Recent Cases

CIVIL PROCEDURE—PERMISSIBLE SCOPE OF WRITTEN INTERROGATORIES

State ex rel. Gray v. Jensen

In 1960 the Missouri Rules of Civil Procedure were revised, one of the purposes being to broaden rules of discovery. Two of the rules relating to interrogatories were intended to lessen controversy over the scope of discovery: Rule 56.01(a) allows for written interrogatories to an adverse party, and Rule 57.01(b) defines the permissible scope of the interrogatories. However certain problems have arisen in this area.

1. 395 S.W.2d 143 (Mo. En Banc 1965).
2. Mo. R. Civ. P. 56.01(a). The relevant portions of the Rule are as follows: "Any party may serve upon any party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party...."
3. Mo. R. Civ. P. 57.01(b). "(b) Scope of Examination. Unless otherwise ordered by the court as provided by this Rule, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party.... It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The examining party may not inquire as to the contents or substance of statements, written or oral, obtained from prospective witnesses by or on behalf of another party. The production or inspection of any writing obtained or prepared by the adverse party or coparty, his attorney, surety, indemnitor, or agent, in anticipation of litigation or in preparation for trial (except a statement given by the interrogating party) or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 60.01, the conclusions of an expert, shall not be required."

In the Note to the Rule, the committee gave its reasons for specifically stating that work product of the lawyer is to be protected. The committee stated that "the last sentence is adapted from Minnesota Rules of Civil Procedure, No. 26.02." The committee obviously felt that reliance on case precedent for protection of work product would give rise to some uncertainty. Therefore, "The opinion of Hickman v. Taylor... protecting the attorney's work product is reinforced by express specific language of the added sentences." Special Comm. on Suggestions Concerning the Rules of Civ. Prac. & Proc., Note, Mo. R. Civ. P. 56.01 (hereinafter cited as Note, Mo. R. Civ. P.).
In 1963, the Missouri Supreme Court, in *State ex rel. Rhodes v. Crain*, allowed the following interrogatory under Rules 56.01(a) and 57-01(b):

Do you or your attorneys know the names of any witnesses to this accident? If so, what are the names and addresses of the witnesses?

The majority of the court held that the interrogatory did not involve work product of the attorney. It found that adoption of the new civil rules was intended to broaden discovery. Since the rules were based on similar federal rules, the supreme court looked to federal decisions for precedent.

In a recent case the Missouri Supreme Court was confronted with a slight variation of the interrogatory in *Crain*. Defendant sent plaintiff various written interrogatories, including one that requested the plaintiff to

State the names and addresses of all witnesses whom plaintiff intends to call at trial.

Plaintiff refused to answer this interrogatory, claiming that it sought information constituting work product. The trial court ordered plaintiff to answer. Plaintiff appealed this order to the supreme court seeking prohibition of enforcement of the order.

The Missouri Supreme Court granted the order of prohibition. The court first took notice that the rules were to be given a broad interpretation. In allowing for written interrogatories, Rule 56.01(a)

broadens the scope of discovery on written interrogatories by adopting Rule 33 of the Federal Rules of Civil Procedure and a portion of the amendments tentatively recommended by the Federal Advisory Committee on Rules in 1954.

However, the supreme court found an exception to the broadened scope of discovery in the notes of the committee that drafted the rules. The court likened

6. 373 S.W.2d at 42-43. The court discussed several cases at length: Baker v. Yellow Cab Co., 12 F.R.D. 84 (W.D. Mo. 1951); Edgar v. Finley, 312 F.2d 533 (8th Cir. 1963); Wycoff v. Nichols, 32 F.R.D. 369 (W.D. Mo. 1962). The supreme court also listed other cases in accord with its decision, including state cases on similar procedural rules. 373 S.W.2d at 44.
7. This is not the actual interrogatory. However, the court treated the decision as if this hypothetical were asked. The actual interrogatory inquired into medical witnesses to be used by plaintiff at trial, in a malpractice action. The actual interrogatory was "State the names and addresses of all doctors, medical specialists or other practitioners of the healing arts that plaintiff intends to call as witnesses to testify at the trial of this case." 395 S.W.2d at 144. The implications of the interrogatory asking for names of expert witnesses rather than fact witnesses will be discussed *infra*.
the committee's notes to legislative committee reports.\textsuperscript{9} As such, the notes are applicable in construing the rule. The committee specifically stated

one portion of the recommended draft omitted is that which would require the answering party to furnish "a listing of the names of witnesses whom the party intends to call at trial."\textsuperscript{10} (Emphasis added).

On this basis, the supreme court held that the interrogatory should not be answered.

A prime motivation for this result is the invasion of trial preparation and strategy which would result if the interrogatory were answered. Trial strategy of the lawyer is obviously his work product. The court felt protection of work product took precedence over any argument for freedom of discovery. Furthermore, the court stated

we think it crystal clear the committee which drafted Rule 56 did not intend to permit the inquiry by interrogatory with which we here are concerned.\textsuperscript{11}

As a practical matter, to rule otherwise would have given the court future problems. For instance, would a party be allowed to call a witness whom he did not intend to call at the time he answered the interrogatory?

In deciding \textit{Crain}, the court used federal decisions as authority to allow the discovery. The dissent disagreed with this approach.\textsuperscript{12} In the noted case, the court made no use whatsoever of federal decisions to bolster its opinion. Perhaps the committee notes were considered sufficient on the matter. Whether this means the court will no longer consider federal procedural decisions as authority is an open question. It is reasonable to presume that when a state adopts a federal rule, such as Missouri has done, it is aware of how the rule has been construed and, absent contrary language, will presumably give the same construction to the rule. Nevertheless, it is possible the court's silence shows a change in its reasoning on what is precedent for Missouri procedural rules.

While Professor Moore\textsuperscript{13} and some federal cases\textsuperscript{14} would allow discovery of witnesses a party intends to call at trial, the decided majority of federal cases

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  \item \textsuperscript{9} The court stated that "These committee notes are comparable to legislative committee reports which pertain to legislation which is passed and are to be considered in determining the scope and meaning of the rule under consideration, just as the legislative committee reports are considered in construing the legislative enactments." \textit{State v. Jensen}, supra note 1, at 145.
  \item \textsuperscript{10} \textit{Note}, Mo. R. Civ. P. 56.01. The Federal Rules contain no such provision.
  \item \textsuperscript{11} 395 S.W.2d at 146.
  \item \textsuperscript{12} 373 S.W.2d at 44. "The rulings of the federal courts upon their own rules are not controlling and, to me, not particularly persuasive here."
  \item \textsuperscript{13} 4 Moore's \textit{Federal Practice} § 26.19[41], at 1251-56 (2d. ed. 1963). Professor Moore states "We believe that, as a general proposition, cases requiring the disclosure of witnesses whom a party intends to call better represent the basic policy underlying the discovery rules." \textit{Id.} at 1251-52. "Since a party clearly can ascertain the names of all persons who \textit{might} be witnesses, under the specific provision for discovery as to 'the identity and location of persons having knowledge of relevant facts,' no good reason is seen why he should not have the right
\end{itemize}
support the result in the present case. In *Mageissen v. Local 518*, it was held improper for an interrogatory to ask the other party "to state the names and addresses of every witness you expect to use in the trial of this case." The question that should have been asked was "state the identity and location of persons having knowledge of relevant facts." The Court of Appeals for the Fifth Circuit in *Bell v. Swift & Co.*, after stating that Federal Rules 33 and 26(b) should be construed broadly to allow discovery of persons having knowledge of relevant facts, refused to allow an interrogatory asking a party to give names "of witnesses he proposes to introduce at trial." While these and other cases support the result in the noted case, the Missouri Supreme Court declined to cite them as authority.

Up to this point, the discussion has considered a general hypothetical interrogatory. In the actual interrogatory in the noted case defendant asked plaintiff to state the names and addresses of medical witnesses whom plaintiff intended to call at trial. The court declined to consider the nature of the witnesses as significant. Rather, it said,

The fact that Interrogatory No. 3 inquired about medical witnesses to be used is of no particular significance. The result herein would have been the same if it had asked generally for the names and addresses of all witnesses to be called and used in the trial.

In so doing, the court obviously felt there was no distinction between fact witnesses and expert witnesses. Defendant had in part relied on *Miller v. United* to learn, at some reasonable time before trial, which of these persons will be witnesses." *Id.* at 1253.

Moore cites *Fidelis Fisheries, Ltd. v. Thorden*, 12 F.R.D. 179 (S.D.N.Y. 1952), as illustrating why a party should not be required to disclose the witnesses whom he intends to call at trial.


15. *Wirtz v. Continental Fin. & Loan Co.*, 326 F.2d 561, 564 (5th Cir. 1964); Padovani v. Bruchhausen, 293 F.2d 546, 549 (2nd Cir. 1961); Bell v. Swift & Co., 283 F.2d 407 (5th Cir. 1960); Wedding v. Tallant Transfer Co., 37 F.R.D. 8, 10 (N.D. Ohio 1963); *Mageissen v. Local 518*, 32 F.R.D. 464 (W.D. Mo. 1963); *U.S. v. Procter & Gamble Co.*, 25 F.R.D. 252, 255 (N.J. 1960); *B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co.*, 24 F.R.D. 1, 3 (S.D. Tex. 1959). Professor Moore recognizes this in his treatise, *supra* note 13, at 1247. See also, 2A *Barron & Holtzoff, Federal Practice and Procedure § 650*, at 93 (Wright ed. 1961), which states "A distinction must be drawn between witnesses to the events in question and witnesses who will be called for trial by the adverse party. The names of occurrence witnesses may always be obtained by discovery. It is generally held that a party is not entitled to find out, by discovery, which witnesses his opponent intends to call at the trial." (Emphasis added)

16. See cases cited note 15 *supra*.


19. 283 F.2d at 409.

20. For the text of the actual interrogatory, see note 7 *supra*.

21. 395 S.W.2d at 146.
States for authority on the need to know of the other party's expert witness. That court categorized expert witnesses as ones who were not witnesses to the actual facts, therefore not discoverable by an interrogatory asking for names of witnesses to the occurrence. The issue of trial strategy was negated by the need for the other party to find out about the qualifications of the expert. Therefore, the expert who a party intended to use could be discovered.

Recently the Minnesota Supreme Court, which has discovery rules substantially the same as Missouri's, applied the rationale of the Miller case. The pertinent interrogatory was as follows:

Do you know the names of any witnesses to this accident or the facts pertinent to the above lawsuit?

Plaintiff did not disclose the name of an expert who the trial court allowed to testify. On appeal, the Minnesota Supreme Court reversed, stating:

If such an expert is to be called, he should not be given a preferred status over other witnesses. Other parties ought to be given an opportunity to investigate his qualifications and, if necessary, obtain the assistance of equally qualified experts on the other side of the case.

By refusing to draw the above distinctions, it would seem the Missouri Supreme Court has rejected them without actually so stating. Presumably a party would have enough time to learn the qualifications of an expert after discovering his identity at the pre-trial conference. It does not seem that an expert witness would be discoverable under authority of the Grain case.

On balance, State v. Jensen upholds the right of the lawyer to retain the secrecy of his trial strategy. This would seem to be fair, as Missouri rules explicitly give protection to a lawyer's work product. The court has refrained from relying on federal case precedent in construing the Rules. It also ignored federal and state precedent on distinguishing between fact witnesses and expert witnesses. This points out that Missouri continues to protect the work product of the lawyer with some rigidity. An important consideration of any lawyer is who he will call to prove the necessary elements of his case. It would put an undue burden on the lawyer if he were forced to tell his opponent what his trial presentation plans were.

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23. Respondent's Brief, p. 6. Respondent's contention on this issue was that, "To permit counsel to fully explore the background of prospective witnesses, determine their qualifications, and their interest in the outcome of the litigation, the names and addresses of such witnesses must be disclosed well in advance of the trial date." Ibid. At the pre-trial conference, both parties disclosed the names of the expert witnesses they intended to use. Between the conference and the rescheduled trial date, one of plaintiff's doctors died. Defendant felt that because of the situation he was entitled to inquire of plaintiff whom he intended to use.


25. See note 3 supra, for the proposition that the committee looked to Minnesota Rules on the permissible scope of examination.

26. 136 N.W.2d at 65.

Defendant, while driving his automobile, was involved in an accident in which three persons in the other automobile were killed. He was subsequently charged with manslaughter in three separate informations, each alleging the death of a different person. He waived formal arraignment and pleaded guilty to each of the three charges. The trial court imposed a two year sentence on each charge, said sentences to run consecutively and not concurrently. Defendant appealed, contending he could be guilty of no more than one offense of manslaughter.

The Missouri Supreme Court affirmed, deciding that there is a separate offense of manslaughter for each person killed and that the rule that a person shall not be twice put in jeopardy for the same offense is directed to the identity of the offense not of the act. The court expressly stated that the case presented no question of collateral estoppel, as the defendant had pleaded guilty to all three charges.

In Missouri the prohibition against being tried twice for the same "offense" is recognized by both a constitutional provision and the common law. In other jurisdictions there is a conflict in cases where multiple deaths arise from one automobile accident, due to the differing interpretations of the meaning of "offense."

The majority of courts hold the "gravamen of the offense" of manslaughter to be the killing of a human being. Under such interpretation there is a distinct offense for each death and multiple manslaughter charges arising out of a single accident do not violate the prohibition against double jeopardy. Some of the theories upon which the courts have based this interpretation include: (1) same evidence, (2) constructive intent, (3) public policy, (4) weight of authority.

1. 382 S.W.2d 665 (Mo. 1965).
2. "Many courts refer to collateral estoppel as 'res judicata.' This should not be confused with the concepts of merger and bar, whose criminal-law analogue is double jeopardy." Mayers, New Trials and Successive Prosecutions, 74 HARV. L. REV. 1, n. 148 (1960).
4. Ex parte Dixon, 330 Mo. 652, 654, 52 S.W.2d 181, 182 (1932).
7. To determine if one is being twice put in jeopardy for the same offense the following test is generally used: If the facts charged would have warranted a conviction on the first information, then the second information charges the same offense and violates the prohibition. 15 AM. JUR. Criminal Law § 380 (1938). Many of the cases point out that in a prosecution for the manslaughter of A, proof of the death of B would not convict the defendant. Since proof of injury to a different person is necessary in the second prosecution, different evidence will be necessary.
and (5) reliance on the strict wording of the statute defining the crime of manslaughter.11

The minority find the "criminal act" of reckless disregard for the safety of others in the operation of the auto to be the basis of the offense.12 Thus, one charge of manslaughter constitutes jeopardy for the act or omission causing the accident, and subsequent charges based on the accident are thereby barred regardless of the number of deaths arising from the act or omission. The reason generally given to support this interpretation is that the existing criminal intent is disregard for the safety of others. As no such disregard can exist as to one passenger in an auto to the exclusion of the other passengers, there is a single criminal intent. There being a single criminal intent, there can be only one offense against the state.13

Missouri, as a result of this decision, has adopted the majority position as to the applicability of the double jeopardy provision in a case involving multiple manslaughter in an automobile accident. However, does it necessarily follow that a prosecutor can subsequently prosecute for each death if he feels a not guilty verdict was wrongfully returned in the original prosecution for manslaughter? Certainly this would not be a just result,14 as the effect would be to force the defendant to run the gauntlet of consecutive prosecutions identical in every way except the name of the deceased. The reasons for requiring an end to litigation between

to sustain that prosecution. Thus, it is reasoned, the second prosecution is not for the same offense and not prohibited by the double jeopardy provision. People v. Allen, 368 Ill. 368, 379, 14 N.E.2d 397, 403 (1937); State v. Martin, 154 Ohio St. 539, 542, 96 N.E.2d 776, 778 (1951). This appears to be a rather technical application of the test.

8. Holder v. Fraser, 215 Ark. 67, 70, 219 S.W.2d 625, 627 (1949), held that conscious and deliberate disregard for the safety of others is behavior which "orders so closely upon that motivated by actual intent that we have no hesitancy in saying that the same reasoning is applicable." The court was repudiating the "single intent" reasoning of the minority in Smith v. State, 159 Tenn. 674, 682, 21 S.W.2d 400, 402 (1929).

9. State v. Fredlund, 200 Minn. 44, 54, 272 N.W. 353, 358 (1937), held that because of present day conditions a narrow construction cannot be given to the state's right to protect its people.


11. Holder v. Fraser, 215 Ark. 67, 71, 219 S.W.2d 625, 627 (1949) (McFaddin, J., concurring): "Our statute defines manslaughter as: 'the killing of a human being. . . .' I emphasize that the crime relates to 'a human being' and not to 'human beings.' . . . Our statute does not give a criminal a bargain rate on wholesale homicides."


14. Hoag v. New Jersey, 356 U.S. 464, 475 (1958) (Warren, C.J., dissenting): "The vice in this procedure lies in relitigating the same issue on the same evidence before two different juries with a man's innocence or guilt at stake. This taints the second trial, whether the new indictment charges robbery of the same or different victims."
the same parties of an issue of fact once it has been directly put in issue and determined by a court of competent jurisdiction is stronger in criminal cases than in civil cases. The harassment factor in subsequent relitigation is greater in the criminal case as there is a great disparity in the resources of the parties. The government has available relatively large amounts of funds and legal manpower to utilize in successive actions.16 "Further, a new action is a more serious matter for the defendant than in the civil context, since he may be incarcerated pending the new trial if bail cannot be obtained."18

The injustice of such a result can be avoided if the rule of collateral estoppel is given "reasonable effect."17 The court in the Whitely case expressly reserved any judgment as to the applicability of collateral estoppel in a case of this nature, saying "Appellant pleaded guilty to each of the three charges of manslaughter. Therefore, the question of the application of the doctrine of 'collateral estoppel' does not arise."18

The applicability of collateral estoppel to criminal cases was first recognized in Rex v. Duchess of Kingston19 and is now widely accepted.20 However, its applicability in Missouri is uncertain. In State v. Ash,21 defendant had been acquitted of the robbery of A, at a gambling table. In a subsequent prosecution for the robbery of B the court refused to apply the doctrine as a bar to the jury's finding that defendant was guilty of the robbery of B, another player at the same table at the same time. In so refusing, the court quoted language from State v. Hoag22

16. Ibid.
17. In State v. Coblentz, 169 Md. 159, 167, 180 Atl. 266, 270 (1935), the court makes collateral estoppel virtually meaningless by quoting from Bell v. State, 57 Md. 108, 116 (1881): "An acquittal of a party does not ascertain or determine any precise facts. It may have resulted from insufficiency of evidence as to some particular fact, where several facts are necessary ingredients of the crime." Such a statement ignores the record of the evidence in the prior trial and limits the possibility of a bar by collateral estoppel to situations where the prior offense was in all its elements included in the second offense.
22. State v. Hoag, 35 N.J. Super. 555, 562, 114 A.2d 573, 577 (1955), aff'd, 21 N.J. 496, 122 A.2d 628 (1956), aff'd, Hoag v. New Jersey, 356 U.S. 464 (1958). Note that the court in Hoag v. New Jersey failed to decide whether the application of collateral estoppel in favor of a defendant in a criminal case was a constitutional requirement of due process, saying at 471, "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this court has never so held. However, we need not decide that question." The court then held, "Keeping in mind the fact that jury verdicts are sometimes inconsistent or irrational, ... we cannot say that the New Jersey Supreme Court exceeded constitutionally permissible bounds in concluding that the jury might have acquitted petitioner at the earlier trial because it did not believe that the victims of the robbery had been put in fear, or that property had been taken from them or for other reasons unrelated to the issue of identity." 356 U.S. at 472.

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to the effect that the court was confident that prosecutors would not resort to unfair multiple indictments and successive trials in order to accomplish indirectly what the constitutional interdiction against double jeopardy precludes.

It is hoped State v. Ash\textsuperscript{23} has not precluded the application of collateral estoppel in any criminal case. A case involving multiple deaths arising from an automobile accident can of course be distinguished from the Ash case on the basis that the state of mind required for the offense of manslaughter is different from that required for robbery. Further, in the Ash case the court said the verdicts were not necessarily inconsistent, because in the first trial where A was the alleged victim of the robbery the jury may not have believed beyond a reasonable doubt that property was taken from him, whereas, in the second prosecution for the robbery of B they found property had been taken from him. If on an examination of the record, pleadings and evidence submitted, such issue was in fact not decided in the first case, then of course collateral estoppel would not bar a prosecution for the robbery of B. However, in a case where the defendant in a single accident kills two or more people who are riding in the same car, these numerous possibilities for failure of the state’s case do not arise. If in the first case causation or death were not the basis of the favorable verdict, as it seldom is, then a finding of guilty in a second prosecution would of necessity be inconsistent, as all other elements of the state’s case are identical.

In such a case collateral estoppel should be available to the defendant to avoid the injustice of allowing the state to relitigate the same issue on the same evidence before a second jury. As was said in United States v. Oppenheimer,\textsuperscript{24} where the court explicitly held that collateral estoppel was applicable to criminal cases, “It surely cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.”\textsuperscript{25} Protection from so potent a weapon as harassment by unjustifiable multiple prosecutions should not be left to the conscience of the local prosecutor.\textsuperscript{26}

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\textsuperscript{23} State v. Ash, \textit{supra} note 22.
\textsuperscript{24} United States v. Oppenheimer, 242 U.S. 85 (1917).
\textsuperscript{25} Id. at 87.
\textsuperscript{26} For a discussion of the problems involved in separate prosecutions for multiple offenses arising from a single transaction and a possible solution, see Hunvald, \textit{Criminal Law in Missouri}, 25 Mo. L. Rev. 369 (1960). For a discussion of the application of collateral estoppel to criminal cases, see Mager, \textit{Double Jeopardy and Collateral Estoppel in Crimes Arising From the Same Transaction}, 24 Mo. L. Rev. 513 (1959).
In August 1955, defendant Wehmeyer (hereinafter referred to as mortgagor\(^2\)) borrowed $2,600 from plaintiff Noelker (hereinafter referred to as mortgagee\(^3\)) and executed a promissory note for $2,600 secured by a deed of trust. Five years later mortgagor, in fear of losing his equity of redemption because of liability arising from an auto accident, executed a warranty deed conveying the property to mortgagee. The note and deed of trust were subsequently released of record. Mortgagor remained in possession.

The subsequent agreements and relations between mortgagor and mortgagee were confusing to say the least. Mortgagee testified that mortgagor was to pay him $20 per month rent, that mortgagee took title to the property on condition that he could build a dam and lake and repair a road, and that mortgagor would pay for such improvements when he exercised his right to redeem. Mortgagor testified that mortgagee were merely to hold the title to the property until mortgagor’s liability from the auto accident was settled and then reconvey upon payment by mortgagor of the admitted principal and interest due on the money borrowed.

In June 1961, after certain now disputed consultations, mortgagee began building a dam and road. After the dam was finished and the road partially completed mortgagor stopped further work by blocking the road. Mortgagee then brought suit in ejectment. Mortgagor counter-claimed alleging that mortgagee’s deed had been procured by fraud and asking that the property be reconveyed to him upon payment of his admitted indebtedness.

The trial court determined the deed was not procured by fraud, but was intended as an equitable mortgage for security.\(^4\) The trial court decree further provided that upon payment by mortgagor of the indebtedness and $4,765.02 to reimburse mortgagee for his improvements, mortgagee should reconvey the property to mortgagor. Mortgagor failed to make the payments and the trial court entered a final decree on mortgagee’s petition for ejectment and against mortgagor’s counter-claim.\(^5\)

On appeal mortgagor accepted the trial court’s determination of equitable mortgage, arguing only that (1) mortgagee should not be entitled to reimbursement for improvements, and (2) if mortgagee is entitled to reimbursement for improvements, it should only be $1,500 rather than $4,765.02. The St. Louis Court

1. 392 S.W.2d 409 (St. L. Mo. App. 1965).
2. Defendant Wehmeyer occupied successive positions of mortgagor, grantor, and tenant.
3. Plaintiff Noelker occupied successive positions of mortgagee, grantee, and landlord.
4. Supra note 1, at 410.
5. Ibid.
of Appeals rejected both of mortgagor's contentions and affirmed the trial court decision. 6

The purpose of this note is not to criticize the result of the instant case. Rather the purpose is twofold: first, to comment briefly on the failure of the court to discuss fully the question of reimbursing the mortgagee for his improvements; second, to point out the inherent dangers in using an absolute deed in lieu of, or in conjunction with, foreclosure.

The court in the noted case concluded that plaintiff Noelker was an equitable mortgagee. 7 The essential fact situation, therefore, is a mortgagee making improvements on the mortgagor's premises. 8 The general rule is that a mortgagee cannot improve a mortgagor out of his equity of redemption. 9 That is, a mortgagee cannot make it more difficult for the mortgagor to redeem by charging the mortgagor with the costs of improving his property. Generally a mortgagee is to be credited with the reasonable cost of any repairs of the mortgaged premises, 10 but not for any improvements. 11 This general rule is subject to the exception that a mortgagee, thinking he is a bona fide owner, generally is entitled to the value of any improvements he adds. 12 This situation usually arises when a mortgagee thinks he has obtained good title by purchasing at a foreclosure sale, but in fact title is defective because of failure to join a necessary party. The non-joined party whose equity of redemption is not effectively foreclosed is thereafter permitted to redeem.

The court in the instant case did not decide whether the mortgagee was a bona fide purchaser. For the purpose of this decision it merely assumed he was not. 13 The court found that the mortgagee expended the money for the improvements "with the knowledge and consent of defendant [mortgagor]." 14 The court therefore reasoned that to deny the mortgagee reimbursement for his improvements would be inequitable and would have unjustly enriched the mortgagor. 15

The court's decision would have been sounder if it had discussed the possibility that the mortgagee was not a bona fide purchaser and that he did not make

6. Supra note 1, at 413. Note that the court failed to indicate just what type of foreclosure procedure was to be used. The opinion seems to indicate that strict foreclosure will result since no mention is made of judicial foreclosure or foreclosure under a nonjudicial power of sale.
7. Id. at 410.
8. Note that in the instant case the mortgagee was making improvements on the premises while the mortgagor was still in possession. The "improvements" problem usually arises when the mortgagee makes improvements after obtaining possession from the mortgagor.
11. Supra note 9.
13. Supra note 1, at 412.
14. Id. at 413.
15. Ibid.
the improvements with knowledge and consent of the mortgagor. If this were the case, the mortgagee would not have been entitled to reimbursement for the improvements\(^1\) unless he made the improvements thinking he was a bona fide purchaser.\(^2\)

The motivation for using an absolute deed in lieu of, or in conjunction with, foreclosure is almost always the expense and time involved in foreclosure.\(^3\) While this may be a valid reason in other jurisdictions, it is not in Missouri. Missouri's foreclosure procedure under a nonjudicial power of sale in the deed of trust is relatively short and inexpensive.\(^4\) There is simply no compelling reason in Missouri to resort to such alternative methods of foreclosure. Furthermore to use such a transaction in lieu of foreclosure, as the parties here did, involves three principal dangers.

First there is a danger of intervening liens or other interests. That is, the grantee of the purported absolute deed will take subject to any interests derived from the mortgagor-grantor that arise between execution of the mortgage and the conveyance.\(^5\) By contrast, a purchaser at a foreclosure sale takes title free of interests subsequent to the date of the mortgage.\(^6\) For the grantee in the absolute deed arrangement to be certain he obtains absolute title, he would have to obtain a quitclaim deed from everyone who could possibly have a piece of the mortgagor's equity of redemption. Furthermore even if the mortgagee-grantee checks the record for intervening interests there is a question whether he would take free of unrecorded interests. He may not be a purchaser for value if he takes merely in satisfaction of the antecedent debt. Also if the conveyance to the mortgagee-grantee is by quitclaim deed he may take with "notice" of certain unrecorded interests.\(^7\)

Second, there is an underlying idea that the mortgagor and mortgagee are not of equal bargaining strength.\(^8\) It is therefore entirely possible, especially if

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16. Supra note 9.
17. Supra note 12.
18. While this is ordinarily the case, here the motivation for using an absolute deed was to defraud defendant Wehmeyer's creditors. For a general survey of the expense and time involved in mortgage foreclosure see Russell & Bridewell, Mortgage Loan Closing Costs, 7 JOHN MARSHALL L.Q. 8 (1941).
19. §§ 443.290-.440, RSMo 1959.
20. For example, assume a mortgage executed on Jan. 1, 1960. On Jan. 1, 1961 a judgment lien is perfected against the land. If thereafter an absolute deed is used in lieu of foreclosure, the grantee would take subject to the judgment lien. Also mortgagor can convey or mortgage his equity in the interim.
22. 2 GILL, REAL ESTATE PRACTICE IN MISSOURI 890-95 (1949). If the mortgagee-grantee takes by warranty deed and gives adequate present consideration this problem is obviated.
23. "The mortgagor may make a subsequent release of the equity of redemption . . . but the transaction must in all respects be fair, with no unconscientious advantage taken by the mortgagee." Lipscomb v. Talbot, 243 Mo. 1, 33, 147 S.W. 798, 807 (1912). "Necessitous men are not, truly speaking, free men, but, to answer a pressing exigency, will submit to any terms that the crafty may impose upon them." Vernon v. Bethell, 2 Eden 110, 113, 28 Eng. Rep. 838, 839 (1762).
the consideration paid is disproportionately less than the value of the equity or if none is paid where the equity has value, that the whole transaction will be construed as unfair and unconscionable. The courts will either permit the mortgagor to redeem at this point or restore the original mortgagor-mortgagee relationship.

Third, courts are very reluctant to allow the mortgagee to fetter or clog the mortgagor's equity of redemption. The whole transaction therefore may be construed as an equitable mortgage with an equity of redemption, unlimited as to time, which would have to be foreclosed. The holding in the instant case that the purported absolute conveyance was, in actuality, an equitable mortgage clearly illustrates this point.

It should be noted that any time an absolute deed is used in lieu of foreclosure the parties should effectuate a clean and absolute break in their relationship. Any continued relationship between the parties makes it more likely that the purported absolute conveyance will be construed an equitable mortgage.

In recent Missouri publication it is suggested that such transactions in lieu of foreclosure are "perfectly acceptable and will accomplish the desired purpose. . . ." Such a statement ignores the last two pitfalls or dangers previously mentioned. Since Missouri's foreclosure procedure under a nonjudicial power of sale in the trustee is relatively quick and inexpensive, there is no real reason to use alternative procedures in lieu of foreclosure.

In short, such transactions in lieu of foreclosure in Missouri serve no useful purpose. Possibility of litigation makes the title unmarketable. If litigation actually results, it can be very expensive in both time and money. It would appear that in Missouri a nonjudicial sale under the power of a deed of trust should always be used.

STEPHEN H. ROMINES

24. Niggeler v. Maurin, 34 Minn. 118, 24 N.W. 369 (1885). In Baugher v. Merryman, 32 Md. 185, 192 (1869), it was held that "[U]nless the transaction appears to be fair, and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation of debtor and creditor." See also JONES, MORTGAGES, § 302 (8th ed. 1928).

25. "When once it is determined to be a mortgage, all the consequences of account, redemption and the like, follow, notwithstanding stipulations to the contrary." (Emphasis added.) Sheppard v. Wagner, 240 Mo. 409, 438-41, 144 S.W. 394, 403-04 (1912). "A man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. It would ruin the distressed and unwary, and give unconscionable advantage to greedy and designing persons." Spurgeon v. Collier, 1 Eden 55, 28 Eng. Rep. 605, 606 (1758).

26. Supra note 4. See also Lynch v. Ryan, 132 Wis. 271, 111 N.W. 707 (1907).


28. Supra note 19.
SEARCH WARRANTS—PROBABLE CAUSE—MISSOURI RULE

State v. Taylor

Defendant was convicted of receiving stolen property. His sole contention on appeal was that the court erred in not sustaining his motion to quash the search warrants and suppress the evidence. Three search warrants had been issued on three sworn complaints. The complaints and search warrants were identical except for the property described and the places to be searched. Each complaint was a bald, yet positive, statement that certain stolen property was being held at a certain described location, wherefore the complainant prayed that a search warrant be issued. There were no supporting affidavits or other written statements. The Supreme Court of Missouri affirmed the conviction, basing its decision on the constitutionality of Rule 33.01 of the Missouri Rules of Criminal Procedure. Rule 33.01 provides, in part, that if a written complaint is filed with the judge of a court having original criminal jurisdiction stating that personal property which has been stolen is being held within the territorial jurisdiction of such judge, and "if such complaint be verified by the oath or affirmation of the complainant and states such fact positively and not on information or belief," then such judge shall issue the search warrant.

The essence of the present decision is that a search warrant will issue in Missouri upon a sworn complaint which states "positively" that certain stolen property is being held at a described location. The court requires no further evidentiary facts to be stated. No explanation of how the complainant acquired this "positive knowledge" or why he knows the "positive statement" to be true is needed. The instant case is substantially in accord with earlier Missouri decisions.

The fourth amendment to the United States Constitution provides:

[And no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.]

1. 391 S.W.2d 929 (Mo. 1965).
2. Exhibit 3 is representative of the property described in the complaints: Men's clothing, consisting of 35 top coats, 24 sport coats, 24 student's suits, 139 dress suits; and Ladies clothing, consisting of 7 coats and 9 car-coats.
3. A grey one-story frame house, with a blue composition roof, and a basement, at 5409 Laurel, in Raytown, Jackson County, Missouri.
4. Supra note 1, at 932.
5. Ibid.
6. Ibid.
7. State v. Brugioni, 320 Mo. 202, 7 S.W.2d 262 (1928); State v. Naething, 318 Mo. 531, 300 S.W. 829 (1927); State v. Stevens, 316 Mo. 602, 292 S.W. 36 (1927).
8. The Missouri counterpart, Mo. Const. art. I, § 25, is to the same effect: "and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause supported by written oath or affirmation."
The Supreme Court of the United States has held the fourth amendment's proscriptions enforceable against the states through the fourteenth amendment. The Court has further held that the standards of reasonableness are the same under the fourth and fourteenth amendments.

In the present case defendant contended that the portion of Rule 33.01 which reads "and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief," is unconstitutional. The question thus raised is what, if any, is the distinction between the constitutional requirement of probable cause and the statement of positive fact which, according to the instant case, will suffice under Rule 33.01.

Federal decisions in this area have set forth two related precepts. The first is that the facts stated in the complaint must be based on the personal experience of the complainant or information supplied to him by reliable informants. The second is that the complaint may not be based solely on the belief of the complainant. The Missouri court was able to distinguish the instant case (1) because the Missouri court assumes that a complainant who states facts positively is either speaking from personal experience or from information supplied by reliable informants, and (2) because the Missouri court assumes that positive statements are not based on the belief of the complainant. Both assumptions are open to question. The Supreme Court of Missouri has taken Rule 33.01, which requires that the facts be stated positively and not upon information or belief, and applied it so that the positive statement alone satisfies the "not upon information or belief" requirement.

Does a positive statement guarantee the complainant is speaking from personal experience? If it does not, there is a danger that search warrants may be issued on information supplied by unreliable informants. A statement made positively is not necessarily limited to a statement made from personal experience. Positive statements may be based on information supplied by third persons. Nevertheless the Missouri court holds that there is no requirement that the court make

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9. Mapp v. Ohio, 367 U.S. 643 (1961), held that the exclusionary rule is of constitutional origin. As such, it is a command of the due process clause of the fourteenth amendment upon the courts of the states to exclude all evidence obtained as a result of an unreasonable search. When a search warrant is issued without probable cause, the search becomes unreasonable. In all such cases, the product of the search is inadmissible in evidence to establish guilt.


13. This assumption is implied in the court's holding: "Finally, there is no requirement that the court make a specific determination of the reliability of the informant. The warrant recites, however, that a duly verified complaint had been filed, and we hold this to be sufficient." Supra note 1, at 932.

14. In distinguishing Aguilar v. Texas, supra note 9, in which the complaint was written in terms of belief, the court held "This case is not in point because it does not deal with a verified complaint which states facts positively." Supra note 1, at 933.
a specific determination of the reliability of the informant.\textsuperscript{15} Although this holding is not directly contrary to any federal decision it seems inconsistent with the rule that search warrants be issued on hearsay information only if the informant is reliable.

The second and broader distinction the Missouri Supreme Court makes is between statements of belief and "positive" statements.\textsuperscript{16} The implication is that positive statements are based on knowledge rather than belief and therefore require no further explanation. It is difficult to justify such a distinction between knowledge and belief. The relevant distinction is not in the abstract but rather concerns the practical matter of how the complainant draws the line between what he says he knows and what he says he believes. This process is apparently a determination in his own mind of how certain his statement is. It is a weighing of information available to him and a decision as to the probability of his conclusion. Presumably, if the information weighs heavily enough in his mind, he will consider it knowledge rather than belief. The fallacy in the distinction is that the positive statement is merely a result of a higher degree of certainty in the mind of the believer. In other words, whether the complainant makes the statement in a positive manner or upon belief depends solely on how certain he himself is. Why should the distinction turn on the certainty of the complainant? Moreover, it is not the complainant but the judge who should determine the degree of certainty. The weighing of information is exactly what the judge is to do under the fourth amendment when he determines probable cause.

But granting, for the time, that a positive statement will not be based on information or belief, is Rule 33.01 constitutional as stated? Should not the complainant be required to explain why he can make the statement in a positive manner? Why he is so convinced of its truth? The language of the court in \textit{Giordenello v. United States}\textsuperscript{17} would seem to indicate that something more than a mere conclusion by the complainant is required:

When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.\textsuperscript{18}

The court in the noted case distinguished \textit{Giordenello} on the two grounds discussed above\textsuperscript{19} but the language of \textit{Giordenello} would seem to mean that the judge must have some basis for determining probable cause. The predetermination of probable cause by a neutral and detached magistrate is the whole essence of the

\textsuperscript{15} Supra note 13.
\textsuperscript{16} Supra note 14.
\textsuperscript{17} 357 U.S. 480, 486 (1958).
\textsuperscript{18} Ibid.
\textsuperscript{19} See text accompanying note 13 supra.
fourth amendment. It is a judicial function and may not be delegated to the complainant.\textsuperscript{20}

Can the Missouri rule fully guarantee a judicial determination? In Missouri the complainant need only make the required "positive" statement and the magistrate must issue the warrant.\textsuperscript{21} In no sense is the magistrate left anything to decide. Only the complainant knows how certain the "positive" statement is. Under the Missouri rule the judge can make, at best, only a "rubber stamp" determination of probable cause.

\textbf{WILLIAM V. MORGAN}

\textbf{TORTS—RETENTION OF CONTROL BY LANDLORD}

\textit{Green v. Kahn}\textsuperscript{1}

On the evening of March 4, 1960, a fire broke out in an apartment occupied by tenant, Shirley Green, and her children. Shirley died in the fire and her daughter, Debra, suffered severe burns. Debra brought an action against the landlords for personal injuries, alleging defendants were negligent in supplying an open gas cooking range for heating purposes. Evidence at the trial tended to show that the pipe supplying gas extended from a front building back and into three apartments, one of which was rented by plaintiff's mother. Attached to the branch of the pipe in Shirley Green's apartment was the open gas range, supplied for heating as well as cooking purposes, and apparently the source of the fire. A witness for defendants testified that on the evening of the fire she had been in Shirley's apartment and had observed that wet blankets were hanging approximately eighteen inches over the flames from the stove burners.\textsuperscript{2} A member of the bombing and arson squad of the police department inspected the apartment after the fire was extinguished and determined that the fire had originated near the stove approximately three feet above the floor. He testified that the cause of the fire was "blankets over the stove."\textsuperscript{3}

\textsuperscript{20} "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." McDonald v. United States, 335 U.S. 451, 455-56 (1948).

\textsuperscript{21} This is provided, of course, the statement is sworn to, and adequately describes both the stolen property and the place to be searched.

\textsuperscript{1} 391 S.W.2d 269 (Mo. 1965).

\textsuperscript{2} Any contributory negligence on the part of Shirley Green would not be imputable to the plaintiff in her personal injury action, but could be considered as a concurring cause. \textit{Id.} at 277.

\textsuperscript{3} \textit{Id.} at 273.
The jury returned a verdict for plaintiff, but the trial court sustained defendants' motion for judgment in accordance with their motion for a directed verdict at the close of all the evidence. On appeal the Missouri Supreme Court reversed and remanded, holding that there was substantial evidence that defendants were negligent and that such negligence was a proximate cause of the fire and resulting injury to plaintiff.

An interesting aspect of this case is the use of the following rule of law to impose a duty upon the defendants:

A landlord is under a duty to exercise ordinary care to keep the portions of the premises which he retains in his control in a reasonably safe condition for the use intended and is liable in damages for personal injuries resulting from his failure to perform that duty.

The duty resulting from retention of control seems to be based on principles of invitation, for it extends to those persons rightfully using the premises. This control rule is firmly established throughout most of the United States, but a few jurisdictions, notably Massachusetts, use a rather peculiar modification. In Regan v. Nelson the Massachusetts Superior Court pointed out that the landlord's duty with respect to common passageways which are within his control is to use reasonable care to keep them in as safe a condition as they were, or appeared to be, at the time the tenancy was created. This Massachusetts limitation on the duty imposed by the landlord's retention of control applies only to common approaches or passageways and is therefore not significant in the present situation.

The control rule appears most frequently where the injury is caused by some defect in a stairway, passageway, porch or the like; but logically there appears no reason why the rule should not extend to any agency or instrumentality

4. The court remanded for new trial because of prejudicial jury instructions. Id. at 278.
5. The noted case contains an interesting discussion of proximate cause. Supra note 1, at 274.
12. Peterson v. Brune, 273 S.W.2d 278 (Mo. 1954); Schneider v. Dubinsky Realty, 344 Mo. 654, 127 S.W.2d 691 (1939); Gray v. Pearline, 328 Mo. 1192, 43 S.W.2d 802 (1931).
which the landlord controls. In fact, the rule has frequently been applied to defective appliances, and to heating, water and electrical systems. The court in the noted case was careful to point out that the rule applies not only to defects in structural portions of the building, but also to unsafe conditions in agencies and appliances. If there was ever any real doubt of this Marentette v. Luechtefeld answered the question. In that case the refrigeration pipe in tenant's apartment was pinched shut after the refrigerator was removed. Later gas escaped, injuring plaintiff's daughter. The court held that the control rule was applicable to the pipe extending into the apartment. Likewise, in Thompson v. Paseo Manor South, Inc. the court held that defendant-landlord was in control of the uninsulated heating pipes in plaintiff-tenant's apartment, and that this control imposed a duty to use ordinary care to keep said pipes in a reasonably safe condition.

Plaintiff in the present case did not allege, nor did the court attempt to find, control of the gas range as a separate unit. Rather the control theory is based on the idea of a system. The court found substantial evidence to warrant a finding that the gas pipes extending from defendants' building to the rear building which contained plaintiff's apartment, and the stoves attached to branches of the piping in the three apartments, constituted an integrated system, controlled by defendants, and for use by the tenants as a group. Viewed in this manner the gas stove clearly falls within the control rule as expressed in Thompson and Marentette. It could scarcely be argued that defendants did not retain control of the gas lines or that said lines did not constitute a system for use in common by the tenants. Defendants, however, in an effort to persuade the court that the stove should be considered as a separate agency, argued that complete control of the stove was in the tenant. The court dismissed this argument summarily as a confusion between "use" and "right of control." As pointed out in Gladden v. Walker & Dunlop, Inc. fixtures of this type "are not isolated either in use or maintenance." Because they are supplied by the landlord and attached permanently to a common system upon which they are dependent for operation it seems natural to consider them a part of that system.

17. Green v. Kahn, supra note 1, at 274.
18. 268 S.W.2d 44 (St. L. Mo. App. 1954).
19. Id. at 47.
21. Id. at 5-6. For an unusual, contrary opinion see Yuppa v. Whittaker, 88 R.I. 214, 217, 145 A.2d 255, 257 (1958), wherein the court said, "It is not the control of the source of the heat in the central heating system which is the decisive factor but rather the control of the premises wherein existed the particular heated pipe which caused the injury."
23. Supra note 16.
Once the landlords' control of the gas range has been established a second feature of the rule comes into play. The landlords' duty is to use reasonable care to keep the agency reasonably safe for the use intended. The negative statement of this seems to be that a landlord does not have a duty, in the absence of knowledge, to use reasonable care to keep the agency reasonably safe for an unauthorized and improper use. Had the stove been supplied only for the usual cooking purposes, defendants would not have been under a duty of reasonable care with regard to safety for heating purposes. Thus, a critical point in the case is the fact that defendants supplied a cooking stove to be used as a heater. Their duty then arose as to such intended use. The range was apparently in a reasonably safe condition for use as a cooking stove, but as a heater it was dangerous because of the open flames.

It seems that under the control rule in Missouri a "system" for use by the tenants in common now includes not only the pipes or wires which extend throughout the building, and the extensions which pass into the separate living quarters, but also appliances supplied by the landlord, attached to such extensions, and dependent upon the system for operation. Although Thompson and Marentette stand for something close to this same proposition, it is most clearly and distinctly expressed in Green v. Kahn, which represents the broadest Missouri view of systems over which the landlord retains control. The extent to which various appliances may be deemed part of a greater system is not clear. Suffice it to say that the potential breadth of a landlord's duty under the control rule has not yet been limited.

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26. There was some evidence tending to show that the valves on the burners of the stove were defective, but the court did not consider this in reaching its decision. Green v. Kahn, supra note 1, at 274.