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**Recent Cases**

**EQUITY—EQUITABLE CONVERSION BY CONTRACT—RISK OF LOSS**

*Skelly Oil Company v. Ashmore*[^1]

The plaintiff, Skelly Oil Co., entered into a written contract with the defendant Ashmore for the sale of the latter's realty as a prospective service station site. The contract price was $20,000. The contract covered "the buildings, driveways, and all construction equipment thereon." It was plaintiff's intention to raze the buildings in order to make way for new structures.

After the making of the contract, but before the agreed closing date, the principal building was destroyed by fire, without fault of either party. There was no provision in the contract, which had been drawn by Skelly's legal department, covering risk of loss. The building was covered by fire insurance to the extent of $10,000, which amount was recovered by the insured (defendant-vendor).

Plaintiff claimed the right to these proceeds by virtue of the contract of sale.[^2] Defendant disagreed, and refused to deliver the deed under plaintiff's altered terms. Plaintiff brought suit for specific performance, with an abatement in the purchase price equal to the amount received by the defendant on the fire insurance policy. The trial court found for the plaintiff. Vendor appealed. *Held:* Judgment for plaintiff—vendor affirmed.

The case raises the question whether, after the execution of a contract of sale of realty, but before the closing date, a portion of the subject matter is destroyed, equitable conversion can be said to have shifted the burden of loss to the vendee. A distinct, but related, question is which party should be the recipient of the insurance proceeds.

*The Rule of Paine v. Meller*

As to the first question, *Paine v. Meller*[^3] has long been thought to state the majority American view.[^4] Under the rule of this case, a conversion of land into

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[^1]: 365 S.W.2d 582 (Mo. 1963).
[^2]: Plaintiff informed defendant he was relying on Standard Oil Co. v. Dye, 223 Mo. App. 926, 20 S.W.2d 946 (Spr. Ct. App. 1929), see note 39 infra.
[^4]: 4. Loventhal v. Home Ins. Co., 112 Ala. 108, 20 So. 419 (1895); Roach v. Richardson, 84 Ark. 37, 104 S.W. 538 (1907); Felt v. Morse, 80 Fla. 154, 85 So. 636 (1920); Phinizy v. Guernsey, 111 Ga. 346, 36 S.E. 796 (1900); Thompson v. Norton, 14 Ind. 187 (1860); O'Brien v. Paulsen, 192 Iowa 1351, 186 N.W. 440 (1922); Godfrey v. Alcorn, 215 Ky. 465, 284 S.W. 1094 (1926); Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582 (1869); Skinner & Sons' Shipbuilding & Dry-Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900); Cetkowski v. Knutson, 163 Minn. (641)
money, and money into land, is said to have taken place at the time of the execution of the contract of sale, the vendee thus being regarded as the equitable owner of the land and the vendor, equitable owner of the purchase amount. Since the vendee is regarded as equitable owner of the land, a natural consequence of the doctrine is to place the risk of loss on the vendee, notwithstanding the fact that the vendor may still be in possession.

The reason for the rule is often said to rest on the maxim that equity regards what ought to be done, as done. As with most maxims when used to explain the result in a complex situation, the attempted application here is open to the criticism of oversimplification, or a priori reasoning to support a result.

A better explanation would seem to be that equitable conversion is applied because, in equity, the vendee is regarded as the substantial owner of the land from the time of the making of the contract. The vendor has evidenced his intention to give up, and the vendee, to take, the land in question. Thus, during the period between execution and closing, when the abstract of title is being brought up to

492, 204 N.W. 528 (1925); McGinley v. Forrest, 107 Neb. 309, 186 N.W. 74 (1921); Coolidge & Sickler, Inc. v. Regn, 7 N.J. 93, 80 A.2d 554 (1951); Gallicchio v. Jarzla 18 N.J. Super. 206, 86 A.2d 820 (1952); Re Sermons's Land, 182 N.C. 122, 108 S.E. 497 (1921); Woodward v. McCollum, 16 N.D. 42, 111 N.W. 623 (1907); Oak Bldg. & Roofing Co. v. Susor, 32 Ohio App. 66, 166 N.E. 908 (1929); Dunn v. Yakish, 10 Okla. 388, 61 Pac. 926 (1900); Spratt v. Greenfield, 279 Pa. 437, 124 Atl. 126 (1924); Brakhage v. Tracy, 13 S.D. 343, 83 N.W. 363 (1900); Maudru v. Humphreys, 83 W. Va. 307, 98 S.E. 259 (1919); Wetzler v. Duffy, 78 Wis. 170, 47 N.W. 184 (1890).

5. To the effect that Paine v. Meller, supra note 3, does not actually stand for so broad a proposition, see Hermann, The Doctrine of Equitable Conversion: I. Conversion by Contract, 12 De Paul L. Rev. 1, 10-12 (1962).

Lord Elden, in Paine v. Meller, supra note 3, rejected the dictum of Stent v. Bailis, 2 P. Wms. 217 (1724), where it was stated: “If I should buy a house, and before such time as by the articles I am to pay for the same, the house be burnt down by the casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again.”

6. This rule has been criticized for the reason that, it is said, the vendor in possession can better protect the premises from harm. This argument fails to note that if the fire is caused, or allowed to occur, by the negligence of the vendor, the loss falls on him even under the majority rule.

7. “It seems clear ... that the courts do not base the rule on the doctrine of equitable conversion. ... The rule is based on the principle that the contract gives to the purchaser in fact and substance the real ownership of the land, the vendor retaining in his own right possession, rents and profits for the brief interval before performance, and the legal title as security for the purchase money. ... The question must turn on whether the purchaser does become in fact and substance the dominant owner of the property ... so that the risk of loss should fall on him because the dominant ownership is in him.” Walsh, Equity 440 (1930). But see Keener, The Burden of Loss as an Incident of the Right to the Specific Performance of a Contract, 1 Colum. L. Rev. 1, 8 (1901): “The phrase equitable conversion, it is submitted, is a form of speech used to express a result which has been reached in a certain class of cases in the interest of justice. It does not lead to, but represents results reached. It is just in a given case that realty should be treated as if it were personality, or personality as if it were realty, and a court of equity so treats it. The reason why it is just will vary with the facts presented. It may be because of the intention of the parties or for other reasons.”
date, and the details of financing are being worked out, it is reasonable to give both the benefits and burdens of ownership to the vendee.8

An oft heard objection to the application of the majority rule of Paine v. Meller is that it rests on a "legal fiction."9 There can be little doubt that equitable conversion is a fiction, since the land is not really transformed into money, or vice versa. However, to use this as a criticism of the result reached under Paine v. Meller seems to indicate a misunderstanding of the doctrine.

Equitable conversion takes place at the time of the execution of the contract.10 However, for this conversion ever to be given any legal effect, there must be a specifically enforceable contract "at the very time when the court is called upon to perform it."11 Since specific performance is always a discretionary remedy,12 a court of equity can merely refuse to grant it when to do so would cause inequitable results. Thus, the mere fact we are using a fiction to express the result reached does not mean that we should ever have an inequitable decision. It is, then, only when the granting of specific performance would not cause inequitable results, because of the conversion which is said to have taken place, that the remedy should be allowed.

Once we have determined, under the doctrine of Paine v. Meller, that the risk of loss is on the vendee, the question becomes: Who is to receive the proceeds of a recovery on a fire insurance policy which the vendor had taken out prior to the execution of the contract of sale? This was the question presented in Rayner v. Preston,13 and the court found for the vendor.14 The theory of the case was

8. Some of the benefits and burdens to the vendee are listed by Keener, supra note 7 at 3-4, as follows: "(1) The vendee can call for a conveyance of the property from a donee or purchaser with notice. (2) The interest of the vendee can be assigned or devised. (3) In the event of the vendee's death, his heir, not his personal representative, is entitled to a conveyance. (4) Under a devise by the vendee of his real estate, the interest of the vendee passes. (5) In jurisdictions where a wife is given dower in equitable estate, the widow of the vendee is entitled to dower. (6) The vendee has the right to require husband-like conduct of the vendor in the management of the estate. (7) The vendee is chargeable with the costs of improvements made by the vendor under compulsion of law. (8) The vendee is chargeable with taxes paid by the vendor beyond the value of the usufruct. (9) An estate which a vendor has contracted to sell will pass under a will to a devisee to whom the vendor has devised the estates held in trust by him. (10) A court of equity will not allow a widow to claim, as against the vendee, dower in land which the husband had, before his marriage, contracted to sell. (11) The property is no longer liable for the debts of the vendor."

9. Some legal writers refer to the so-called English rule as a legal fiction. It is well named. Legal fictions are the bane of the law. They should not be permitted to propagate in this state." Dissent in McGinley v. Forrest, 107 Neb. 309, 318, 186 N.W. 74, 78 (1921).

10. 19 AM. JUR. Equitable Conversion § 28 (1939). This point was apparently overlooked in Stone, Equitable Conversion by Contract, 13 COLUM. L. REV. 369, 386 (1913).

11. Stone, id. at 386. Contrast the author's approach on this point.


13. 18 CH. DIV. 1 (1881).

14. The companion case of Castellain v. Preston, 11 Q.B.D. 380 (1883), held that the vendor must return the insurance money to the insurer on the theory of subrogation.
that a contract of insurance does not run with the land; thus, even though equitable ownership passes to the vendee at the time of execution of the contract of sale, no interest in, or right to, the insurance proceeds is so transferred.\(^{15}\)

The considerable weight of American authority, however, has adopted the view of the dissenting judge in *Rayner v. Preston*.\(^{16}\) He said that the insurance money was an altered form of the *res* of which purchaser was equitable owner.\(^{17}\) The relationship between the parties was said to be that of trustee and *cestui que trust*.\(^{18}\)

**The Massachusetts Rule**

A strong minority position is that first pronounced by the Massachusetts court.\(^{19}\) Courts following this view hold that where buildings on property covered in the contract of sale are destroyed before the time for performance of the contract, the loss falls on the vendor.\(^{20}\)

15. "The majority of the court in Rayner v. Preston were sound in principle. Insurance is a mere personal contract to pay a sum of money by way of indemnity to protect the interest of the insured. ... Both in the forum and the market place it is known that the insurance runs to the individual insured and not with the land. The vendor has a beneficial interest to protect, i.e., his own. ... Plaintiff (vendee) may not have the insurance money collected by defendant (vendor). It is not a part of the *res* bargained for and no trust relation exists in regard to it." Pound, J., in Brownell v. Board of Education, 239 N.Y. 369, 374, 146 N.E. 630, 632 (1925).

16. 2 Chafee and Simpson, Cases on Equity 970-71 (1934). The cases are collected in 64 A.L.R.2d 1402 (1959). The English rule was changed by statute to provide that the purchaser might claim the insurance money received by the vendor. 15 Geo. V. c. 20, § 47 (1925).

17. "The money is considered a substitute for the insured property, and is held by the vendor under precisely the same duties and obligations as he had held the building. This view seems much more equitable and it is in harmony with the general principles controlling the majority view (Paine v. Meller) of the main question, where the vendor is so often treated as trustee for the purchaser." Vanneman, Risk of Loss, in Equity, Between the Date of Contract to Sell Real Estate and Transfer of Title, 8 Minn. L. Rev. 127, 138 (1924).

18. "The result reached by these English cases (Rayner and Castellain) seems unwise, unjust, and inequitable. ... The majority of the courts in this country avoid such results by means of a theory which is quite consistent with the view which places the risk of loss on the purchaser. It is submitted that the error was made in the case of Rayner v. Preston in denying the purchaser a right in the insurance contract." Vanneman, *supra* note 17 at 138-39. See also Vance, Vendee's Claim to Insurance Money Received by Vendor, 34 Yale L.J. 87 (1924); Simpson, Legislative Changes in the Law of Equitable Conversion by Contract: II, 44 Yale L.J. 754 (1935); and, Cribbet, Insurance and the Executory Contract for the Sale of Real Estate, 51 Ill. B.J. 124 (1962).


20. The cases are collected in 27 A.L.R.2d 454 (1953).
The rule is based on contract principles, and it is said that the contract must be construed as if there were an implied condition that the subject matter be in existence when the time for performance arrives.21 If the subject matter has ceased to exist on the closing date, each party is discharged from the contract.22

This rule has been praised by those writers who think it is more equitable to leave the risk on the vendor until the conveyance.23 It is considered the better position on another ground, i.e., it does away with the problem of determining who is to get the insurance proceeds. Since the vendor, under the Massachusetts Rule, retains the risk of loss, he is entitled to the insurance proceeds should such loss occur.24

**Possession as Determining Risk**

A third view which has found its way into the law is that of placing the risk on the party in possession.25 This view was first espoused by Professor Williston,26 and the acceptance by several courts of possession as the criterion of risk resulted in his drafting of the Uniform Vendor and Purchaser Risk Act.27 This act was subsequently approved by the Commission on Uniform Laws,28 and has now been passed by the legislatures of eight states.29

**Missouri Precedents**

The Missouri Courts have long followed the majority rule of *Paine v. Meller.*20 The first Missouri case, *Snyder v. Murdock,*21 was an action at law on two promissory notes given for land and fixtures. The fixtures were burned. The court, in giving judgment for the holder, stated the rule broadly:

21. See Anderson v. Yaworski, 120 Conn. 390, 181 Atl. 205 (1935), citing RESTATEMENT, CONTRACTS § 281, which states: “In promises for an agreed exchange, a promisor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject-matter of means of performance. . ." Note, however, comment c.: “After a contract to sell land on which there is a building, in some states and under some circumstances, the buyer is held bound to pay the price in spite of the destruction of building. . . . These cases, however, are not exceptions to the rule stated in the Section, since when recovery of the price is allowed, the result is based on the premise that the substantial incidents of ownership had already passed to the buyer before the destruction.”


24. *Id.* at 143.

25. Presumably, the theory is that the one in possession has the burden of taking due care of the property and guarding against loss by appropriate insurance.


28. 9c U.L.A. 313, 314 (§ 1).

29. These states are: California, Hawaii, Michigan, New York, North Carolina, Oregon, South Dakota, and Wisconsin.

30. See 4 Mo. L. Rev. 290 (1939).

31. 51 Mo. 175 (1872).
After an executory contract for the conveyance of real estate has been entered into, by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser.

If it burns up it is his loss, if it increases in value it is his gain. This is the settled equity doctrine, and is based upon the principle that in equity what is agreed to be done must be considered done.\(^32\)

In *Walker v. Owen*,\(^33\) the risk was again placed on the vendee. Here, however, the vendee had gone into possession prior to the building's destruction; and the fact of possession was emphasized by the court to take an oral contract to convey out of the Statute of Frauds.

In *Manning v. North British and Mercantile Insurance Co.*\(^34\) the Kansas City Court of Appeals held that the execution of a valid written contract transfers an equitable interest to the vendee. The court rejected the notion that possession in the vendee is required to perfect equitable ownership.

In *Ranck v. Wickwire*,\(^35\) the supreme court seemed to deviate from the theory of equitable conversion, holding, as the headnote correctly states, "where, before the submission to defendant of an abstract showing clear title in him and tendering a deed, things the contract for the exchange of lands required, a valuable dwelling house on plaintiff's lands burns by accident, while there is no depreciation in the value of defendant's property, and plaintiff offers nothing by way of reparation, he cannot have specific performance." The court cited no Missouri cases for this holding. It is interesting to note that in *Mahan v. The Home Insurance Co. of New York*,\(^36\) the Kansas City Court of Appeals said:

It is the rule in this state that after "a contract for the conveyance of real estate has been entered into, by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser. If it burns up it is his loss, if it increases in value it is his gain." *Snyder v. Murdock.* This is the view latter announced by the Supreme Court as shown in *Ranck v. Wickwire*, 255 Mo. 42, 61. (Emphasis ours.)\(^37\)

This same language was quoted with approval by the supreme court in *American Central Insurance Co. v. Kirby*.\(^38\)

The fact of the matter is that the *Ranck* case represents a tacit rejection of the theory of equitable conversion. This, however, is the sole exception to Missouri's adherence to the majority view, and this view was apparently so ingrained in Missouri law that the courts have failed to recognize it as a deviation.

*Standard Oil Co. v. Dye*\(^39\) is a case similar on its facts to the principal case. The plaintiff had exercised an option to purchase realty from defendant. There

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32. Id. at 177.
33. 79 Mo. 563 (1883). See also Ingram v. Kiewit, 331 S.W.2d 681 (K.C. Mo. App. 1960) where vendee was in possession.
35. 255 Mo. 42, 164 S.W. 460 (1914).
37. Id. at 593.
38. 294 S.W.2d 556, 560 (1956).
was a building on the property which plaintiff wished removed, and on which defendant carried insurance. Before closing, the building was destroyed by fire, and defendant collected the insurance proceeds. In an action by the purchaser to recover the insurance proceeds, the court of appeals, following the dissent in Rayner v. Preston, 40 gave judgment for plaintiff. 41

In the instant case, the majority of the court, notwithstanding the precedents discussed supra, allegedly adopted the Massachusetts rule of Libman v. Levenson. 42 The court states:

We do not agree that we should adopt the arbitrary rule of Paine v. Meller, supra, and Standard Oil Co. v. Dye, supra, that there is equitable conversion from the time of making a contract for sale and purchase of land and that the risk of loss from destruction of buildings or other substantial part of the property is from that moment on the purchaser. . . . Instead we believe the Massachusetts rule is the proper rule. . . . The reason for the Massachusetts rule is that specific performance is based on what is equitable; and it is not equitable to make a vendee pay the vendor for something the vendor cannot give him. 43

But the Massachusetts rule, as we have seen, 44 leaves the risk of loss on the vendor. Thus, also, the vendor is entitled to the insurance proceeds. The Missouri court, on the other hand, in purporting to adopt the Massachusetts rule has, in effect, placed the risk of loss on the vendee, since the vendee was awarded the entire amount of the insurance proceeds in the form of an abatement of the purchase price.

The court quotes from Libman v. Levenson, saying:

When the value of the buildings constitutes a large part of the total value of the estate . . . the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for conveyance to be made, the buildings are destroyed by fire. . . . The contract is no longer binding on either party. . . . If the change in the value

41. The dissenting opinion in Skelty states: "... adapting this doctrine (Paine v. Meller) and following a majority opinion in another English case, Rayner v. Preston, . . . the rule as stated in the Dye case has evolved." (emphasis added) 365 S.W.2d at 592. See also In Re Savings Trust Co. v. Skain, 345 Mo. 46, 53, 131 S.W.2d 566 (1939): "The relation of vendor and purchaser exists as soon as a contract for the sale and purchase of land is entered into. Equity regards the purchaser as the owner and the vendor as holding the legal title in trust for him. . . . This equitable principle may be invoked in actions at law . . . and that even though the purchaser has not been put in possession." (Authorities omitted.) This language has been approved in: Hamilton v. Linn, 355 Mo. 1178, 1180, 200 S.W.2d 69, 70 (1947); Spitcaufsky v. Hatten, 353 Mo. 94, 134, 182 S.W.2d 86, 110 (1944); Hernandez v. Prieto, 349 Mo. 658, 661, 162 S.W.2d 829, 831 (1942); State v. Baumann, 348 Mo. 164, 168, 153 S.W.2d 31, 34 (1941).
43. 365 S.W.2d at 587-89.
44. Supra, note 24.
of the estate is not great, or if it appears that the buildings did not constitute so material a part of the estate to be conveyed as to result in an annulment of the contract, specific performance may be decreed, "with compensation for any breach of agreement, or relief may be given in damages." (Court's emphasis)\(^45\)

Thus, under this language, a vendor can get specific performance only if the breach is not substantial. Similarly, because of the mutuality requirement, a vendee cannot get specific performance if there has been a material breach.

Apparently, then, by awarding the amount of the insurance recovery to the vendee, the court is saying that the vendor has breached his agreement to the extent of $10,000; and, yet, this is seemingly not, in the court's view, a substantial breach. This seems questionable when we consider that the contract price was only twice this amount.

A further criticism of the case would seem to be that the court has, without necessity, disregarded the principle of stare decisis. Had the court accepted the Paine v. Meller approach, it would have reached exactly the same result that it did, in fact, reach. And, under Standard Oil Co. v. Dye,\(^46\) the insurance proceeds would have gone to the vendee.

With this in mind, it seems doubly difficult to justify this sudden acceptance of the "Massachusetts Rule." Although the court specifically rejects the Standard Oil Co. case as acceptable precedent, it fails even to discuss the supreme court cases which seem clearly contra to the Massachusetts view. We are thus left in doubt as to whether Snyder v. Murdock,\(^47\) and the line of cases following Snyder, have been tacitly overruled by the principal case.\(^48\)

Judge Storckman, dissenting, suggests that the case be decided by a resort to general principles of equity. As applied here, he concludes that specific performance should be granted on condition that plaintiff-vendee pay the full $20,000 purchase amount, less any actual damage that it can show. Thus, he would reach, in this case, at least, the same result as would the Massachusetts Rule, when properly applied. As Judge Storckman suggests, whether the insurance proceeds are given to the vendor, or to the vendee, one party is receiving a windfall of $10,000.\(^49\)

Thus, possibly a more equitable approach might be to apportion the proceeds between the two parties. This has been done by Missouri courts in the case of a

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45. 365 S.W.2d at 589.
46. Supra, note 38.
47. 51 Mo. 175 (1872). See supra, note 31.
49. "[T]he problem . . . is which of them is to have the advantage of this piece of good fortune. Skelly contracted to pay $20,000 for the property. If it is awarded the $10,000 windfall, it will receive a $20,000 lot for $10,000. If the Ashmores retain the $10,000, they will in fact have realized $30,000 for a piece of property they have agreed to sell for $20,000." 365 S.W.2d at 591.
life tenant and remainderman, and a life tenant and reversioner. To so dispose of the matter would not conflict with the doctrine of Paine v. Meller, and would seem, in the writer's opinion, to most closely represent a fair result on both sides.

DONALD R. WILSON

PROCEDURE—DISCOVERY OF LIABILITY INSURANCE POLICY LIMITS

State ex rel. Bush v. Elliot

A boy nine years of age was allegedly injured, while riding his bicycle, as the result of a collision with the defendant Bush's car. Suit was filed and interrogatories were submitted to the defendant. One asked for the name of the defendant's liability insurer, and another requested that a copy of the insurance policy be attached to the answer. Defendant admitted disclosure of his insurer was proper for the purpose of jury examination, but objected to producing the policy. This, defendant argued, would reveal the policy limits and would be beyond the scope of applicable Missouri discovery rules. The trial judge overruled the objection, and defendant brought prohibition to prevent the trial judge from requiring disclosure of the policy limits. The Missouri Supreme Court, en banc, held that discovery of liability insurance policy limits is not available under the Missouri rules.

In denying the requested discovery, the supreme court relied heavily upon two propositions. First, the simple test for discovery in Missouri is whether the information sought "tends to prove an issue in the case"; it is not that the requested information might aid the inquiring party in preparing for trial. The issue before the trial court was the alleged negligence of the defendant, which his liability insurance neither tended to prove nor disprove. Second, the court found the Missouri statutory provisions for the preservation of the rights of a potential judgment creditor and for the application of liability insurance proceeds to the payment of a final judgment to be salutary and adequate for the protection of a successful plaintiff.

52. The theory would be that the vendee would receive the proportionate value of his equitable interest, which he has acquired by equitable conversion; the vendor would receive the value of his retained legal interest. Admittedly, some criteria would have to be worked out in order to determine the value of these interests.
53. This case is also noted in 39 N.D.L. Rev. 351 (1963), and 8 St. Louis U. L.J. 266 (1963).
1. 363 S.W.2d 631 (Mo. En Banc 1963).
2. Mo. R. Civ. P. 56.01, 57.01(b).
This was a case of first impression in Missouri, although it has been the subject of numerous decisions in other jurisdictions. The federal district courts have considered the question on so many occasions that one judge recently concluded it is now merely a matter of determining the school of thought which one considers to represent the proper interpretation of Federal Rule 26(b).

The controlling phrases of both the Missouri and the federal rules concerning such discovery are: "relevant to the subject matter involved in the pending action" and "reasonably calculated to lead to the discovery of admissible evidence." The first two federal cases to consider the pertinent language, as amended in 1948, were *Orgel v. McCurdy* and *Brackett v. Woodall Food Products, Inc.*, both of which permitted the discovery. The *Orgel* decision found that the inquiry was "made as to matters generally bearing on the issue," and the court in the *Brackett* case believed the tenor and purpose of state legislation regarding automobile financial responsibility made such insurance relevant.

The next federal case of *McClure v. Boeger* denied such recovery, and the battle was joined. Since the *McClure* decision, the issue has been litigated at least fifteen times in the federal district courts with substantially the same arguments. Proponents of such discovery contend it is "relevant to the subject matter" in light of Rule 1, which sets forth the purpose of the rules to be the "just, speedy, and inexpensive determination of every action." The purpose of the rules will thereby be served, because the plaintiff's knowledge of the insured's policy limits will promote out of court settlements. To the contrary, opponents of discovery reason that every argument to be made in favor of disclosure of liability

4. State ex rel. Cummings v. Witthaus, 219 S.W.2d 383 (Mo. En Banc 1949), allowed discovery, but is clearly distinguishable because the case also involved a question of agency, which the insurance policy tended to prove.
10. The Tennessee insurance law at that time was of the general type requiring proof of financial responsibility upon having an accident.
12. Cases cited supra note 5.
13. This question has never been decided by a federal appellate court.
limits can be made in every civil case to furnish the plaintiff with full information as to the defendant's personal wealth,15 further arguing that compromise settlements are not the aim of the discovery rules.16

The question is a close one and seems open to personal interpretation. Only four years after the Brackett decision, a different judge on the same court denied discovery of policy limits.17 Although the court attempted to distinguish the cases on the basis of punitive damages, two subsequent decisions18 by the same court leave no doubt that the Brackett case has been overruled. Even state courts and the federal courts located within that state do not always agree.19 Although it has never been held that state discovery rules are binding20 on the federal courts under Erie R. R. v. Thompkins,21 it might be thought that the construction of the same state financial responsibility laws would result in similar decisions.

Naturally, state court decisions are as varied22 as the federal courts', due to differently worded rules of discovery.23 South Dakota denies discovery under a rule which requires the information sought to "constitute or contain evidence material to any matter involved in the action."24 The California courts have allowed discovery both under their old rules of discovery25 and under their new rules, which are patterned after the federal rules.26 In allowing discovery, the

21. 304 U.S. 64 (1938).
court relied principally upon § 11580 of the California Insurance Code, which it construed to create a contractual relationship between the insurer and third parties negligently injured by the insured. Nevada later denied discovery even though its rules were patterned after California’s, because it had no similar provision in its insurance code. Illinois allows discovery under a rule which requires the subject to be “related to the merits of the matter in litigation.” In allowing discovery, the Illinois court expressed the opinion that litigation is a practical matter, and because the insurer is the real party in interest in such a suit, discovery should be permitted.

Apparently, the courts do not rely as much upon the precise language of the discovery rules or statutes in deciding the question as they do upon the basic issue of whether the plaintiff should be allowed to discover policy limits when it is clear that the same is not an issue in the case and is only for evaluation and settlement purposes. The number of decisions both allowing and denying discovery give no positive indication of either a majority view or a recent trend toward one position. However, the action of New Jersey in recently amending its discovery rules to expressly provide for discovery of liability limits may supply a key. Many courts may, in their cases of first impression, deny such discovery in the belief that if it is warranted, then the rules themselves should explicitly support such a conclusion.

RAY E. KLININGSMITH

PROPERTY—TITLE TO STOCK PURCHASED WITH FUNDS WITHDRAWN FROM JOINT BANK ACCOUNT

Pelsue v. Pelsue

Husband and Wife, hereafter H and W, opened a bank account entitled “Ed or Agnes Pelsue.” At least part of the funds placed in this account were originally the separate property of W. Before their marriage H had bought and sold corporate stocks, and after their marriage H continued to do so, presumably with W’s knowledge. The funds for some of these purchases were withdrawn from, and the proceeds from some of these sales were placed in, the parties’ joint bank account. Upon the discovery after H’s death that the stocks so purchased were in H’s individual name, W claimed that this fact had been unknown to her, and she as-

27. CAL. INS. CODE § 11580.
28. Supra note 27.
1. 367 S.W.2d 487 (Mo. 1963). The decision also involves other points not within the scope of this note.
serted ownership of the stocks by virtue of their having been purchased with funds from the joint bank account. \( H \) had left a will which evidently was unsatisfactory to \( W \) and she had filed a renunciation, thereby electing to take an undivided one-third interest in \( H \)'s estate. However, in this action \( W \) contended that these particular corporate stocks were owned by \( H \) and \( W \) as tenants by the entirety, and therefore that they were not a part of \( H \)'s estate, but were rather her sole property, as surviving cotenant. This contention was opposed by the executor of \( H \)'s estate, who of course was responsible for the conservation of \( H \)'s estate, and by \( H \)'s two children by a previous marriage, who presumably were beneficiaries under \( H \)'s will. Held, the entirety interests of \( H \) and \( W \) continued in the withdrawals from the joint bank account, and the stocks purchased therewith were, in equity, owned by \( H \) and \( W \) as tenants by the entirety, so that \( W \), as survivor, became the sole owner.

In a situation involving property with multiple owners, there is always an initial, and frequently perplexing, problem of classifying the legal interests of the cotenants. However, for present purposes, it will be assumed that the court's classification of the bank account as constituting a tenancy by the entirety was correct.\(^2\) Rather, the problem to be specifically dealt with is the respective interest of the cotenants in personal property purchased with funds withdrawn from such a bank account. And, since the right of survivorship is one of the principal inducements to the creation of a tenancy by the entirety (as well as a joint tenancy), it is not surprising to discover that most cases on this problem, including the principal case, arise upon the death of one of the cotenants.\(^3\) The surviving cotenant, of course, claims that such property is held under the same tenancy as the bank account and therefore that he is now the sole owner of the property.

In view of the undoubted popularity of bank accounts in the name of two or more persons, particularly a husband and wife, payable to either or the survivor, and in view of the legal effect given such accounts in Missouri,\(^4\) it is somewhat surprising that only a handful of reported cases in this state can be found.

The principal case quotes from two of these Missouri cases.\(^5\) Although the point is not discussed, the rulings in these two cases appear to be basically inconsistent on at least one point. The *Ambruster* case finds a presumption, albeit a

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2. On this problem see Evans, *Property—Estates by the Entirety in Joint Bank Account*, 8 Mo. L. Rev. 213 (1943), and Russell, *Cotenancies in Personal Property*, 19 J. Mo. Bar 70 (1963). Concerning the use of or instead of and in the account name "Ed or Agnes Pelsue," and the apparent failure to include other words expressing an intention as to the tenancy created, such as "payable to either or the survivor," see Longacre v. Knowles, 333 S.W.2d 67 (Mo. 1960), discussed in Fratcher, *Trusts and Succession in Missouri*, 25 Mo. L. Rev. 417, 417-419 (1960).

3. Of course the question can also appear in other contexts, such as upon a divorce or a suit by creditors of one spouse.

4. Section 362.470, RSMo 1959, is to the effect that cotenants of such accounts in a bank shall hold as joint tenants. Similar provisions relating to savings and loan associations and to trust companies are found in §§ 369.150 and 363.740, RSMo 1959, respectively. Also see § 301.195, RSMo 1959 relating to ownership of automobiles.

weak one, in favor of the proposition that the joint interests of the depositors follow withdrawals and attach to property, consisting in that case of stock certificates, purchased therewith. On the other hand, the Harrellson case, dealing with an automobile purchased in the husband's name with funds from a joint bank account with his wife, espouses the theory that the presumption should be that a withdrawal destroys the joint interests therein, where the withdrawal is partial and can reasonably be considered to be one which would be within the contemplation of the other cotenants.

As indicated above, this discrepancy is not discussed, much less resolved, in the principal case. Practically, however, the point may be relatively unimportant, since the Ambruster case indicates that the presumption in favor of the joint interests readily yields to proof of the real intentions of both parties. And, these real intentions may perhaps be implied from the fact that the withdrawal was partial and was one which could be considered to be within the contemplation of the cotenants, thus satisfying the criteria of the Harrellson decision.

Clearly, joint interests should not follow withdrawals, where one cotenant expressly consents to, or acquiesces in, the purchase of property by the other cotenant in the latter's sole name. But where no such express consent or acquiescence can be found nor be implied, the principal case indicates that property purchased with funds from an account held by the entireties will be impressed with the same ownership interests.

Several other states have tended to follow a rule similar to that of the principal case, although variations can be observed. California has apparently adopted the same rule as the principal case. In fact, the California rule has been described as "a rule of property that now must be followed." The New York courts have had occasion to deal with this type of problem often. Some of the New York decisions seem to apply the rule used in the principal case; however, other cases have indicated that the applicability of the rule may depend on whether one cotenant withdrew all or only a moiety of the account.

6. Harrellson v. Burks, supra note 5; Zahner v. Voelker, 11 S.W.2d 63 (St. L. Mo. App. 1928).
7. Feltz v. Pavlik, 257 S.W.2d 214 (St. L. Mo. App. 1953), in accord with the principal case and citing cases in New York, California, Oregon and Pennsylvania.
No distinction between withdrawal of more or less than a moiety of the account is found in the principal case, and it is probably safe to assume that no such mechanical formula will be used in the Missouri courts in future decisions on this question. Of course, the amount of the withdrawal, especially in relation to the total deposit, may be an important factor in determining the existence of an implied consent on the part of one cotenant for the other to appropriate some funds for his own use. While the principal case sheds little light on the question of the weight to be given various factors in determining such consent, the Ambruster case\textsuperscript{13} indicates that from a common sense view the very fact that each cotenant is given the right to make withdrawals would seem to imply permission to make personal appropriations of the funds for certain purposes from time to time.

Continuing with this common sense view of the matter, it would seem reasonable to suppose that each cotenant of a bank account in the name of a husband and wife assumes, and even expects, that the other cotenant will use funds in the account for necessary personal expenditures, as well as to purchase items for the family as a unit. With regard to such personal items, "it would seem forced and unnatural to say that the purchaser becomes a trustee for the other spouse as to a joint interest in the property."\textsuperscript{14} But, by the same token, it would seem reasonable to suppose that the cotenants do not contemplate withdrawals for investment purposes, unless the same interests attach to the new investment as existed in the bank account.

There is dictum to the effect that such items as a suit of clothes or jewelry will not be impressed with the same joint interests as existed in the bank account out of which the items were purchased.\textsuperscript{15} However, it is suggested that this categorization should not be considered conclusive. The court was apparently attempting to list items of a purely personal nature in which the other spouse would normally not even consider asserting any interest. But the court might have very little difficulty in reaching a result similar to that in the principal case in a situation where one spouse purchases valuable jewelry with funds from a joint bank account, since such jewelry could easily represent a considerable amount of money and might have been purchased as something of an investment.

What is the rule in regard to household furniture, books, musical instruments, or appliances? These items can represent a substantial expenditure, which is often taken from the spouses' joint bank account. There is apparently no reported authority in Missouri on this precise point, and in view of the statutory provisions giving the surviving spouse such items absolutely,\textsuperscript{16} it is likely that no such question will be litigated in the future, at least in the context of the principal case.

There is also an apparent lack of reported cases in Missouri concerning the ownership of various other items of personal property which might be purchased.

\textsuperscript{13} Ambruster v. Ambruster, supra note 5.
\textsuperscript{14} Id. at 72, 51 S.W.2d at 37.
\textsuperscript{15} Ambruster v. Ambruster, supra note 5.
\textsuperscript{16} Section 474.250, RSMo 1959.
ostensibly in the husband's sole name with funds from a joint bank account. Ob-
vious examples include livestock, farming implements and manufacturing machin-
ery. These, and other similar tangible investments, can easily represent a consider-
able amount of money, and ownership of them could therefore become an impor-
tant matter in a given situation, but in the absence of additional elaboration by
the Missouri courts it is uncertain how such a situation would be resolved.

The rule of the principal case might find some applicability to an automobile
purchased in the name of one spouse with funds taken from the joint bank ac-
count. This point has been mentioned in at least two Missouri cases. In one,27 an
automobile was included with a suit of clothes as examples of the type of more
or less personal items which a husband would be expected to buy with funds from
the joint account. But in view of the importance of the automobile to both spouses
in the modern American family, and the somewhat frequent practice of register-
ing the automobile in the names of both spouses, a contention that a "family"
automobile is the "personal" property of the husband may be subject to serious
doubt. In the second Missouri case discussing this point,28 ownership of an auto-
mobile registered in the husband's name but purchased with funds from a joint
bank account, was directly involved, but the court was able to decide the case
without making a definitive ruling on the question of the actual ownership of the
automobile. However, the court did indicate that it might decide, in an appro-
priate case, that both spouses were the actual owners of an automobile so pur-
chased, if it could be shown that the one spouse had purchased the car in his in-
dividual name wrongfully and contrary to the intention of both spouses, and if it
could further be shown that the other spouse had not acquiesced in the purchase.

Therefore, it seems that the present status of Missouri law on this subject is
that joint interests may attach to securities, as in the principal case, or to a new
bank account, in which withdrawals from the joint bank account have been
placed,29 or perhaps to an automobile under the conditions outlined above. How-
ever, it should be stressed that there is no indication at the present time that
the Missouri courts intend to let this principle be so extended as to provide a
sort of painless estate planning technique. If the surviving cotenant can be shown
to have consented at the time to the purchase of the property in the other coten-
ant's name, or if the survivor can be shown to have failed to complain about the
transaction after he learns of it, then the joint interests which existed while the
funds were in the bank account will be deemed to have been destroyed.20 The rule
of the principal case seems to be most applicable in situations where one cotenant
has apparently attempted to take unfair advantage of the other, without the lat-
ter's knowledge or consent.

WM. C. MORGAN

17. Ambruster v. Ambruster, supra note 5.
TORTS—MISSOURI—RIGHT OF WIFE TO RECOVER FOR LOSS OF CONSORTIUM FOR NEGLIGENCE INJURY

Novak v. Kansas City Transit, Inc.¹

Plaintiff Novak averred that her husband, while a passenger in an automobile, was negligently injured by respondent and as a result she was deprived of his consortium, including his companionship and conjugal affection, for which she sought $100,000 as damages. Defendant’s motion for summary judgment was sustained on the ground that a wife may not recover for loss of consortium caused by the negligence of a third party. On appeal, held, reversed. Even though the wife had no such right under common law, she can now sue for loss of consortium caused by the negligence of a third party because of the effect of the Married Women’s Act² on her legal status.

At early common law, the status of a wife was that of a servant of her husband. Consequently, the husband had an action for loss of services or consortium for interference with his proprietary right in his wife.³ However, the wife had no action for loss of consortium.

We may observe, that in these relative injuries notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or, at least, the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and, therefore, the inferior can suffer no loss or injury.⁴

The wife’s identity was merged into that of her husband. She therefore had no capacity to maintain an action in her own name. She had no legal standing to sue.⁵ Thus, at early common law, the wife was denied both the right and the remedy for loss of consortium.

The passage of the Married Women’s Acts, however, gave the wife an independent legal standing. She could, inter alia, hold her real and personal property, including rights in action, separately from her husband, and she could sue and be sued in her own name without joining her husband. She was now able to recover in actions for intentional interference with her marital interests such as criminal conversation,⁶ alienation of affections,⁷ and the inhibited sale of liquor or narcotic

1. 365 S.W.2d 539 (Mo. En Banc 1963).
4. 3 Blackstone, Commentaries 143 (8th ed. 1778).
drugs. And the husband, in most jurisdictions, could still recover for any invasion of his marital interests. However, the wife was still denied the right to sue for a loss of consortium due to negligence.

This denial is based upon the following arguments. The wife's injuries are too remote and consequential to be capable of measure. The wife had no such right under common law and the Married Women's Acts conferred no new rights, but merely removed procedural disabilities. The purpose of damages in negligence cases is to compensate the injured person for the direct consequences of the wrong; and as the injury to the wife is indirect, it is not compensable. The material services are the predominant factor for which compensation is given; and as the wife has no right to her husband's services, she has no cause of action. Since the husband is legally bound to support his wife, he recovers for any impairment of his ability to perform that duty in his own action and thus the wife recovers indirectly for her loss of consortium. If she were allowed to sue independently, therefore, she would gain a double recovery.

But in *Hitaffer v. Argonne Co.*, a 1950 decision, the United States Court of Appeals for the District of Columbia, in the face of the unanimous decisions to the contrary, held that a wife has a cause of action for loss of consortium due to the negligent injury of her husband. Since that decision, eight states, now including Missouri, have followed the *Hitaffer* lead. Two federal courts have held that the

9. Furnish v. Missouri Pac. Ry., 102 Mo. 669, 15 S.W. 315 (1891); Restatement, Torts § 693 (1938); see Annots., 133 A.L.R. 1156 (1941), 21 A.L.R. 1517 (1922). But see Annot., 23 A.L.R. 2d 1378 (1952) for cases representing a minority view denying the right to the husband so as to be consistent with denial of the wife's right.


laws of two additional states would compel a similar conclusion, although the courts of those states have as yet voiced no opinion on the question.\textsuperscript{48} Two concepts have weighed large in the reasoning of these courts: the enlarged scope of consortium and the effect of the Married Women's Acts on the wife's legal status. Consonant with the modern view, and indicating the view which these courts take, consortium has been defined by the Supreme Court of Missouri as including, "a spouse's society, which, in turn, encompasses the right to the other's affection and companionship and the conjugal rights of each. . . \textsuperscript{219} And the court in the Hitaffer decision has said, "Consortium, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity."\textsuperscript{20} Taking cognizance of the fact that the Married Women's Acts have recognized the equality of the wife to the husband, these courts have concluded that if a husband is allowed a right to recover for loss of consortium due to negligent injury, a wife cannot be denied the same right.

The effect of these conclusions is to reject the arguments used by the majority of jurisdictions in denying the wife's action. If the injuries to the wife be remote and consequential, or indirect, then those injuries would bear the same relation to the husband in his action for loss of consortium from negligent injury of his wife. Yet he is allowed to recover. Therefore, the wife should be allowed to recover, for her rights are equal to those of her husband and are equally protected by law. The Married Women's Acts have created in the wife new rights not previously held. Consortium includes more than material services; it includes sentimental interests as well. Accordingly, the wife may recover for those sentimental interests because they are her separate and direct personal loss. The double recovery argument of the majority emphasizes only the loss of support element of consortium. But the wife is suing, not merely for loss of support, but for other elements of consortium which are not compensable in the husband's action. The possibility of double recovery, therefore, may easily be avoided by allowing compensation for only those elements of the wife's loss which have not been recovered by the husband in his action.\textsuperscript{21}

\begin{itemize}
  \item IOWA. Acuff v. Schmidt, 248 Iowa 272, 78 N.W.2d 480 (1956).
  \item MISSOURI. Novak v. Kansas City Transit, Inc., supra note 1.
  \item SOUTH DAKOTA. Hoekstra v. Helgeland, 98 N.W.2d 669 (S.D. 1959).
  \item 21. Cases cited note 17 supra. But see, on the issue of double damages, the dissenting opinion in Novak v. Kansas City Transit, Inc., supra note 1, at 548 where it is said, "The judge who is able to avoid double damages by 'accurately delineating' the items that the husband has recovered or will recover in another action in another court, and correctly instruct the jury on the items of damages properly recoverable in this case will indeed need the wisdom of a Solomon, not to mention the utter confusion of the juries.''
\end{itemize}
Of these arguments, the Supreme Court of Missouri, in the Novak case, has emphasized the effect of the Married Women's Act on the status of the married woman and the method of determining damages so as to prevent double recovery. The effect of this decision is to protect a right not previously recognized in Missouri by allowing a wife to sue for loss of consortium due to her spouse's negligent injury. The Missouri cases espousing the previously existing Missouri law on this subject\(^\text{22}\) have been directly overruled.\(^\text{23}\) It would seem, further, that this is but one decision in a relatively new trend in the law.

**Louis Jerry Weber**

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**LIBEL PER QUOD: SPECIAL DAMAGES IN MISSOURI**

*Langworthy v. Pulitzer Publishing Company\(^1\)*

Plaintiff Langworthy brought an action for libel against defendant publishing company based on an article published in defendant's newspaper. The article, appearing under the caption, "'Towhead Pete's Gang of 5 Boys, 4 Girls Seized," related that plaintiff, an attorney, had reported to the police that three pieces of Swiss cheese, a piece of cake, some jello and twenty dollars had been taken from his home and that he wanted something done about it. The article further stated that a group of nine children ranging in ages from two to thirteen years old had been rounded up by the police and that they had admitted entering the house, but they insisted that they had found only twenty-eight cents rather than twenty dollars. The article reported that the children, other than the two year old, had been lectured by the police and juvenile authorities, but that the two year old, who was in diapers, was released because the police "couldn't pin anything on him, anyway."

Plaintiff charged that certain portions of the article were false and that the acts which he had reported to the police included a long series of intrusions, including several acts of larceny and vandalism. Plaintiff pleaded that the article meant, was intended to mean, and was understood by those to whom it was published to mean, that he had falsely reported the amount of money stolen and was therefore untruthful, and for that reason it could be inferred that he was not well suited for his professional duties as an attorney, and that he was a selfish and egocentric person who enlarged the importance of a trivial wrong committed against him by small children in demanding police action against those committing the action, to an extent that he was ridiculous. No special damages were pleaded. *Held:* the article was not libelous per se and without special damages being pleaded, no action for libel per quod could be maintained.

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\(^{23}\) Novak v. Kansas City Transit, Inc., *supra* note 1, at 542, 545.

1. 368 S.W.2d 385 (Mo. 1963).
Since the *Langworthy case* the supreme court has again stated in *Otto v. Kansas City Star Co.* and in *Hellensen v. Knaus Truck Lines* that in order to state a claim for which relief could be granted for libel per quod, special damages must be pleaded. The *Langworthy case* has been cited as authority in both of these later decisions.

A distinction between the law of slander and the law of libel has long been recognized. Libel has been considered a more serious offense than slander. The distinction seems to have arisen because libel comes from defamation embodied in a physical form, whereas slander does not. Oral defamation comes to an end when it falls on the ear of the person to whom it is spoken and is left only to the hearer’s memory, whereas libel remains in existence and breeds a new crop of defamatory harms every time that it is seen. The harm that libel threatens is therefore of a greater range and duration than is the harm threatened by slander. It has been thought that libel possibly evidences a greater malice on the part of the publisher than does slander, since libel is deliberately reduced to a permanent and distinct physical form.

There are two different types of libel: libel per se and libel per quod. Libel per se exists where the defamatory imputations are clear upon the face of the publication, whereas in libel per quod the defamatory imputations arise only by reference to extrinsic facts known by the reader. Until comparatively modern times special damages did not need to be pleaded in order to maintain an action for either libel per se or for libel per quod. The *Restatement of Torts* sustain this position and it is still followed in some jurisdictions. However, the modern American trend appears to treat libel per quod as slander is treated, thereby requiring special damages to be pleaded and proven in order to state a cause of action for which relief can be granted.

Early libel cases in Missouri used language broad enough possibly to have allowed an action of libel per quod to be maintained without the pleading and proof of special damages. In 1847, the Missouri Supreme Court seemed to recognize that there was only one dividing line in the law of defamation—whether that defamation was oral or whether it was of a permanent form. If it was oral, one

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2. Ibid.
3. 368 S.W.2d 494 (Mo. 1963).
4. 370 S.W.2d 341 (Mo. 1963).
7. Ibid.
11. "... And it is not necessary to the right to maintain an action for a publication not libelous per se to allege or prove special damages." Gibler v. Houston Post Co., 310 S.W.2d 377 (Tex. Civ. App. 1958).
12. Furlong v. German Press Ass’n, 189 S.W. 385 (Mo. En Banc 1916); Nordlund v. Consolidated Elec. Co-op., 289 S.W.2d 93 (Mo. 1956); also see 53 C.J.S. *Libel and Slander* § 170(c) (1948); 33 Am. Jur. *Libel and Slander* § 243 (1941); Prosser, *Libel Per Quod*, supra note 8.
set of rules was applicable; if it was of a permanent form, another was applicable. This is exemplified in *Nelson v. Musgrave* where the court said that "the rule which prevails in relation to oral slander is not applicable to actions of libel."

In 1876 the St. Louis Court of Appeals inferred that the pleading and proof requirement pertaining to damages for libel per quod and libel per se were the same. "If, in such covert meaning, an injurious effect is implied, the offense of libel is as complete as if it were apparent in the common acceptance of the words employed." Hence, one might conclude that if libel per se was actionable without pleading and proving special damages, libel per quod was also actionable without pleading and proving special damages.

The exact issue of damages was touched upon in *Spurlock v. Lombard Investment Co.* There the court held that if an alleged libel contained anything from which the law would infer damages as being necessarily occasioned from its publication, then that alleged libel was actionable per se. Since a libel could arise just as easily from words defamatory only in light of certain extrinsic facts as from words defamatory on their face, it would seem to follow that the law would infer damages as being necessarily occasioned from one as readily as from the other. This would indicate that all libel was per se in regard to damages, i.e., all libel was actionable per se regardless of whether it was defamatory per se or defamatory per quod.

Other Missouri cases have failed to maintain this demarcation between the law of slander and the law of libel. They have tended to merge the law of slander and the law of libel per quod insofar as damages are concerned. This tendency is noticeable in *Eby v. Wilson*, one of the precedents relied upon in the *Langworthy* case. The *Eby* case was an action for libel, but in its decision the court relied on both libel and slander cases as precedents. Language in the slander cases was relied upon as precedent for requiring that extrinsic facts be proved to show special damages in order for recovery to be had in an action for libel per quod. The court went so far as to distinguish libel per se and libel per quod only by the necessity to plead and prove special damages to recover in the latter but not in the former:

Courts and writers of text books have divided defamatory words into two classes: Those which are said to be libelous per se, for which general damages may be recovered, and those designated as libelous per quod, and on account of which special damages only are recoverable, and then only because alleged and proved.

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13. 10 Mo. 648 (1847).
17. 315 Mo. 1214, 289 S.W. 639 (1926).
18. Supra note 1.
20. Noenger v. Vogt, 88 Mo. 589 (1886); Rammel v. Otis, 60 Mo. 365 (1875).
21. Supra note 17.
A further indication of an intermingling of the law of slander and the law of libel in Missouri can be found in Creekmore v. Runnels.\textsuperscript{22} The case there before the court was an action for both libel and slander. The court discussed the need of special damages to maintain the cause of action without distinguishing between libel and slander.

Thus, the law of libel and the law of slander may have effected somewhat the merger in Missouri, at least insomuch as to require the pleading and proof of special damages in order to recover for libel per quod.\textsuperscript{23}

There is impressive authority to the effect that this is a prevalent trend throughout the United States.\textsuperscript{24} This trend has gone so far as to lead to speculation as to what change would result should the Restatement of Torts be rewritten today.\textsuperscript{25} However, there would seem to remain a question as to the soundness of the logic behind this trend. Since libel does have permanence of form, since it may indicate a greater evil mindedness on the part of the publisher than does slander, should not all libel continue to be treated as a more serious offense than slander and thereby require only an allegation of general damages in order to be actionable? The mere fact that some libel is defamatory only in light of extrinsic facts would not seem to detract from the lingering harmfulness which is threatened by that libel's permanence of form.

\textbf{JOHN E. PARRISH}

\textbf{TORTS—PRODUCTS LIABILITY—STRICT LIABILITY?}

\textit{Greeman v. Yuba Power Products Inc.\textsuperscript{1}}

Plaintiff's wife purchased a power tool from a retailer for her husband. Two years later he bought the necessary attachments to use it as a lathe for turning

\textsuperscript{22} 359 Mo. 1020, 224 S.W.2d 1007 (1949).

\textsuperscript{23} Some suggestion of a further merger of the law of libel and the law of slander can be found in \textit{Eby v. Wilson}, supra note 17. The court said that language either \textit{written} or \textit{spoken} of another and his affairs which caused him pecuniary loss could be divided into two classes: that which necessarily occasions damages and that which does not necessarily but by a natural and proximate consequence occasions damages. This would seem to suggest that all defamation might be treated alike in the future without regard to whether it is spoken or reduced to a permanent form.

The court had previously hinted that this result might be reached. In \textit{Boogher v. Knapp}, 76 Mo. 457 (1882), language was used in discussing libel which seemingly was more appropriate to slander than to libel. The court said:

If defendants falsely charged and published in writing that plaintiff had been convicted of libel and his punishment assessed at imprisonment, this is actionable without any allegation of special damages.

\textsuperscript{24} Prosser, \textit{Libel Per Quod}, supra note 8.

\textsuperscript{25} Prosser, \textit{Libel Per Quod}, supra note 8, at 850.

\textsuperscript{1} 27 Cal. Rptr. 697, 377 P.2d 897 (1962). See also, the discussion of this case in 23 LA. L. REV. 810 (1962-63); 15 STAN. L. REV. 381 (1962-63); 16 VAND. L. REV. 455 (1963).
a large piece of wood into a chalice. After he had worked on the wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead, inflicting serious injury. About ten and a half months later, he gave the retailer and the manufacturer written notice of claimed breaches of warranty and filed a complaint against them alleging such breaches, with an additional count of negligence.

The court submitted to the jury the cause of action alleging breach of implied warranty against the retailer and the causes of action alleging negligence and breach of express warranty against the manufacturer. Plaintiff recovered from the manufacturer, but not the retailer; both the plaintiff and the manufacturer appealed.

The manufacturer contended that the plaintiff had not given a notice of breach of warranty within a reasonable time and therefore his cause of action for such breach was barred by section 49 of the Uniform Sales Act.\(^2\)

Justice Traynor, author of the opinion, dismissed this contention on two grounds. Initially, as between the buyer and seller this is a sound commercial rule, but when applied to notice to a remote seller (manufacturer) in a personal injury case, it becomes a boobytrap for the unwary. The second basis was that to impose strict liability on the manufacturer in this situation, it is not necessary to establish an express warranty as defined in section 12 of the Uniform Sales Act;\(^3\) "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."\(^4\)

This quotation, while not absolutely necessary to the decision, is an alternative ground supporting the decision. Since manufacturer's liability in this case is strict liability in tort, it must be governed by the law in that area and not by rules defining and governing warranties, unless those rules serve the purpose for which strict liability is imposed. Thus, in Justice Traynor's opinion, to require a buyer to give notice of breach of warranty to a remote seller is surely a subversion of the purposes for which strict liability in tort has been imposed. Therefore, the cry of dictum\(^5\) is without support when we note the well settled rule

\(^2\) Uniform Sales Act § 49: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

\(^3\) Uniform Sales Act § 12: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."


that, "where two independent reasons are given for a decision, neither one is to be considered mere dictum."

How did Justice Traynor reach the conclusion that the manufacturer's liability is strict liability in tort? Is this determination correct?

The concept of warranty is indeed a strange one. Warranty has been referred to as a word that illustrates the fault of the common law in the ambiguous use of terms, and cited as a notable example of legal miscegenation. "Warranty," while originally a tort concept, slowly became limited in its use to direct transactions between the parties. The divorce of warranty from deceit, its origin in tort, was completed about the beginning of the nineteenth century and the existence of a cause of action founded upon breach of warranty become identified with the existence of a contract between the parties. The modern concept of warranty, while identified with the existence of contract, retains through court interpretation many elements of its birth in the area of torts.

This obvious miscegenation has caused many limitations, inconsistencies, disadvantages and complications in expanding the law in this area to meet the public policy demands of our time. If the "warranty" cause of action is truly a contract remedy, only slightly colored by its birth in the tort area, and not strict liability in tort, it would seem the cases requiring a contract between the parties are correct. Under this view, recovery of damages should be limited to those within the purview of breach of contract; there should be a necessity for an agreement between the parties, and the liability should be subject to a disclaimer by the seller.

Justice Traynor in concluding that these contract limitations are no longer a part of the changing law in this area analyzed the present situation as follows. Strict liability was first recognized in the case of unwholesome food products, and then extended to other areas including a grinding wheel, bottle, vaccine, in-

8. 42 Harv. L. Rev. 414 (1928-29).
10. 2 Harper & James, § 28.16 (1956).
11. S. H. Kress & Co. v. Lindsey, 262 Fed. 331 (5th Cir. 1919); Sterling Aluminum Prod. Inc. v. Shell Oil Co., 140 F.2d 801 (8th Cir. 1944); Whiteley v. Webb's City, 55 So.2d 730 (Fla. 1951); Wadleigh v. Howson, 88 N. H. 365, 189 Atl. 865 (1937); Goodwin v. Misticos, 207 Miss. 361, 42 So.2d 397 (1949).
12. 27 Minn. L. Rev. 123, 124 (1942-43).
sect spray,18 surgical pin,19 automobile,20 skirt,21 home permanent,22 hair dye,23 automobile tire,24 and an airplane.25 These cases while finding liability on the theory of an express or implied warranty, abandoned the traditional contract limitations, thus making it clear that liability is governed by the law of strict liability in tort. In Peterson v. Lamb26 an employee was injured by a defective grinding wheel and the court found privity between the employee and seller, even though in fact no privity existed. This result was reached because of the natural assumption that employees are going to use products purchased by their employers. This decision was followed in two later cases involving an employee injured by an exploding bottle,27 and thus for all practical purposes the long standing requirement of privity was abandoned in California. However, Justice Traynor did not stop there as he cited cases applying the law of Pennsylvania,28 Hawaii,29 Kansas,30 Ohio,31 and New Jersey32 which had abandoned the privity requirement either outright or by rather fictitious reasoning.

The Greeman opinion points out that other strict warranty limitations had been abolished. The necessity for an agreement between the parties has been abolished in some jurisdictions33 where it is held that the manufacturer’s obligation is one imposed by law, and some jurisdictions refuse to permit the manufacturer to define the scope of its own responsibility for defective products.34 Leading the way in this area is the often cited Henningsen case35 which denied the effectiveness of a disclaimer and abandoned the requirement of privity between the plaintiff and manufacturer, both on the impetus of public policy. One other contract limitation which has been abandoned in many states was not mentioned, yet the recognition of the fact that a suit can be based on an implied warranty for wrong-

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33. Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).
35. Ibid.
ful death further strengthens an already strong line of reasoning. Thus, we see that, in accordance with the growing trend of the law, Justice Traynor's conclusions were reasonable when he stated the manufacturer's liability is no longer to be governed by the law of contract warranties, but should be governed by the laws of strict liability in tort.

Much has been said about the necessity of redefining the manufacturer's liability, so as to make him essentially an insurer of his products. Some of the more notable arguments that have been advanced are as follows: (1) Since the dealer serves as no more than a conduit in imposing liability on the manufacturer, we should dispense with this circuitous route and allow the injured person to sue directly. (2) The use of warranty to achieve social justice serves as an obstacle rather than a useful tool. (3) The manufacturer who is reaping the profit should be made to bear the loss, and can do this by insuring the product or himself against the loss. (4) Since the McPherson case res ipsa loquitur has been used with a great deal of success in imposing strict liability, thus the courts have accepted the idea of liability without fault, so why not do it openly. Whether or not these arguments are individually persuasive, taken together they present a strong argument for the imposition of strict liability in tort.

A rule of law similar to that pronounced by the California Supreme Court is set out in the Restatement of Torts, Tentative Draft #7. It applies to anyone engaged in the business of selling food for human consumption or other products for intimate bodily use and is imposed regardless of fault or privity. This trend toward strict liability for injury caused by a defective product, has been confused as a result of the courts' attempt to shroud the change in less than lucid

39. 2 Harper & James, op. cit. supra note 10, at 1573; Roberts, op. cit. supra note 38, at 204; Restatement (Second), Torts § 402A, explanatory notes comment m at 7 (Tent. Draft No. 7, 1962).
42. Restatement (Second), Torts, op. cit. supra 39, at 1: "One engaged in the business of selling food for human consumption or other products for intimate bodily use, who sells such a product in a defective condition unreasonably dangerous to the consumer, is subject liability for bodily harm thereby caused to one who consumes it, even though
(a) The seller has exercised all possible care in the preparation and sale of the product, and
(b) The consumer has not bought the product from or entered into any contractual relation with the seller.
language. However, now for the first time in a majority opinion, we find a clear evaluation of the present situation. We find the same progress in other states which culminated in the present decision in California. As a result of this careful evaluation, the trend as noted by the Restatement submission, and the analogous development of the privity requirement in a negligence action, this author is led to believe that strict liability in tort is imminent in the area of products liability.

Missouri law in this area had also rejected some of the traditional contract limitations, but had not progressed as far as many of the noted cases. However, in November 1963, Morrow v. Caloric Appliance Corporation was decided by the Missouri Supreme Court. Now, for the first time we have a fairly clear opinion outlining the law in Missouri. This case involved a situation analogous to the one in Greeman v. Yuba Products Company. It seems to this author, that the Missouri Supreme Court has, with this case, liberalized its rules in connection with products liability. This case presented the question of "whether a manufacturer of an instrumentality which is imminently dangerous if defectively manufactured is to be held to strict liability upon proof of the defect and causation." The court in a unanimous opinion answered this question in the affirmative. It seems that this decision opens the way to use of strict liability in almost every case involving injury by a product defectively manufactured. It seems quite logical to say that under this holding, products may be classed as imminently dangerous merely by reason of their defective manufacture. If the courts take this approach, it seems that the impact and breadth of the decision is as great as the holding in the Greeman case. Even if the courts refuse to accept this interpretation, it can surely be said the supreme court has extended strict liability far beyond the impact of prior Missouri decisions and has left the door open for a truly pragmatic approach to each case.

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