, all employees in the bargaining unit were continuously employed at Barry's plant except for the driver, Yorke, and he had to cross the picket line at the plant on his way to and from work plus, in the course of driving the pick-up and delivery truck, crossing the picket line once or twice a day.

Thus by picketing the premises of the primary employer, Barry, alone, the Union had a fully adequate opportunity to publicize its labor dispute to the members of the bargaining unit generally and also to exert individual pressure on Yorke by embarrassing him into either joining the strike or quitting his job. Certainly from these facts it was logical and reasonable for the Board to draw the inference that the Union's picketing of Yorke's truck at the premises of secondary employers must have been designed, in part at least, to encourage those employers to cease doing business with Barry, or to induce their employees not to handle or transport Barry's freight.

The court pointed out that causing other employers, or their employees, to cease doing business with the primary employer need not be the sole object of the picketing on the secondary employer's premises to make the picketing illegal. It is enough if that result is an object of the activity. Thus, it may be noticed that the Board is applying the Washington Coca Cola doctrine to cases where there is a principal plant but the court here did not make it as automatic a rule as does the Board. The court seems to look to all the facts before affirming the Board and has found sufficient facts to show that an object of the union was violative of 8(b)(4)(A).

The Board has continued to apply the Washington Coca Cola doctrine along with its added "an object" test in its recent decisions. Thus the rigid rule of Washington Coca Cola is still applied with possibly greater sweep than it was originally. The

48. Id. at 1470.
49. 250 F.2d at 187.
50. NLRB v. Denver Bldg. Trades Council, 341 U.S. 675 (1951). Also, it is not required that this object be attained. See NLRB v. Associated Musicians, 226 F.2d 300 (2d Cir. 1955).
addition of the "an object" test has allowed the Board to find the union's common situs picketing illegal activity if the factual situation demands. The line of cases shows a definite trend of the Board and of some of the enforcing courts to limit the scope of permissible union activity as much as possible in order to satisfy the present conception of the balance of interest between the union and secondary employers.

To illustrate the extent to which the Board is now willing to go in order to find common situs picketing illegal by application of the "an object" test is its decision in *Incorporated Oil.*52 There the union, having a dispute with the company, called a strike in 1953 and picketed the fourteen gasoline stations operated by the company in St. Louis. All the stations were picketed during the first year of the strike. In 1954 the union began picketing the stations by a roving team of pickets, moving from station to station so that all fourteen stations were picketed from time to time. In March of 1955 the company decided to rebuild one of its stations located on Manchester Road,53 and engaged Drury, an independent union contractor to do the work. The job progressed to the point where the old station was torn down and a temporary building constructed when the roving team of pickets arrived at the Manchester station and commenced to picket the premises. This had the effect of inducing Drury's employees to cease work. The filling station was later closed down with all company signs removed and the union then ceased picketing at this station. No further work was attempted by Drury for several weeks. Then, with the station still closed down and no primary employees present at the Manchester station, Drury employees returned to work on August 8, 1955. Three hours later the picketing was resumed with the result that Drury's employees ceased work and refused to cross the picket line. The Board found an 8(b) (4) (A) violation on the basis that the picketing on August 8, 1955 induced Drury employees to cease work and that an object of the inducement was to compel Drury to cease doing business with the company. Much weight was given to the fact that no primary employees were present when this later picketing took place and the only persons present at the primary premises were the secondary employees.

In refusing to enforce the order of the Board in this case, the eighth circuit court of appeals said the "an object" test is proper in cases where the picketing involved was not lawful primary picketing.54 The court felt that the picketing of the primary employer's premises had been lawful before the arrival of Drury employees and remained lawful after they began to work on the primary employer's premises. In holding that this activity on the part of the union was lawful primary picketing the court relied on the prior Board decisions in the *Pure Oil* and *Ryan* cases.

The court further stated that the "an object" test was too narrow in this case.

52. Local 618, Automotive Employees Union, AFL-CIO, 116 N.L.R.B. 1844 (1956), enforcement denied, 249 F.2d 332 (8th Cir. 1957).
53. This station was some two and one-half miles from the site of the nearest other station.
54. 249 F.2d at 334.
where the picketing took place entirely at the premises of the primary employer. To find this primary premises picketing unlawful as violative of 8(b)(4)(A) the Board must show evidentiary support for a conclusion that the primary picketing serves no lawful purpose.\(^5\) Thus the "an object" test has been denied the approval of at least one court in a primary site picketing situation.

**CONCLUSION**

Until the United States Supreme Court speaks more directly on the legislative intent of section 8(b)(4)(A) with reference to common and roving situs situations, no final solution seems presently possible. The approaches to the problem have been varied within the Board and with the federal courts. The "an unlawful object" test as compared with the rule-making of the Board are not easily reconcilable but it may be done in time. The rigid rule application of the Board in varied factual situations has been for the most part viewed with disfavor by the courts. The reason for this would seem to be that the courts have realized that the Board has occasionally lost view of its purpose as an expert agency. In cases involving alleged unlawful secondary picketing the purpose of the Board is to determine, as a board of experts, if the union has in fact engaged in activity proscribed by section 8(b)(4)(A), keeping in mind the dual congressional objectives. By applying rigid rules the Board is denying to itself the use of expert determination.

At present the following can be said of the Board:

1. The Board has shown that it does not intend to apply the primary situs doctrine of *Ryan Construction* with any degree of finality but will look to all the related union activity in a primary picketing situation.

2. The standards of the *Moore Dry Dock* case are still applied but the union must also make a "bona fide" effort to minimize the effect of the picketing on neutrals in common and roving situs situations.

3. The *Washington Coca Cola* doctrine has lost the automatic illegality of picketing aspect and has been altered somewhat by the "an object" test. If the primary employees can effectively be reached at the primary employer's establishment then any other picketing of them would probably run afoul of the "an object" test.

4. The rigid rule application of the Board has been eroded by the enforcing courts. More time will be given to a detailed examination of the entire union activity in each factual situation before determining the legality of the picketing.

5. The trend seems to be a greater attempt to protect the neutral secondary employer from the adverse effect of picketing. The balance seems to be drawing away from the union and toward the neutrals.

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55. *Id.* at 336.

http://scholarship.law.missouri.edu/mlr/vol24/iss1/9
The recent case of Hedrick v. Bigby, decided by the Supreme Court of Arkansas, vividly illustrates the way in which the Soldiers' and Sailors' Civil Relief Act of 1940 affects title to land. Leslie Hedrick, his mother and two sisters, owned certain land in 1941. Hedrick entered the army in September, 1941, and was still in the service at the time of this action in 1955, as an acknowledged career military officer. In the years 1941, 1942, and 1943, different portions of the land were sold for taxes, were deeded to the state, and three or four years later were deeded by the state to plaintiff, Bigby. None of the defendants occupied or used the land prior to the tax proceedings. Bigby went into possession of the lands in 1947, continued in possession and paid taxes. In 1955, after being in possession for eight years, he brought this suit to quiet title against any claims of defendants. The Chancellor found that under Arkansas law the plaintiff was entitled to the relief sought and quieted title in Bigby. On appeal, the Supreme Court of Arkansas reversed the decree. The court held that section 525 of the Soldiers' and Sailors' Civil Relief Act of 1940 tolled the running of the period of redemption in favor of defendant, Colonel Hedrick. Having decided that Colonel Hedrick had a right to redeem, the court further held that he could redeem for his co-tenants.

This is the usual and correct result under the law, however shocking or unfair it may seem to be that one should have a right of redemption for fourteen years, and for an indefinite number of years in the future, solely by virtue of his being in military service continuously during the period.

The Soldiers' and Sailors' Civil Relief Act of October 17, 1940, is, in substance, identical with the act of March 8, 1918. The purpose of the act, as stated in section 510, was to promote national defense by making provision for the suspension of

... enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act ... remains in force.

(Emphasis added.)

The act provided that it should remain in force until May 15, 1945, but if still at war, "until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter." As there was no peace treaty at the termination of the fighting, Congress passed a joint resolution declaring the war terminated for the
purpose of article IV of the Soldiers' and Sailors' Civil Relief Act\(^8\) as of July 25, 1947. But article IV of the act only dealt with insurance provisions, and nothing was said as to the termination of the other sections of the act. Therefore the cases in this area either presumed without discussion or expressly decided that the other sections of the act remained in force.\(^9\)

By a provision in the Universal Military Training and Service Act of June 24, 1948,\(^10\) Congress removed any doubt as to the future effectiveness of the act by declaring that, notwithstanding the previous provisions for its termination,\(^11\)

... all of the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended ... shall be applicable to all persons in the armed forces of the United States ... until such time as the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, is repealed or otherwise terminated by subsequent Act of Congress...\(^12\)

In its effect upon title to land, two sections of the act are of primary importance—sections 560\(^13\) and 525.\(^14\)

Section 560\(^15\) of the act limits the sale of certain lands of a serviceman for non-payment of taxes, and provides for redemption of these lands, if sold, within six months after termination of military service.

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11. See statutes cited notes 6 and 7 supra.
12. Statutes cited note 10 supra. Review of the legislative history of this section extending the act, as reported in 2 U.S. CODE CONG. SERV., 80th Cong., 2d Sess. § 14, at 2009 (1948), reveals no discussion of this provision except a statement in Senate Report No. 1268, May 12, 1948, that this section provides the Soldiers' and Sailors' Civil Relief Act of 1940 shall be applicable to persons serving in the armed forces pursuant to this act. This indicates that Congress probably gave little or no thought to the serious effect the extension, in this manner, would have upon titles to land.
15. Section 560 reads, in part, as follows:
   (1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.
   (2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act... for a period extending not more than six months after the termination of the period of military service of such person.
   (3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to
The provisions of this section apply only to that real property owned and occupied by the serviceman or his dependents, at the commencement of service and by his dependents at the time of the tax sale, for dwelling, professional, business, or agricultural purposes. In *Margraf v. County of Los Angeles* the serviceman was denied relief under section 560 where it was shown that he never occupied the land in question, but merely acquired another's right to redeem prior to entry into service. It was held in *Day v. Jones* that the serviceman who had neither lived on nor farmed the land in question did not occupy the land for agricultural purposes as required in section 560 by merely going on the land after buying it, assuming control over it, and riding past it two or three times a year to see if anyone was trespassing upon it.

Those lands of a serviceman falling within the above classifications may be sold for nonpayment of taxes only upon leave of court. Were it not for subsection (3), this provision as to sales would not be a great threat to stability of land titles as its operation is in the discretion of the court which may permit a sale, particularly if it finds that the ability of the serviceman to pay the tax is not materially affected by reason of his being in service. But even though the court allows the sale, the serviceman has the right to redeem under subsection (3) until six months after termination of his military service. Unlike the above limitation upon sales, this extension of the period of redemption is automatic, and has the effect of amending state statutes fixing periods of limitations on the right to redeem. It is this automatic

redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ... ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

See Annot., 32 A.L.R.2d 619 (1953), where cases decided under this section are briefed.


20. Le Maistre v. Leffers, 333 U.S. 1, 5 (1948); Day v. Jones, 112 Utah 286, 295, 187 P.2d 181, 185 (1947). After a court has determined that a serviceman's ability to pay his taxes has not been materially affected by reason of military service, and pursuant to such finding under section 560(2) authorizes a tax sale, it might seem that he should not have his right of redemption protected and extended by sections 525 and 560(3) beyond what local law may permit. However, a reading of sections 525 and 560(3) and the cases cited supra leads one to the conclusion that this extended permit of redemption is provided by the several sections of the statute. The statutory period within which the serviceman has a right to redeem is extended under section 525, and to some extent under section 560(3), as to all land owned by the serviceman. Additional protection is given a serviceman as to his land used for dwelling, professional, business, or agricultural purposes, by section 560(2), which prevents the sale of such property except upon leave of court. Section 560(2) was intended to enlarge rather than diminish the rights of the serviceman with respect to land used for these special purposes.

21. United States v. Alberts, 59 F. Supp. 298 (E.D. Wash. 1945). After holding that the act had the effect of amending state statutes, the court upheld the constitu-
extension of the right to redeem which creates title problems, as will be pointed out more fully in the discussion below.

But even if relief is denied under section 560, a serviceman may still be entitled to relief under section 525 of the act.22

Section 52523 is the most important section of the act in its effect upon title to land. That provision, as enacted in 1940, declares that the time in military service shall not be included in computing any period of limitation now or hereafter provided by statute for the bringing of any action by or against a serviceman. Military service occurring after October 6, 1942, is specifically excluded, by the amendments of that date, from the computation of periods allowed for redemption of land by the serviceman.24

The suspension of the running of periods of limitation during military service applies to limitations upon the bringing of "any action" and is not limited to the suspension of those statutes properly called statutes of limitation.25 This was established in the early case of Clark v. Mechanics' American Nat'l Bank,26 decided under a similar provision of the Soldiers' and Sailors' Civil Relief Act of 1918. There the serviceman was allowed to make claim to a mechanic's lien where by deducting the period of military service, the claim was filed within the one year period limited by Arkansas statute.

Neither is the application of section 525 limited to land of a certain character as is section 560. Efforts by the Florida supreme court to limit the application of section 525 to those lands enumerated in section 560 (those used for dwelling, professional,

tionality of the act, as interpreted, based upon the war power of Congress. The court relied upon the early Supreme Court case of Stewart v. Kahn, 73 U.S. (11 Wall.) 493 (1870), upholding an act of Congress of 1864 which suspended the running of statutes of limitations during the period a defendant or accused was beyond the reach of judicial process by reason of the Civil War. It might be argued that the Soldiers' and Sailors' Civil Relief Act, so far as it has the effect of automatically amending state statutes, is unconstitutional during a time when the nation is a peace.22


23. Section 525 reads as follows:

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

24. The latter portion of section 525 concerning redemption was not a part of the Act of 1940, but was added by the amendments of Oct. 6, 1942. 56 Stat. 770 (1942). See note 23 supra for text of the section.

25. 2 Paton, Titles § 563 n.66 (2d ed. 1957).

26. 282 Fed. 589, 591 (8th Cir. 1922).
business, or agricultural purposes) were rejected by the United States Supreme Court in *Le Maistre v. Leffers* where it held that:

The two sections . . . supplement each other. Section 500 [50 U.S.C. APP. § 500], applicable to restricted types of real property, gives greater protection than § 205 [50 U.S.C. APP. § 525]. It restrains the sale for taxes or assessments of specified types of real property except upon leave of court and prescribes for them a specified time within which the right to redeem may be exercised if the property is sold. Section 205 [50 U.S.C. APP. § 525] extends in terms to all lands and only tolls the time for redemption for the period of military service.

The Supreme Court also held in the *Le Maistre* case that the application of section 525 was not limited, as to redemption from tax sales, to those states having statutes which pass title after tax sale subject to defeasance by redemption, but was also applicable under the Florida statute which provided that issuance of the tax deed passed title and ended the period of redemption. The Florida statute provided that the holder of a certificate of sale could apply for a tax deed after two years from the sale. In the subsequent case of *Burke v. O'Brien*, the Florida supreme court held that certain tax deeds were void and set them aside as having been issued prematurely, since that part of the two-year period during which the plaintiff was in service could not be counted against him. The same result was reached in the *Margraf* case under a California statute providing that issuance of a tax deed by the state terminates the period of redemption. The court held that the effect of the act was to preclude the termination of an existing right of redemption so long as the holder thereof is in military service.

Using this approach, that the act creates no new rights but precludes the termination of any existing rights, the Missouri supreme court denied relief under the act to a serviceman who claimed under an unacknowledged, unrecorded deed, in the case of *Godwin v. Gerling*. The court held that the serviceman was not even the equitable owner, but only had an equitable claim against one of the record owners personally, which did not bring him under the coverage of the act which protects the soldier's ownership in land. This was a fair and equitable result upon the facts, but its holding as to the rights of one claiming under an unacknowledged, unrecorded deed was contrary to what was thought to be the law in Missouri.

The way in which the act precludes the termination of an existing right is to suspend the running of periods of limitation for the period of military service. That part of military service occurring after October 6, 1942, may not be counted in computing the periods of redemption. This suspension has the effect of amending state statutes to give additional time for redemption. The suspension is self-
executing. It is not merely directory or permissive, but is imperatively controlling, and automatically extends the period allowed for redemption or assertion of rights in all cases coming with in its terms.

Patton makes the following comment on the act:

The moratoria created by this act in favor of persons in the military service of the United States has affected the conclusiveness of all titles based upon official sales since October 17, 1940. So long as the act remains in force no part of the period of military service subsequent to October 6, 1942, is to be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

As noted earlier, the act in its present form remains in force until it is changed by a subsequent act of Congress.

Although there was much merit in the original purpose and effect of the act—to promote national defense by helping those who were uprooted by military service—its long-continued extension has been undesirable, and current applications of the act reach a result surely never intended by Congress. In Burden v. Traister, the New York supreme court allowed a career soldier to redeem over twelve years after forfeiture and specifically rejected the argument that a career military man should not have the benefit of the act. The court said that since petitioner entered service in 1943, at the height of the emergency, he was unquestionably among the class the act was designed to protect, and it was unwilling to deny relief in 1955, just because he had chosen to remain in service.

The method used in the act to protect interests of servicemen is automatic, and because it has been in force so long (nearly 18 years) it creates great potential title difficulties. These defects are serious because they are not cured by adverse possession as are most title defects. The present act does not protect according to merit. It protects those pursuing a certain occupation—military service.

The question remains as to how we shall deal with the problems created by the Soldiers' and Sailors' Civil Relief Act. Patton points out that "the title standards of several bar associations treat the possibility of divesture of the record title by reason of military service as being too remote to affect marketability." This procedure may seem to be sound in view of the relatively small number of cases which have arisen. But the weakness of this attempted solution is made apparent from a consideration of

34. 2 Patton, Titles § 591 (2d ed. 1957).
35. 3 Misc. 2d 928, 933, 148 N.Y.S.2d 60, 65 (Sup. Ct. 1955).
36. 2 Patton, op. cit. supra note 34 § 591, at 528.
the cases which have arisen under the act. Where title is affected by the act, the consequences are usually severe and inequitable, and future cases promise to be even more harsh. It would seem to be better procedure for the purchaser to require the abstract of title to land which has been the subject of an official sale since October 17, 1940, to show that the holders of any right of redemption were not in military service. If it is found that they were in military service at the time they had a right of redemption, a careful investigation should be made to determine that they are no longer protected by the act, and if this is questionable, quit-claim deeds should be obtained from them.

The only effective solution to the title problems created by the long-continued effectiveness of the Soldiers' and Sailors' Civil Relief Act will be for Congress to amend it so as to eliminate automatic relief to all servicemen for an indefinite period. Except as to the temporary periods of active hostilities, the act should protect only those persons whose ability to meet their obligations or protect their rights has been adversely affected to a substantial degree by reason of being uprooted by military service. This end might be attained by giving state courts discretionary power to extend or withhold relief, as is already the case with many of the provisions of the act. Perhaps a more effective way to correct the problem would be for Congress periodically to terminate protection under sections 525 and 560(3) of the act, allowing suitable grace periods before the protection is terminated; such a provision could be self-executing and would not require affirmative court action. In this manner those who deserve the protection of the act would have it for reasonable periods. Such an amendment would remove the present drastic provision which automatically suspends the running of periods of limitation for the entire period of military service, and defects in title caused by military service could be cured by adverse possession.

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37. In each of the cases listed below an action was maintained after the normal period of limitation had run. Unless otherwise indicated, this resulted from an application of either section 525 or section 560, or both, of the Soldiers’ and Sailors’ Civil Relief Act.

Land redeemed from tax lien foreclosure: Burke v. O’Brien, supra note 29; Burden v. Traister, supra note 35.


County Collector enjoined from selling land deeded to the state for nonpayment of taxes 22 years earlier, where petitioner was in military service and the statute provided sale by the state terminates the indefinite right to redeem: Margraf v. County of Los Angeles, 144 Cal. App. 2d 647, 301 P.2d 490 (Dist. Ct. App. 1956).

Quiet title action maintained against the serviceman under that part of section 525 which suspends the running of limitations on actions by or against the serviceman: Kasner v. Ashburn, 200 Okla. 256, 192 P.2d 181 (Okla. 1947).

Land redeemed from mortgage foreclosure: Peace v. Bullock, 252 Ala. 155, 40 So. 2d 82 (1949); Illinois Nat’l Bank v. Gwinn, 390 Ill. 345, 61 N.E.2d 249 (1945) (serviceman was beneficial owner of land held in trust for him).


Serviceman allowed to intervene to set aside tax sale for irregularities after expiration of one year period allowed by Mechanic’s lien claimed and foreclosed: Published by University of Missouri School of Law Scholarship Repository, 1959
SURVIVORSHIP AFTER JOINT TENANTS EXECUTE CONTRACT FOR SALE OF LAND*

A possible danger to land titles has been brought to light by the doctrine expounded in Buford v. Dahlke and In re Baker's Estate. The facts of the two cases are almost identical. Husband and wife (hereafter referred to as H and W, respectively) owners of a certain tract of land as joint tenants, entered into a contract to convey this realty. While the contract was still executory, H died. The question was whether the heirs of H were entitled to a share in the purchase price. Both courts held that the heirs of H were entitled to share in the purchase price with W. They reasoned that the contract to convey entered into by H and W reflected a severance of the joint tenancy with right of survivorship and converted it into a tenancy in common without right of survivorship. Therefore, when H died his undivided one-half interest in the land descended to his heirs, who are now entitled to a share in the purchase money.

The most important aspect of these cases is not that H's heirs were given a share of the purchase money. Rather, what is important is that under this doctrine the surviving tenant does not survive to all right, title, and interest in the land; and therefore the survivor cannot effectively convey a title to the purchaser that is either marketable of record or good in fact. This being so, the stability of land titles in Missouri which rest upon the conveyance by a surviving joint tenant in the type of case under consideration depends upon whether the Missouri supreme court would follow the Buford and Baker cases or would reject the doctrine of these cases.

A joint tenancy exists where an estate in property, real or personal, is held per my et per tout by the joint tenants. The essential elements of a joint tenancy are the four unities of interest, title, time, and possession. This means that the tenants must have the same interests both as to the share of the common property and as to the period of duration of the interest of each; that the titles of all the tenants must be derived from one instrument; that the tenants must have acquired their estates at the same time; and that the tenants must have equal rights to

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Statutory period limited for substitution of parties held extended by sections 521, 524, and 525 of the act; Shire v. Superior Court, 63, Ariz. 420, 162 P.2d 909 (1945).

Partition proceeding reopened because section 520 of the act (concerning non-appearance of serviceman at proceedings) not complied with: Mitchell v. Richardson, 187 Tenn. 189, 213 S.W.2d 111 (1948).

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*The basic research for this comment was undertaken by four students in the University of Missouri School of Law: Charles E. Brown, Marion F. Wasinger, John E. Luther, and Ted M. Henson, Jr. The writer, Mr. Henson, here acknowledges his indebtedness to Messrs. Brown, Wasinger, and Luther.


possession. There can be no joint tenancy at common law if one of these unities is missing.

The most important incident of a joint tenancy is the right of survivorship. This right of survivorship means that upon the death of one of the joint tenants the entire estate continues in the surviving joint tenant, and no interest in the estate passes to the heirs or devisees of the deceased tenant.\(^3\)

This right of survivorship is of course extinguished if the joint tenancy is terminated otherwise than by the death of a joint tenant.\(^4\) If there is such a termination, the tenants will then hold as tenants in common as long as the unity of possession remains, for unity of possession is all that is required for a tenancy in common. As tenants in common, each tenant is the owner of an undivided interest in the whole estate, and upon his death his undivided interest passes to his heirs or devisees. There is a severance or termination when a joint tenant conveys his interest to a stranger,\(^5\) because there is no unity of time and title between the stranger and the remaining tenant. It has also been held that a contract by one joint tenant to convey his interest to a third person acts as a severance.\(^6\) This is well settled in equity because of the equitable maxim that equity regards as done what in good conscience ought to be done. In addition, joint tenants by their mutual agreement may sever their joint tenancy.\(^7\) And in at least one case a court has held that a conveyance by all the joint tenants "destroys" the joint tenancy.\(^8\)

That these acts by some or all of the tenants effect a severance has never been seriously questioned. The difficulty comes when the foregoing rules of law are applied to the facts of the Buford and Baker cases. Does it follow that a contract to convey by all the joint tenants severs the joint tenancy? The Nebraska and Iowa supreme courts answered this question in the affirmative.

The Supreme Court of Nebraska in the Buford case believed that there was a severance because the unities of title, interest, and possession had been destroyed by the contract of sale. This is so, said the court, because if a contract to convey by one joint tenant operates as a severance and if a conveyance by all the joint tenants destroys the joint tenancy, "it logically follows . . . that if all the joint tenants enter into a joint contract to sell the joint property . . . this destroys the joint tenancy in the realty. . . ."\(^9\) This severance occurs through the mysterious working of the doctrine of equitable conversion. The effect of equitable conversion on the unities is explained by the court:

The ownership of the real estate described in this case as such passed to the purchasers by the contract made by the owners and from that time

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4. For an extensive discussion of the whole problem of severance, see Annot., 129 A.L.R. 813 (1940).
8. Ball v. Mann, 88 Cal. App. 2d 695, 199 P.2d 706 (1948). This is but to state the obvious.
9. 158 Neb. at 45, 62 N.W.2d at 255.
forth the vendors had only the legal title as security for a debt and this they held as trustees. The interest the vendees acquired was real estate. The right conferred by the contract upon the vendors was personal property. The contract put the vendees in complete possession of the real estate. Their possession was adverse to any right of possession of the vendors. The vendees are in possession as owners and the vendors or their successors can never by their own volition alone terminate that possession or ownership. It is not convincing to contend that the joint tenancy continued when the tenants by their voluntary act deprived themselves of their unities of possession, interest, and title. They had neither title to the real estate, interest in, nor possession of it after the contract of sale was made. The contract of sale destroyed the joint tenancy of the vendors.10

The Iowa supreme court in the Baker case began its approach to the problem by noting that the "four unities" common law rule was not the law in Iowa. The law was rather that the intention of the parties should prevail. Having stated this to be the law in Iowa,11 the court ignored this proposition and proceeded to make an analysis comparable to that made in the Buford case. In fact the court purported to rely on the Buford case and concluded that if a severance occurs when one joint tenant contracts to convey, the same result must follow when both joint tenants enter into a contract of conveyance even though the vendors retain legal title as security. The court, it seems, overlooked the fact that the reason there is a severance where one of the two joint tenants conveys his interest in the property is that there is no unity of time and title between the stranger and the remaining tenant.12

If Iowa does not follow the four unities doctrine but instead looks to the parties' intention, it makes no difference whether a contract to convey by one or both joint tenants destroys some of the unities through the doctrine of equitable conversion since the intention of the parties is controlling anyway.

There is a vigorous dissent in the Baker case. There are also several law review articles which attack the doctrine of the Buford and Baker cases. This criticism is essentially twofold:

(1) If the intention of the parties to sever should control (as was initially stated by the court in the Baker case), then there should be no severance since there is an absence of any intention on the part of the parties to sever.

(2) If the issue of severance is to be decided on the basis of whether one or more unities were destroyed (the view ostensibly taken in the Buford case), there should be no severance because even though equitable conversion takes place their respective rights as joint tenants remain the same.

As to the first point, it would seem to go against the intention of the parties

10. Id. at 47, 62 N.W.2d at 257.
11. It seems that the law in Iowa, at the time the Baker case was decided, was that the intention of the parties should control. An unanimous court, ten years before the Baker case, said, "we are more in accord with the latter which holds that the rule as to the intention of the parties should prevail over the technical common law rules as to the creation of joint tenancies, and such we believe has been the trend of our decisions in this state." Switzer v. Pratt, 237 Iowa 788, 791-92, 23 N.W.2d 837, 839 (1946).
12. Gwinn v. Commissioner, supra note 5.

http://scholarship.law.missouri.edu/mlr/vol24/iss1/9
to say that a contract to convey by all the joint tenants operates as a severance. In Hayes' Estate, an Irish case, six sisters held land as joint tenants. All of the sisters joined in a contract to sell the property to a third party in exchange for stock. Two of the sisters died while the contract was still executory, and their successors contended they were entitled to a share in the stock on the ground that the contract effected a severance of the joint tenancy. The lower court held that an agreement to sell land entered into by all the joint tenants effected a severance of the joint tenancy. The High Court of Justice reversed this decision. In his opinion Campbell, C., observed:

In this case I can find no evidence of any intention on the part of the joint tenants to sever. At first I thought there might be some weight in the suggestion that by reason of their deliberate act in changing the subject-matter of the property from land into money, an inference might be drawn that severance was intended, as, generally speaking, money might reasonably be supposed to be held by the owners thereof in their respective shares and proportions. On the other hand, the purchase-money in this case is represented by stock, and there is no reason in the nature of things why joint tenants might not be equally well satisfied to hold the stock as joint property just in the same way as if, instead of selling the estate for money, they had exchanged it for other lands. . . .

This view of Campbell, C., that the joint tenants intended that the proceeds of the sale of realty were to represent the realty and were to be held in the same manner as the realty was held, finds support in the American authorities.

Another way to view the intention of the joint tenants in entering into a contract to sell can be found in Kurowski v. Retail Hardware Mut. Fire Ins. Co. of Minn. In this case H and W owned a certain lot as joint tenants. H and his son were partners in a mercantile business, and they agreed that the partnership would erect a building on the lot and that the partnership would be the owner of the lot. The building was erected and was used for partnership business for eight years. Just before the fire insurance with the defendant company was renewed the last time, W died intestate leaving several children. Subsequently, the partnership brought an action to recover a fire loss from the defendant insurance company. The insurance company defended on the ground that the partnership did not own the lot in fee simple as required by the policy. The theory of the defendant was that legal title did not vest in H by survivorship when W died because the partnership agreement and the acts pursuant thereto severed the joint tenancy. Therefore, when W died W and H held as tenants in common, and W's interest descended to her heirs. The court held that there was no severance by the partnership agreement or the acts pursuant thereto. Looking at H's actions as they appeared in the record, the court said:

Here the agreement . . . was not to transfer his interest to the partnership

13. 1 Ir. R. 103, 207 (1920).
15. Childs v. Childs, 293 Mass. 67, 199 N.E. 383 (1935); Allen v. Tate, 58 Miss. 585, (1881); In re Bramberry's Estate, 156 Pa. 628, 27 Atl. 405 (1893).
16. 203 Wis. 644, 234 N.W. 900 (1931).
but the entire property. This he could not do except on the assumption that he was or contemplated becoming the sole owner. If he assumed he was the sole owner, as he probably did, there was no idea of severance. And if he had the state of the title in mind and its legal effect . . . he must have contemplated survivorship as the only contingency that alone would enable him to carry out his agreement. We are unable to perceive why in equity the agreement should be held to effect a severance when the circumstances all indicate that such effect could not have been intended or contemplated.\(^\text{17}\)

This approach in looking to see what reasonable intention can be imputed to the party whose acts allegedly operated as a severance may be the most rational solution to this problem. If the court had wanted to, there is no reason it could not have held that there was a severance of the joint tenancy under the four unities doctrine. Such a result would follow under this doctrine on the ground that \(H\) had not only agreed to convey his interest to the partnership but had in fact conveyed it. It is submitted that there was more reason to say here that there was a severance than there was in the \textit{Buford} and \textit{Baker} cases. In the \textit{Kurowski} case the alleged acts of severance were committed by only one of the joint tenants, and this would tend to make the respective rights of the joint tenants dissimilar. In the Nebraska and Iowa cases the alleged acts of severance were committed by both parties thus preserving mutuality of rights between them. Also, in the \textit{Kurowski} case, one could argue that there was a conveyance by \(H\) of his interest in the land to the partnership. But in the \textit{Buford} and \textit{Baker} cases no conveyance was made by the joint tenants; all they did was enter into a contract of sale. The court in the \textit{Kurowski} case could not only have reached the same result as the Iowa and Nebraska courts; but could have done so on generally accepted principles. But this court did not concern itself with legal fictions. Instead the court reached what may properly be called a just result by imputing to \(H\) the kind of reasonable intention he would have had if he had been cognizant of the legal import of his acts.

Another case in which this same approach was used is \textit{In re De Witt's Will}\.\(^\text{18}\) \(H\) and \(W\), owners of land as tenants by the entirety, contracted to convey to a third party. \(H\) died. An action was brought by one of the co-executors of the will of \(H\) to recover one-half of the remainder of installments due under the land contract. The court held the contract for the sale of land did not sever the tenancy by the entirety, so that when \(H\) died \(W\) became entitled to the whole of the installments due under the contract. The court looked to the contract to discover what reasonable intention could be imputed to the parties. The contract read:

\begin{quote}
It is further understood and agreed that the parties of the first part \([H\text{ and } W]\) shall be under no obligation to return any payments made hereunder to the party of the second part, and \textit{all parties agree that in the event of default, that the payments so made shall be rent}.\(^\text{19}\) (Emphasis added.)
\end{quote}

The court found that the italicized expression was a sufficient basis to impute an intention to \(H\) and \(W\) that severance through equitable conversion should not take place.

\(^{17}\) Id. at 648, 234 N.W. at 901-02.  
\(^{19}\) Id. at 170, 114 N.Y.S.2d at 84.
There is no good reason why the reasonable intention of the parties, as it is imputed to them by the courts, should not be made the sole test for determining if a severance occurs, and there is good reason why the courts should make this intention controlling. First, it is the duty of the courts in all cases in which contracts are interpreted to follow as closely as practicable the manifested intentions of the parties and to give effect to those intentions. This is also the rule as to deeds. Second, there is a present tendency to let clear intention create survivorship even though the four unities are lacking. A fortiori, the same rule should be followed regarding the destruction of joint tenancies as is followed concerning the creation of these same tenancies. The wiser policy would seem to make both depend on what reasonable intention is imputed to the parties in the light of all of the facts and circumstances of the case as well as the relationship and situation of the parties. In the case of husband and wife, it would not be difficult to approximate what the parties most likely would have intended had they given the matter any thought.

Turning now to the second point of the criticism, it is submitted that even if the four unities doctrine is to apply the view taken in the Baker and Buford cases is still indefensible.

First, according to both courts, if there is a severance when one joint tenant enters into a contract to convey, the same result must follow when all joint tenants enter into a contract of conveyance even if they retain legal title to the land as security. This, it seems, is a classic non sequitur. It is well settled that a contract to convey by one joint tenant works a severance, but it does not follow that a contract to convey by all the joint tenants produces this same result unless the reason for the former result is equally applicable to the latter result. The reason for the former result is that when one tenant conveys his interest to a stranger there is no unity of time and title between the stranger and the tenant who remains and that in equity this process is regarded as having already occurred when the selling tenant and the stranger enter into the contract of conveyance because “equity regards as done that which in good conscience ought to be done.” Is this reason applicable to the case in which all joint tenants enter the contract to convey? It seems that it is not. It is not contemplated that a stranger will take the place of one of the tenants.

20. “... the primary and cardinal rule, which permeates and pervades the entire field of construction, is that the court should ascertain the intention of the parties and then give effect thereto unless it conflicts with some positive rule of law.” Cook v. Tide Water Associated Oil Co., 261 S.W.2d 415, 420 (Spr. Ct. App. 1955).

21. “The intention of the grantor, as gathered from the four corners of the instrument, is now the pole star of construction. That intention may be expressed anywhere in the instrument, and in any words, the simpler and plainer the better, that will impart it, and the court will enforce it no matter in what part of the instrument it is found.” Utter v. Sidman, 170 Mo. 284, 294, 70 S.W. 702, 705 (1902).


23. “In determining how the cotenants wish to hold the purchase price the courts should give due consideration to the way in which the land was owned. The tenancy, formed by husband and wife and subject to survivorship, should be viewed as an arrangement for holding wealth. When looked at in this manner the alteration in the form of that wealth should not affect the manner in which it is held. ... The close ties of the parties would bolster the inference that survivorship was intended.” 41 CORNELL L.Q. 154, 159-60 (1955).
The respective rights of the joint tenants remain mutual, and their relationship remains unimpaired. The unities of title, time, interest, and possession remain the same.

Second, according to the Nebraska court (presumably the Iowa court would agree), by the doctrine of equitable conversion when the joint tenants entered into the contract of sale the ownership of the real estate passed to the purchasers, the tenants had only bare legal title as security, the interest of the purchasers was realty, the contract put the purchasers into complete possession, and the tenants had deprived themselves of their unities of title, interest, and possession. All of this is said to destroy the joint tenancy. Should the doctrine of equitable conversion be said to effect such a result?

It is highly questionable if the doctrine of equitable conversion should have any application at all. It would seem in fact, in connection with this problem of severance, that equitable conversion is wholly misapplied. It has been well stated:

Equitable conversion is not a rule of law to be reasoned from, but a short hand way of describing the consequences of the rule that a land contract will be specifically enforced by a court of equity, and should only be applied where it will carry out the intention of the parties.\(^\text{24}\)

Such was the attitude of the Supreme Court of Illinois in *Watson v. Watson*.\(^\text{25}\) In that case, \(H\) and \(W\) were owners in joint tenancy of a certain piece of property. This they contracted to sell to one Stone. \(H\) died. \(W\) continued after \(H\)'s death to collect payments under the terms of the contract. A share in these payments was claimed by the administrator of \(H\)'s estate. The only possible theory, said the court, which would support the administrator’s contention was that through the doctrine of equitable conversion the payments would be treated in administration as personalty. But equitable conversion, said the court, “would have no application on these facts to divest the surviving joint tenant of her rights.”\(^\text{26}\) There can be no doubt that the doctrine of equitable conversion may be appropriately applied in many situations. For example, when a testator devises his land in trust and directs that after his death his land be sold and the money distributed to certain beneficiaries, the interests of the beneficiaries are in personalty and not in realty.\(^\text{27}\) Also, equitable conversion has been applied to give the vendee all benefits attaching to the property and to subject him to all losses which may befall the land while the contract is executory.\(^\text{28}\) These are familiar equitable principles, which are recognized almost universally. But the use of equitable conversion in connection with destruction of joint tenancies when all tenants enter a joint contract to convey is a novel idea, indeed. It may well be concluded that an extension of such a fiction into this sphere of the law is inappropriate and unwarranted unless good reasons exist for such an extension. There are no good reasons for such an extension, or at least none have

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24. Id. at 155-56.
25. 5 Ill. 2d 528, 126 N.E.2d 220 (1955).
26. Id. at 533, 126 N.E.2d at 224.
been offered. And there is a good reason why such an extension should not be made. Equitable conversion “is not a fixed rule of law but a mere fiction of equity designed to effectuate the obvious intention of the parties and to promote justice.”

It follows that when the doctrine of equitable conversion would defeat the intention of the parties, it should not be used.

In In re Maguire’s Estate, a New York case, H and W acquired property as tenants by the entirety. In February H and W entered into a contract for the sale of the property. On the signing of the contract H received a deposit with the balance to be paid in April. W died in March. In April H had executed and delivered a deed to the purchaser and received the balance of the purchase money due. Six years later H died testate. The administratrix of W’s estate claimed one-half of the net amount received by H on the sale. The surrogate court found against the administratrix. The court was of the opinion that a conversion occurred when the contract was signed, which converted the tenancy by the entirety into a tenancy in common. But the proceeds were not to be held equally if the facts showed that equitably they should hold different shares. H had furnished the primary purchase price, and there was no evidence that he intended to give any part to W. Thus, according to the court, the proceeds of the contract were the sole property of H.

The appellate division took a different view. This court found that there was no necessity for invoking the doctrine of equitable conversion. This was because a surviving tenant by the entirety becomes sole owner, not because he succeeds to any interest of the deceased tenant, but because of the original grant to him as one of the tenants by the entirety. “To invoke it [equitable conversion] would . . . ignore the intention of the parties at the time they acquired the property.” But there is dictum that the court would hold survivorship was terminated once the contract of sale had been executed by delivery of a deed. Possibly a sounder basis upon which this case could have been decided would be what the intention of H and W was at the time they signed the contract of sale. Instead the court looked to the parties’ intention at the time they acquired the property. Nevertheless, the court was unwilling to allow the workings of any legal fiction to disturb the result it conceived to be intended by the parties.

Another case in which a court refused on this same ground to apply the doctrine of equitable conversion is Detroit & Security Trust Co. v. Kramer. In this case, H and W, owners of two parcels of land as tenants by the entirety, contracted to convey the land. W died. H received the balance due on the contracts. The heirs of W’s estate sought to recover one-half of this money paid to H. The trial court decreed that H as surviving tenant was entitled to all the purchase price unpaid on these contracts at the time of W’s death. The Supreme Court of Michigan affirmed the lower court’s decree and rejected the idea that equitable conversion should apply:

To hold in this case that on account of the equitable doctrine of conversion the respective rights of survivorship between Mr. and Mrs. Kramer

30. Ibid.
31. Ibid. at 339, 296 N.Y. Supp. at 532.
[H and W] were terminated by the execution of executory contracts to sell, is to nullify the settled plan for the disposition of their properties which they deliberately adopted without there being the slightest proof of any intention or desire on the part of either to so do. . . .

We think it conclusively appears in this record that Mr. and Mrs. Kramer so arranged their respective properties that in effect it amounted to a contractual understanding that each should take and hold a right of survivorship in the other's property. . . . If Mrs. Kramer by will had left all her real estate to her surviving husband, the court would hold it to be its plain duty to carry into effect the obvious intent of the testatrix as the same appeared in her last will and testament. It is equally the duty of the court to give the force and effect to the deeds of Mr. and Mrs. Kramer whereby they created each in the other a right of survivorship.33

These, then, are the two principal criticisms made against the doctrine of the Buford and Baker cases. But, these two arguments do not exhaust all the adverse criticisms of these cases. Another reason is that the weight of authority (if such a term is permissible in this relatively uncharted area of the law) is decidedly against the result reached in the Buford and Baker cases.34

There is also the matter of unnecessarily jeopardizing land titles. Concerning the doctrine of the Buford and Baker cases, it has been said: "The plain holding—relating to the purchase price—will create great practical inconvenience; the clear implication—relating to title—is disastrous."35

33. Id. at 472-74, 226 N.W. at 235.

In some jurisdictions there is a rule that an estate by the entirety cannot exist in personal property. Annots., 8 A.L.R. 1017, 1022 (1920), 117 A.L.R. 915, 922 (1938). However, these jurisdictions need not adopt the rule that an executory contract to sell by tenants by the entirety severs their tenancy ipso facto. As long as the contract is executory, the tenants still have title to the land, even if the title is only held as security. Therefore, if one of the tenants dies before closing date, the surviving tenant should survive to all right, title, and interest in the land. Thus, a court could consistently apply the rule that there can be no tenancy by the entirety in personalty and still repudiate the doctrine of the Buford and Baker cases. The Michigan, New York, and Wisconsin courts follow the rule that there can be no tenancy by the entirety in personalty. Scholten v. Scholten, 238 Mich. 679, 214 N.W. 320 (1927); In re Blumenthal's Estate, 236 N.Y. 448, 141 N.E. 911 (1923); Aaby v. Kaapanger (Citizens Nat'l Bank), 197 Wis. 56, 221 N.W. 417 (1928). These same courts reject the doctrine of the Buford and Baker cases. Detroit & Security Trust Co. v. Kramer, supra note 32; In re Maguire's Estate, supra; Kurowski v. Retail Hardware Mut. Fire Ins. Co. of Minn., supra.

Certainly this doctrine of severance could make every Missouri title resting upon the conveyance of a surviving joint tenant doubtful. This is so because most contracts for the sale of land are not recorded and therefore an abstract of title will not show what contracts, if any, preceded a given conveyance; and, where the abstract shows a conveyance by a surviving joint tenant, there is no showing as to whether (1) the deceased tenant joined with the surviving tenant in making the contract of sale and then died, or whether (2) the deceased tenant died and subsequently the surviving tenant entered into the contract after he had already survived to all of the right, title, and interest in the land. The possibility of alternative (1) turning up would, it is submitted, be enough to make any Missouri title resting on such a conveyance of a surviving tenant unmarketable, and it is possible that such a title would not even be good in fact if the Missouri supreme court followed the Iowa and Nebraska courts.

Another practical difficulty arises when the joint tenants contract to sell their land to a purchaser and either the purchaser defaults or the contract is rescinded by the mutual assent of the parties. Under the doctrine of the Buford and Baker cases, it logically follows that the former joint tenants, having become tenants in common when the contract was entered into, would continue to hold as tenants in common. Therefore, if the tenants want to hold the land in joint tenancy again, it would probably be necessary for them to create a new joint tenancy by conveyances through a straw party or by a direct conveyance under section 442.025, Missouri Revised Statutes (1957 Supp.).

Typically, however, after a default or rescission the tenants will not realize that they now hold as tenants in common; they will not re-create a joint tenancy in themselves; and when one of the tenants dies, the deceased tenant's interest will not continue in the survivor. Thus will the tenants' intention be effectively frustrated without their knowing it. Furthermore, this will not appear in the usual abstract of title.

The Missouri lawyer, in drafting instruments for his clients, may want to steer clear of this possible pitfall. How he can do this has been well expressed by the late Stuart P. Dobbs, whose advice to Utah lawyers is equally applicable to Missouri lawyers:

Courts do not usually apply fictions to determine property rights except where the transactions themselves do not speak with authority as to the intent of the parties. A clause, stating in plain English that the sellers are to be joint tenants in the proceeds of the sale, and in the title, if the sale fails to become effective, would almost certainly be given effect. . .

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36. Of course, a court might hold that upon termination of the contract the status quo is restored for all purposes including the joint tenancy.