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Recent Cases

TORTS: LIABILITY OF ADJOINING LANDOWNERS FOR A DANGEROUS CONDITION

_Foster v. Laba_¹

Plaintiff was a second floor tenant of defendant Brune in a two-story building, the south one-half of which was owned by defendant Brune, the north one-half, by defendant Laba. The only access to the second-floor, containing an unoccupied apartment on Laba’s side and plaintiff’s apartment on Brune’s side, was an outside stairway at the rear of the building. The stairway opened onto a porch which was without any barrier separating the north half from the south half. A clothesline ran the length of the porch when plaintiff moved in, and she used it on both halves of the porch. Plaintiff, while sweeping on Laba’s side of the porch, stepped into an observable hole, and received the injuries for which she sued both Laba and Brune. Plaintiff’s theory for recovery was that the defendants maintained a common stairway and porch intended for the use of persons occupying both apartments and that the defendants failed to exercise ordinary care by not discovering and repairing the porch defect. Plaintiff testified that an agent of Brune instructed her to clean the unoccupied portions of the premises. There was no evidence offered as to the use of the porch by prior tenants. Judgment was against both defendants.

On appeal, the trial court’s judgment was reversed on the ground that the defendants should have received a directed verdict. The opinion indicates that the plaintiff would have had a jury question had there been evidence of a common enterprise or common maintenance of the porch by the defendants,² or evidence that it was necessary that both tenants use all of the porch.³ The court also held that the common use doctrine⁴ was not applicable, because neither land-

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¹ 402 S.W.2d 619 (St. L. Mo. App. 1966).
² The court did not elaborate on the meaning of either of these terms. Common enterprise has been used synonymously with joint enterprise or joint venture as in situations where a passenger and the driver of an automobile are held to be on a joint venture so that the negligence of the driver can be imputed to the passenger. See Missouri Pac. Transp. Co. v. Howard, 201 Ark. 6, 143 S.W.2d 558 (1940); Teufel v. Kaufmann, 233 Iowa 443, 6 N.W.2d 850 (1942). Common maintenance may mean some type of agreement or cooperation between the landlords for maintenance.
³ The court stated that the stairway was maintained in common since a tenant could not walk up the steps without treading on both sides of the property line running through the stairs. Supra note 1, at 621.
⁴ The common use doctrine is that a landlord who rents portions of premises to two or more tenants, reserving halls, stairways and other approaches for the common use of his several tenants, is under a duty to use reasonable care to keep said places in a reasonably safe condition. Fitzpatrick v. Ford, 372 S.W.2d 844 (Mo. 1963); Peterson v. Brune, 273 S.W.2d 278 (Mo. 1954); Gray v. Pearline,
lord had two tenants; neither fitted within the usual fact situation of the common use doctrine, i.e., a landlord providing facilities for the common use of two or more tenants. There are two precedents for this holding, Mahnken v. Gillespie and Swingler v. Robinson.  

Mahnken first held that the common use doctrine did not apply to adjoining landowners. Plaintiff’s child drowned in an old well located on the property line between premises owned by the two defendants. One theory of the plaintiff was that the common use doctrine imposed on the landowners the duty to keep the premises in a reasonably safe condition. The court rejected this theory for the reason subsequently relied on in the principle case. In Swingler, the plaintiff was injured on the back porch of her flat. The porch and stairs on the plaintiff’s side leading to the porch constituted the only rear entrance to plaintiff’s flat and a flat in the adjoining building; the two flats were separated only by a wall. In the suit against plaintiff’s landlord, the court, citing Mahnken, held the common use doctrine inapplicable. The court held that the tenant had taken the property subject to an easement in the adjoining owner, and that any liability for failing to keep the easement in repair falls on the owner of the easement. Even though Foster is consistent with these two cases, it is submitted that the result is not entirely sound.  

In Peterson v. Brune, a porch with steps leading from it served both first floor flats in the building owned by the defendant. The plaintiff was injured when the porch railing on his side gave way. The defendant was held to have retained control of the porch because of the common use doctrine. The difference between this and the noted case is the divided ownership in Foster, and for this reason the court in Foster expressly stated that Peterson v. Brune was not in point. The problem can be thus summarized: Is the divided ownership of the building so significant that it requires different results in the Foster and Peterson cases?  

The argument for different results is that a property line through the middle of a building is the same as any other property line. When the plaintiff in Foster went upon the property of another without the owner’s consent, she was a trespasser regardless of whether the property began in the middle of the building, at the edge of the building, or any other place.  

On the other hand, the tenant in Peterson had the right to use all of the porch and hold the landlord responsible for it because one porch was used by two tenants. From the tenant’s standpoint, the determinative fact that one porch is used by two tenants is not altered by the divided ownership in Foster. Since the tenants in both cases stand in the same position, i.e., both share one porch with

328 Mo. 1192, 43 S.W.2d 802 (1931); Miller v. Geeser, 193 Mo. App. 1, 180 S.W. 3 (St. L. Ct. App. 1915); Karp v. Barton, 164 Mo. App. 389, 144 S.W. 1111 (St. L. Ct. App. 1912); Annot., 26 A.L.R.2d 468 (1952).  
5. 329 Mo. 51, 43 S.W.2d 797 (1931).  
6. 321 S.W.2d 29 (St. L. Mo. App. 1959).  
7. Supra note 4.  
8. The fact that the adjoining apartment in Foster was vacant is another difference but is insignificant. See Hassell v. Denning, 84 Cal. App. 479, 258 Pac. 426 (1927); Dillehay v. Minor, 188 Iowa 37, 175 N.W. 838 (1920).
another tenant, their legal rights should be the same. *Ferdinando v. Rosenthal* may offer a solution to the problem. In that case, two premises with separate owners shared a common courtyard serving as ingress and egress from both buildings. Plaintiff was injured on the steps leading to the street, but on the side of the adjoining owner and not her landlord’s side. Plaintiff’s judgment against both landlords was affirmed. The court held that from the circumstances and the construction of the courtyard, it could imply an invitation by both landlords to all tenants of each building to use the courtyard. The adjoining landlord had a duty to inspect and to render the premises reasonably safe, and plaintiff’s landlord had a duty to inspect and warn.10

Another problem with the *Foster v. Laba* decision in regard to porches like this one is that the decision creates a practical immunity from tort liability for the landlord who owns one-half of an apartment house. The *Foster* opinion indicates that in order to hold the landlords liable a plaintiff must prove the landlords were maintaining the porch in common; this fact can be established in three ways: 1) a common enterprise by the two landlords; 2) common maintenance of the porch by the two landlords; or, 3) the necessity of both tenants using all of the porch. The first two possibilities can be eliminated by the landlords avoiding any agreement or repairs. If it is necessary that both tenants use all of the premises, the case may be decided on the basis of easements as in *Swingler v. Robinson*,11 i.e., the person occupying one apartment may have an easement to use the other side of the porch. The owner of the easement or the dominant estate must keep the easement in repair.12 Assuming that the injured tenant’s landlord has the dominant estate, the easement would probably be included in the estate demised to the tenant; thus neither landlord would be responsible for the maintenance of the porch. Similarly if the adjoining landlord has the dominate estate, the easement would probably be demised to his tenant; so neither landlord would be responsible. Only if the adjoining landlord lacked a tenant to whom to demise the easement could an injured tenant recover against a landlord.13

In conclusion, *Foster v. Laba* is consistent with the protection of the landlord-tenant characteristic of Missouri tort law. However, an approach such as that in *Ferdinando v. Rosenthal*14 seems preferable as a middle ground between the immunity of *Foster* and complete disregard of the divided ownership factor. This ap-

10. Similarly, it was held in *Fornagiel v. Wacholder*, 247 App. Div. 305, 285 N.Y. Supp. 1010 (1936), *aff’d, per curiam* 272 N.Y. 589, 4 N.E.2d 817 (1936), that the act of a landlord authorizing tenants to use a clothesline pole on the adjoining owner’s property imposed upon him the duty to determine if the pole was safe.
13. In many cases, of course, a judgment against a tenant will be uncollectable.
proach would allow recovery in instances when the nature and construction of the premises are so conducive to use by the adjoining landowner as to amount to an invitation to use the premises.

TERRY AHERN

BANKS—FIDUCIARY DEPOSITS—LIABILITY FOR PARTICIPATION IN MISAPPROPRIATION

Cassel v. Mercantile Trust Co.¹

Plaintiff, successor trustee under a will, sued defendant bank for participation in a breach of trust by Rosenblum, plaintiff's predecessor in trust. Defendant was the depository of the trust funds, and its liability was based on permitting the withdrawal of 108,225 dollars used by Rosenblum for personal purposes. The funds were in an account in the name of Rosenblum as executor, and all withdrawals were made by checks signed by Rosenblum as executor and payable to himself. Some were paid over the counter to Rosenblum by defendant, and others were honored when cashed by Rosenblum at another bank. All of the thirty-five checks were in large, even, round numbers, and were cashed over a period of eighteen months. Defendant had knowledge of the trust character of the funds, and was experienced in the practices and procedures relating to the administration of estates.

Plaintiff alleged that the withdrawals in cash of such large amounts were so unusual and abnormal as to arouse defendant's suspicion of the misappropriation, and that the withdrawals charged defendant with notice of the breach of trust. Defendant moved to dismiss on the grounds that the action was barred by the statute of limitations and failed to state a claim upon which relief could be granted. The circuit court sustained the motion on the statute of limitations theory, and the plaintiff appealed. On appeal, the Supreme Court of Missouri passed over the limitations issue and held that on the merits the petition did not state a claim upon which relief could be granted, because it did not state facts sufficient to allow a jury to find that defendant was guilty of bad faith or dishonesty.

The court held that in order to subject the bank to liability, the bank must have assisted the fiduciary in accomplishing the misappropriation, having actual or constructive knowledge that the fraud was being, or was about to be, perpetrated.² The elements of this cause of action are: 1) knowledge by the bank of the trust character of the funds; 2) an unlawful misappropriation by the fiduciary; 3) a showing that the bank was not justified in presuming that the fiduciary was

¹. 393 S.W.2d 433 (Mo. 1965).
². Id. at 437. The other two ways a bank can incur liability for a misappropriation are by breach of a contract with the owner of the fund, or by appropriation of the fund to the payment of the fiduciary's debt to the bank.
putting the funds to a proper use; and 4) participation in the breach of trust with notice or knowledge of the breach of trust.\(^3\)

The petition was sufficient on the first two elements; but the allegations concerning the amounts, the frequency, and the unusual manner of the withdrawals did not satisfy the third and fourth requirements. Mere suspicion of a misappropriation is not sufficient. Bad faith, dishonesty, or actual knowledge is an essential element of the bank's liability. In the absence of knowledge that the "withdrawals were out of proportion to the financial needs of the estate,"\(^4\) the cashing of the checks did not constitute bad faith. The court pointed out that a statute\(^5\) now covers the fact situation of this case, but since the checks were cashed before the statute was enacted, it was not controlling. Since all causes of action arising after the passage of the statute will be governed by the statute, the remainder of this note will consider the changes this statute has made in the liability of a depository for participation in a breach of fiduciary duty.

Missouri adopted substantially all of the sections of the Uniform Fiduciaries Act in 1959.\(^6\) Three of these sections (§§ 456.290-310, RSMo 1959) deal exclusively with the liability of banks. The statute applies only where "one person deals with another person whom he knows to be a fiduciary."\(^7\) Questions of actual or constructive notice of the trust character of the funds are not covered. The primary purpose of the statute is to remove the issues of negligence or the exercise of due care from a suit against the bank for participation in a breach of fiduciary obligation.

The common law rule was that where a deposit was made by one in a fiduciary capacity, and a check was drawn by the fiduciary in his name as fiduciary, the bank was entitled to pay the check, and was not liable unless it acted in bad faith or with actual knowledge of the misappropriation.\(^8\) However, the bank was liable where the check was payable to the bank as payment or security for the fiduciary's personal debt.\(^9\) Where the check carried on its face notice of the breach of trust, and the bank profited from the transaction, public policy required that the innocent principal be protected.

3. Ibid.
4. Id. at 441.
5. § 456.290, RSMo 1959.
8. Cassel v. Mercantile Trust Co., supra note 1; Lucas v. Central Missouri Trust Co., 350 Mo. 593, 166 S.W.2d 1053 (1943); State ex rel. Elberta Peach & Land Co. v. Chicago Bonding & Sur. Co., 279 Mo. 535, 215 S.W. 20 (1919) (check to his own order); Gate City Bldg. & Loan Ass'n v. Nat'l Bank of Commerce, 126 Mo. 82, 28 S.W. 633 (1894) (check deposited to personal account); 3 Scott, Trusts § 324.3 (2d ed. 1956); Restatement (Second), Trusts § 324, comment g (1959).
9. People's Nat'l Bank v. Guier, 284 Ky. 702, 145 S.W.2d 1042 (1940); Schofield v. Cleveland Trust Co., 149 Ohio St. 133, 78 N.E.2d 167 (1948); Withrow v. Weaver, 337 Pa. 488, 12 A.2d 92 (1940); 3 Scott, Trusts § 324.4 n.4 (2d ed. 1956); Restatement (Second), Trusts § 324, comment h (1959).

In Schofield, the bank was held liable for payment of a personal note by the fiduciary with trust funds, and also for deposits to his personal account which cancelled overdrafts. See infra note 21.
Section 456.290, RSMo 1959\(^{10}\) does not change the common law rules except in one situation. At common law, a bank was liable if it accepted, in satisfaction of a personal debt of the fiduciary, a check drawn by the fiduciary, payable to the fiduciary personally, and indorsed by him to the bank.\(^{11}\) However, section 456.290 imposes liability without actual knowledge or bad faith only when the check is “payable to the drawee bank.” That this was the intent of the framers of the statute is clear from section 6 of the Uniform Fiduciaries Act\(^{12}\) which deals with checks drawn by, and payable to, a fiduciary. There is nothing in the statute to indicate that “transferee” cannot mean “bank.” To the contrary, the purpose of section 456.290 as stated by the Commissioners on Uniform State Laws is to lay down a definite rule, making the bank, where it acts solely as a depository, liable only if it has actual knowledge of the fiduciary’s breach of duty or if it acts in bad faith; and where the bank acts as creditor, making it liable to the same extent as other creditors are made liable.\(^{13}\)

Since ordinary creditors can accept an indorsed check drawn by and payable to the fiduciary, it follows that a bank is authorized to do so in the absence of actual knowledge or bad faith.

Section 456.300, RSMo 1959\(^{14}\) pertains to deposits made in the name of the

\(^{10}\) This section provides: “If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation in drawing or delivering the check.”

\(^{11}\) Massachusetts Bonding & Ins. Co. v. Standard Trust & Sav. Bank, 334 Ill. 494, 166 N.E. 123 (1929); Comment, 34 ILL. L. REV. 819, 825 (1940). See also McCullam v. Mermod, Jaccard & King Jewelry Co., 218 S.W. 345 (St. L. Mo. App. 1920), where a check by a corporate officer made payable to himself was given to a private creditor.

\(^{12}\) This section is the same as § 456.280, RSMo 1959. The section provides: “If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.”


\(^{14}\) This section provides: “If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal’s account, the bank is authorized to pay such check without being liable
principal, and authorizes the bank to pay checks signed by an authorized fiduciary. The rules discussed in connection with section 456.290, RSMo are applicable here.

Section 456.310, RSMo 1959\textsuperscript{18} covers the situation where fiduciary funds are deposited in the fiduciary’s personal account. At common law the bank was not liable for the transfer of the funds to the fiduciary’s personal account, or for subsequent misappropriations.\textsuperscript{16} However, it was liable if the fiduciary paid a personal debt to the bank from the account.\textsuperscript{17} Some decisions held the bank liable for honoring checks to third persons after payment of a debt to the bank from the account.\textsuperscript{18} These decisions placed on the bank the duty to determine how much of
to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.”

15. This section provides: “If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.”


In New York a bank is liable where it credits the personal account of a corporate officer with funds of the corporation. Wagner Trading Co. \textit{v.} Battery Park Nat’l Bank, 228 N.Y. 37, 126 N.E. 347 (1920).


18. Bischoff \textit{v.} Yorkville Bank, \textit{supra} note 16. The court said that the knowledge the bank acquired when the fiduciary used trust funds to pay his debt to the bank terminated the presumption that the fiduciary was acting properly, and put the bank on notice of the subsequent misappropriations.

Compare Allen \textit{v.} Puritan Trust Co., \textit{supra} note 16, where while the bank was liable for the payment to it of the fiduciary’s personal debt, it was not liable for subsequent misappropriations. The court said that acceptance of the check from his personal account did not establish the bank’s bad faith as a matter of law.
the account consisted of trust funds and how large a withdrawal it could safely permit. This rule has been changed by the statute, as was intended by the Commissioners on Uniform State Laws. The leading case, Colby v. Riggs Nat'l Bank, and many other cases, have held that in the absence of actual knowledge or bad faith, the bank is not liable for accepting a personal check from a personal account containing trust funds.

The test for liability under sections 456.290-310, RSMo 1959 is one of “actual knowledge” or “knowledge of such facts that its action . . . amounts to bad faith.” Negligence or lack of due care is never enough for liability.

The actual knowledge requirement refers to a subjective state of mind. It can be met by knowledge of an agent, but the knowledge of several agents cannot be pieced together to find actual knowledge. This is consistent with the purpose of the statute to impose liability only for an actual wrong. This “wrong” should be based on subjective knowledge, not the objective standard of due care.

In Davis v. Pennsylvania Co. For Ins. On Lives And Granting Annuities, the court distinguished between negligence and bad faith:

The distinction between them is that bad faith, or dishonesty, is, unlike negligence, wilful. The mere failure to make inquiry, even though there be suspicious circumstances does not constitute bad faith, . . . unless such

The Bischoff rule was modified slightly in Grace v. Corn Exch. Bank Trust Co., 287 N.Y. 94, 38 N.E.2d 449 (1941). There trust funds were transferred to the personal account of the fiduciary, then to a corporate account, and then used to discharge a corporate debt to the bank. The court made the bank account to the estate for this money, but it was not held liable for subsequent misappropriations.


In Powell v. Freeport Bank, 200 App. Div. 432, 193 N.Y.S. 100 (1922), the bank was liable only to the extent that the debt exceeded the fiduciary’s personal funds, the presumption being that the fiduciary used his own funds as far as possible.

20. 9B U.L.A. 41 (1966). For a summary of the law on this point and a criticism of the Uniform Fiduciary Act, see Merrill, Bankers’ Liability for Deposits of a Fiduciary to His Personal Account, 40 Harv. L. Rev. 1077 (1927).

21. 92 F.2d 183 (D.C. Cir. 1937). While the bank was not liable for accepting a personal check in payment of a personal debt, it was liable when a check payable to the fiduciary as such was deposited to his overdrawn account. See Annot., 114 A.L.R. 1065 (1938).


23. These requirements are the same as in § 401.056, RSMo 1959 (since repealed by the Uniform Commercial Code). For Missouri decisions construing these terms, see 21 V.A.M.S. at 168.

24. § 456.240(2), RSMo 1959. “A thing is done ‘in good faith’ within the meaning of sections 456.240 to 456.350, when it is in fact done honestly, whether it be done negligently or not.”


27. Supra note 22.
failure is due to the deliberate desire to evade knowledge because of a be-
lief or fear that that inquiry would disclose a vice or defect in the trans-
action,—that is to say, where there is an intentional closing of the eyes or
stopping of the ears.28

This distinction, stressing the intentional aspect of bad faith, is a desirable one
that has been accepted by other courts.29 Some courts have defined “bad faith” as
“dishonesty,” and this definition is supported by the definition of “good faith”
in the statute.30 But this definition is inaccurate if it emphasizes and requires
criminal fraud or corruption. “Instead courts have asked whether it was ‘com-
mercially’ unjustifiable for the payee to disregard and refuse to learn facts readily
available.”31

Thus sections 456.290-310, RSMo 1959 do not radically change the law in
Missouri, and the result in the Cassel case would have been the same if brought
under the statute. If the above rules are followed, the bank will only be liable
when it is guilty of some dishonesty. This will effectuate the purpose of these
sections of the Uniform Fiduciaries Act—“to facilitate banking transactions by re-
lieving a depository, acting honestly, of the duty of inquiry as to the right of its
depositors, even though fiduciaries, to check out their accounts.”32

Clifton Banta, Jr.

MENTAL DISORDER NOT AMOUNTING TO INSANITY AS AFFECTING
CRIMINAL RESPONSIBILITY IN MISSOURI

State v. Garrett1

On April 30, 1963, Rodney Garrett entered a small restaurant and bar in
St. Louis County for the second time that afternoon. He was known to the
single waitress on duty only by sight, due to his past patronage of the bar. He
loitered over a beer long enough for other patrons to depart and then, approaching
the waitress from behind, attacked her, stating that he “... was ‘used to
doing this.’”32 Garrett later stated that he told the girl he wanted money and

28. Davis v. Pennsylvania Co. For Insurance On Lives & Granting Annuities,
supra note 22, at 460, 12 A.2d at 69.
29. Transport Trucking Co. v. First Nat'1 Bank, supra note 22; Bd. of
County Comm'rs v. First Nat'l Bank, 368 P.2d 132 (Wyo. 1962).
30. Supra note 24.
This court also pointed out that contributory negligence cannot negate the bank's
liability under this statute.
32. Transport Trucking Co. v. First Nat'l Bank, supra note 22, at 325, 300
P.2d at 479.
1. 391 S.W.2d 235 (Mo. 1965).
2. Id. at 237. The entire statement of facts is taken from this page of the
opinion.
not to scream, that she started to kick and scream, and that he got excited and "struck her." In the brief attack the girl sustained seven stab wounds in her back and a gash from below the ear to the center of her throat which required fifty-one stitches to close.

Garrett dragged his victim to the rear of the bar, left her and removed all of the paper money from the cash register. He again approached the girl and asked if she knew where he had dropped his knife. After ripping the telephone receiver off the wall, he wrapped his still conscious victim in a sweater, making a vague reference to killing her, and attempted to get her to walk out onto the street. Unsuccessful, he dragged her into the men's room, choked her into unconsciousness, and fled.

The girl did not die, and Garrett was convicted of first degree robbery by means of a dangerous and deadly weapon. At trial, the defense relied on insanity at the time of the act. In the face of psychiatric testimony which conflicted on whether Garrett's subnormal mentality and personality disorders amounted to a mental disease sufficient to establish legal insanity, defendant also invoked the following provision of Missouri's new Mental Responsibility Act:

Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible (1) to prove that the defendant did or did not have a state of mind which is an element of the offense;  

Unfortunately, the use of evidence of mental disorder to reduce the crime is in direct conflict with two precepts of Missouri case law: (1) the limited use of such evidence; and (2) frequent judicial recognition of fictitious states of mind when dealing with specific intent crimes. The new provision is in conflict with the present structure of criminal law in Missouri, and the opinion in the principal case indicates the supreme court is unwilling to allow even limited application of this section of the new law.

Section 552.030(3) reflects the language of Model Penal Code section 4.02

3. § 560.120, RSMo 1959:
Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury...; or... from the person of his... servant, clerk or agent, in charge thereof, and against the will of such... servant,.. by violence to the person... or by putting him or her in fear of some immediate injury... shall be adjudged guilty of robbery in the first degree.

4. § 560.135, RSMo 1959: "Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished... for not less than five years ...

5. State v. Garrett, supra note 1, at 238.

6. §§ 552.010-080, RSMo 1965 Supp. Chapter 552 includes procedures for dealing with all aspects of mental disease as affecting criminal responsibility. The act has been widely praised, not only by those in the medical profession, but also by practicing lawyers, law professors, and judges. 19 J. Mo. Bar 645 (1963). For a comprehensive section by section analysis of the law see Richardson, Reardon & Simeone, An Analysis of the Law, 19 J. Mo. Bar 677 (1963). See also, Player, The Mentally Ill in Missouri Criminal Cases, 30 Mo. L. Rev. 514 (1965).

7. § 552.030(3), RSMo 1965 Supp.
(P.O.D. 1962), and allows evidence of mental disease or defect which is not sufficient to support a finding of legal insanity,8 thereby entitling defendant to acquittal, to be considered in specific intent crimes in order to determine whether the defendant had the intent necessary to constitute the crime charged. If murder in the first degree requires premeditation or deliberation, the defendant's mental condition may be taken into account in deciding whether the required mental element was present. If the jury finds that defendant was too disordered to deliberate the homicide,9 he cannot be convicted of first degree murder, but only of second degree. Properly applied, section 552.030(3) has nothing to do with legal insanity, which excuses a defendant from criminal responsibility without regard for his deliberative abilities.10 The section merely applies the common law principle of criminal responsibility based on the union of act and intent to cases involving mental disorders. Certain crimes require a specific state of mind for their commission.11 Such crimes are usually graded into degrees, the higher of which is not committed unless the act is coupled with the specific mens rea required. Thus, evidence tending to negate defendant's ability to entertain the necessary specific mens rea may be shown to reduce the crime.12 In most jurisdictions13 if a defendant was so intoxicated as to be incapable of a specific state of mind, he cannot be convicted of the higher degree of the offense.14 Since the requisite mens rea was lacking, the crime charged was not committed.

The logic requiring that evidence of impaired mental capacity be equally as competent as any other for the purpose of negating a specific intent is unimpeachable.15 Consequently, the doctrine has long found favor with legal as well as medical writers,16 who find only minor practical problems mitigating against

8. § 552.030(1), RSMo 1965 Supp.: "... did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law."

9. Deliberation is the determining factor for first degree murder in Missouri. State v. Tettamable, 394 S.W.2d 375 (Mo. 1965); State v. Goodwin, 352 S.W.2d 614 (Mo. En Banc 1962).


11. Perkins, CRIMINAL LAW 671 (1957); 21 AM. JUR. 2d Criminal Law § 82 (1965)

12. See authorities cited note 11, supra.


15. Aszman v. State, 123 Ind. 347, 352, 24 N.E. 123, 125 (1889): "It would be a legal as well as a logical incongruity to hold that the crime ... could only be committed after deliberate thought or premeditated malice, and yet that it might be committed by one who was without mental capacity to think deliberately or determine rationally."

its adoption. The doctrine of section 552.030(3) has found only limited acceptance in the courts however. New Mexico recently adopted the rule by judicial decision and joined California, Colorado, Connecticut, Indiana, Nebraska, Ohio, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin as the only jurisdictions allowing the use of such evidence. Court refusal to embrace the doctrine stems largely from an antiquated, illogical "all or nothing" view of mental disease as a defense. Furthermore, the mechanical application of psychiatric evidence to the "test" for insanity recognized in the jurisdiction obscures any other use of that evidence as provided for in section 552.030(3). Missouri has long been prominent among those jurisdictions embracing the "all or nothing" view, refusing to consider evidence of mental disease, weakness of intellect, or subnormal capacity for any purpose other than establishing legal insanity. The rule was stated clearly in State v. Holloway. The opinion in the principal case reaffirms this rule quoting extensively from Holloway, and rejecting completely the principle of section 552.030(3).

Because of the confusion in Missouri over the nature of the crime of robbery, State v. Garrett afforded an extremely poor testing ground for the supreme court's initial review of this new law. Clearly, the efficacy of section 552.030(3)

17. Weihofen, Partial Insanity and Criminal Intent, 24 Ill. L. Rev. 505, 521 (1930).
27. State v. Green, 78 Utah 580, 6 P.2d 177 (1931).
30. Weihofen, Mental Disease as a Criminal Defense 177 (1954).
31. State v. Deyo, 358 S.W.2d 816, 826 (Mo. 1962).
34. State v. Jackson, 346 Mo. 474, 482, 142 S.W.2d 45, 49 (1940).
35. 156 Mo. 222, 231, 56 S.W. 734, 737 (1900); followed in State v. Barbata, 336 Mo. 362, 368, 80 S.W.2d 865, 868 (1935); State v. Weagley, 286 Mo. 677, 688, 228 S.W. 817, 820 (1921); State v. Paulsgrove, supra note 31.
36. State v. Garrett, supra note 1, at 243:
If sane, defendant was indubitably guilty of murder in the first degree; if insane, of nothing. No halfway house exists, in a case of this sort, between murder in the first degree and any minor degree of that crime. Defendant, if sane, "could coolly deliberate said murder"; if insane, he could neither deliberate nor premeditate, and consequently was guiltless of the crime charged, and of any degree of that crime ....
37. Defendant's refusal of instruction "A" followed the language of the robbery statute requiring the jury to find defendant not guilty if he "had a mental disease
is dependent upon a rational and uniform system of grading criminal offenses. Application of the section must be limited to graded offenses, the higher of which requires a specific intent. If the section were to be applied to non-reducible crimes, it would enable the jury to acquit without a finding of insanity, thereby supplanting the established test of criminal responsibility and frustrating the purpose of section 552.040, RSMo 1965 Supp.

Defendant in the principal case was convicted of robbery in the first degree. At common law, robbery required an asportation from one's person or presence coupled with the specific intent to deprive the owner of his property permanently. Early Missouri cases included this state of mind as an element of the offense. The essence of statutory first degree robbery is a felonious taking of the property of another from his person or in his presence and against his will. "Felonious taking" is a meaningless phrase, but has been construed consistently as eliminating the need to allege or prove a specific intent to deprive, so that first degree robbery in Missouri requires only that defendant act knowingly as to the taking. Nor must defendant specifically intend to put his victim in fear of immediate injury since fear will be presumed if the taking is accomplished by force and against the will of the victim. Robbery does require a taking from one's person or presence. There are no Missouri cases stating what mens rea, if any, is necessary for this part of the act. Logically it should be the same as for the taking: knowingly. Thus, if one took another's property from a dark room which he believed to be empty, but in which the owner, too frightened to intervene, observed the taking, the crime could not be first degree robbery. Neither would it be any other degree of robbery, since each degree requires only a felonious taking and differs only in the quality of the act involved. Robbery, as a form of aggravated

or defect sufficient to deprive him of ability to act willfully or feloniously . . . ." Id. at 242. Such an instruction is worthless, since the jury has no way to ascertain what state of mind the mental condition is negating.

38. § 552.030(1), RSMo 1965 Supp. establishes the test for insanity. See note 8 supra.

39. This section requires the court to order one acquitted by reason of insanity to be committed for treatment in the state mental hospital.

40. State v. Graves, 185 Mo. 713, 718, 84 S.W. 904, 905 (1905); State v. McLain, 159 Mo. 340, 352, 60 S.W. 736, 740 (1900); State v. O'Connor, 105 Mo. 121, 126, 16 S.W. 510, 511 (1891). The supreme court has so held as late as State v. Politte, 249 S.W.2d 366, 369 (Mo. 1952).

41. § 560.120, RSMo 1959. See note 3 supra.

42. State v. Churchill, 299 S.W.2d 475, 478 (Mo. 1957).

43. State v. Medley, 353 Mo. 925, 185 S.W.2d 633 (1945); State v. Steenberg, 334 Mo. 880, 68 S.W.2d 684 (1934); State v. Lasson, 292 Mo. 155, 238 S.W. 101 (1922).

44. State v. Kennebrew, 380 S.W.2d 293, 295 (Mo. 1964); State v. Stinson, 379 S.W.2d 545, 547 (Mo. 1964); State v. Rompsey, 339 S.W.2d 746, 750 (Mo. 1960); State v. Jarrett, 317 S.W.2d 368, 369 (Mo. 1958).

45. State v. Reinke, 147 S.W.2d 464, 465 (Mo. 1941); Mansur v. Lentz, 201 Mo. App. 256, 261, 211 S.W. 97, 99 (1919).

46. State v. Medley, supra note 43; State v. Kennedy, 154 Mo. 268, 55 S.W. 293 (1900); State v. Lamb, 141 Mo. 298, 42 S.W. 827 (1897).

47. §§ 560.120-130, RSMo 1959. Each degree requires a "felonious" taking. First degree is a taking by means of fear of immediate injury or by actual battery.
assault, will reduce to common assault, but this is not a lesser degree of the same crime, although it is a lesser included offense. Stealing, statutorily defined as "to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner . . ." has been construed as retaining the specific intent to deprive the owner of his property permanently as a necessary element of the offense. But this specific intent crime will not reduce simply because there is no lesser degree of that offense. According to the Missouri definitions of the two crimes, it is possible for one to be guilty of robbery, and not have violated the stealing statute. Yet, it is a contradiction in terms to say one can commit robbery without stealing anything.

Since Missouri law in this area is so confused, and courts have consistently held indictments and jury instructions which follow the language of the robbery statutes sufficient to convict, the supreme court could have refused to apply section 552.030(3) in the principal case because application of this section must be limited to graded, reducible crimes, such as homicide or aggravated assault and robbery is apparently not such a crime in Missouri. However, in affirming the refusal to give an instruction based upon section 552.030(3) below, the supreme court labeled the request an "attempt to play fast and loose with the statute." The court's abrupt handling of this point, and its strong reliance on the Holloway opinion (a first degree murder case), indicate an unwillingness to apply section 552.030(3) even in properly graded offenses. The principal case cannot stand for that proposition however, and the dogmatic "all or nothing" approach of Holloway cannot long co-exist with this section of the Mental Responsibility Act. The legislature has embraced the better reasoned law; whether the courts will follow remains to be seen. Hopefully, under proper circumstances, State v. Garrett will not prove to be an insurmountable obstacle in convincing the court to apply section 552.030(3).

JAMES M. BECK

Second degree is accomplished by threat of future harm, and third degree is a taking by means of written threats.

48. § 560.156, RSMo 1959: "It shall be unlawful for any person to intentionally steal the property of another . . . ."
49. State v. Zammar, 305 S.W.2d 441, 445 (Mo. 1957).
50. Cases cited notes 43 and 44 supra.
51. §§ 559.010, .020, .070, RSMo 1959.
52. §§ 559.180, .190, .220, RSMo 1959.
53. Although logically it should be since it is graded into degrees just as is homicide. The fact that Missouri is inconsistent in grading criminal offenses, and the existing contradictions in definitions of crimes, will render even limited application of § 552.030(3) extremely difficult in this state.
55. See note 36 supra.
SPENDTHRIFT TRUSTS, TESTAMENTARY—TERMINATION BY RENUNCIATION—ACCELERATION OF FUTURE INTERESTS

Commerce Trust Co. v. Fast

The facts of this case are extremely complex and, for the most part, irrelevant to the trust situation ultimately presented to the courts. For the sake of clarity and brevity, the significant trust provisions may be recast as follows: Testator to trustee in spendthrift trust for daughter Mary for life; income payable to Mary during any period she is unmarried, but to be added to the principal while she is married; upon Mary’s death the corpus to go equally to the other three children, but in the event of any one of them dying before distribution, then to the heirs of the body, if any, of such child, and, if none, to the surviving children other than Mary.

Mary had filed a will contest on September 17, 1962, but on November 15, 1962, prior to the hearing on the will contest, a “Family Settlement Agreement” was executed whereby Mary dropped the will contest and filed an unequivocal renunciation with the court. The other children agreed to join in a suit, if necessary, to compel distribution of the one-fourth in trust to themselves, and upon receipt thereof to convey to Mary for life, without spendthrift or marital status restrictions. Mary was to leave the property to the other children by her will.

The trustee sued for construction of the will and instructions. The trial court held that Mary’s renunciation, being unequivocal, was effective; that her life interest in the trust was thereby terminated; and that the remainders in the other three children were vested and should be accelerated, thus extinguishing the executory interests of the grandchildren, and entitling the children to an immediate distribution of the balance of the trust corpus. The grandchildren appealed contending (1) that the spendthrift trust was not terminable by agreement, and (2) that, in any event, the three children’s remainders were contingent and should

1. 396 S.W.2d 683 (Mo. 1965).
2. No question was raised about the validity of suspending payments to the daughter so long as she remained married. As a matter of public policy, such a condition may be void.
3. The will provided that if any of the children had died before any distribution, “his or her share shall be paid over and delivered to the heirs of the body of such decedent, per stirpes and not per capita; or, if such deceased child leaves surviving no heirs of the body, then such decedent’s share shall be paid over and delivered so as to increase equally the shares of the others (except Mary Elizabeth Silverstein) or the heirs of their bodies as the case may be.” Brief for Appellant, p. 5, Commerce Trust Co. v. Fast, supra note 1. To the effect that this language clearly creates a vested remainder subject to divestment in favor of heirs of the body or others by way of shifting executory interest, see 2 Simes & Smith, Future Interests § 798, at 283, and cases cited n.53 (2d ed. 1956).
4. Caveat. To what extent, if any, the court was influenced by the fact Mary only had a life estate under the family agreement cannot be determined. Under the agreement testator’s intention was frustrated only to the extent that the spendthrift and marital status restrictions were removed, since the property went to the intended remaindermen. These facts are not clear in the opinion, many of them in fact coming from appellant’s brief, and care should be used in applying this case too literally.
not be accelerated. The Supreme Court of Missouri affirmed, holding the trust was terminated by renunciation, not agreement; that the agreement related only to property to be conveyed by the other children, not by the trustee from the estate; and that the children’s remainders were vested and accelerated.

Assuming for the moment that renunciation would effectively terminate Mary’s life estate, the question then becomes one of acceleration, which in turn depends upon the remainders involved. When remainders are indefeasibly vested, acceleration is allowed almost as a matter of course. The same result generally follows when, as in the noted case, remainders are vested subject to divestment. Acceleration was allowed in one case of a class gift subject to open, acceleration resulting in the closing of the class, thereby excluding potential class members from sharing in the property. Contingent remainders usually are not accelerated, although it has been allowed. Of course, it is a general rule of construction that the testator’s intent will control and if he indicates a contrary intent there will be no termination, and consequently, no acceleration.

Returning to the question of renunciation, the general rule has long been that if a devisee or legatee did not wish to accept, he could renounce the interest, and if the renunciation was certain, timely and prior to acceptance, the interest would pass as if the devisee had predeceased the testator. Missouri, following the Model


6. See the will language supra note 2, creating the vested remainders.


9. See cases cited in Simes & Smith, op. cit. supra note 7, § 796, at n.30. Note, also, the change in Illinois law on this set out in the 1965 supplement.

10. See cases cited in Simes & Smith, op. cit. supra note 7, § 796, at n.26. See also, Current Law, Sept. 1966, § 230, wherein it is stated that the holding of Re Dawson’s Settlement, Lloyd’s Bank v. Dawson, [1966] 3 All E.R. 68 (Ch.), noted, 116 New L.J. 1343 (1966), is that “there is no distinction for the purposes of the doctrine of acceleration between vested and contingent interests where the person whose interest is contingent is in esse at the date of the event causing acceleration.” This did not, however, involve a spendthrift trust, as spendthrift restraints on alienation are invalid in England.

11. 2 Restatement, Property §§ 231-233 (1936); 2 Powell, Real Property ¶ 310, at 629 (1966). If the trust remains in force, then the payments thereunder pass under the residuary clause, or an intestate property, or if the trustee has discretion to distribute, he may add the payments to the principal.

12. There had been over a ten month lapse between the date of testator’s death and Mary’s filing of the will contest, and almost a full year elapsed before the renunciation was filed. However, no question of the timeliness of the action was raised.

13. Stoehr v. Miller, 296 Fed. 414 (2d Cir. 1923); Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1941); Restatement (Second), Trusts § 56, comment c (1959); see Annot., 133 A.L.R. 1428 (1941).
Probate Code;\textsuperscript{14} has by statute expressly authorized renunciation of devises or legacies.\textsuperscript{15} However, when the interest involved is one under a spendthrift trust, as in the noted case, the courts in jurisdictions which enforce spendthrift restraints on alienation are not in agreement as to whether a life beneficiary may renounce. The position stated in the noted case allowing renunciation is followed by most courts,\textsuperscript{16} writers,\textsuperscript{17} and the Restatement.\textsuperscript{18} The problem with which the courts are presently struggling is what effect, if any, the renunciation will have upon the spendthrift trust. There are three basic approaches.

The majority rule. The prevailing rule is that when the life beneficiary makes a valid renunciation, the spendthrift trust is terminated and the remainders are accelerated into present estates to the same extent as remainders would be accelerated following an ordinary life estate. As indicated above, a valid renunciation must be certain, timely and prior to acceptance of any benefits under the trust.

The Pennsylvania rule. The law previously followed in Pennsylvania was that not only would renunciation not terminate a testamentary spendthrift trust, but the beneficiary was without power to renounce.\textsuperscript{19} No other jurisdiction appears to have gone this far, and Pennsylvania has expressly repudiated this by statute.\textsuperscript{20}

The New York rule. New York, by a combination of statute\textsuperscript{21} and case law,\textsuperscript{22} has taken a position somewhere between the majority and Pennsylvania views. The beneficiary is free to renounce his interest under the trust, and the renunciation is effective to end the beneficiary's interest; but if the will has been probated, and the trust is active, no termination is allowed, the payments passing either under the residuary clause or as intestate property. A renunciation prior to probate seems to achieve the same result as the majority rule.

The courts have been less willing to allow termination of spendthrift trusts by means other than renunciation. Thus, all of the beneficiaries are not entitled

\begin{itemize}
\item \textsuperscript{14} Model Probate Code § 58 (Simes 1946).
\item \textsuperscript{15} Section 474.490, RSMo 1959.
\item \textsuperscript{17} Griswold, Spendthrift Trusts § 524, at 603 (2d ed. 1947); 3 Scott, Trusts § 337.7 (2d ed. 1956).
\item \textsuperscript{18} Restatement (Second), Trusts § 36, comment c at 100 (1959).
\item \textsuperscript{19} Malatesta's Estate, supra note 7; Porter's Estate, supra note 7. Cf., In re Feeney's Estate, 293 Pa. 273, 142 Atl. 284 (1928).
\item \textsuperscript{21} N.Y. Pers. Prop. Law § 15; N.Y. Real Prop. Law § 103. New York does not recognize spendthrift trusts as such, but these laws make the interests of income beneficiaries of trusts inalienable.
\item \textsuperscript{22} Petition of Manufacturers Trust Co., 110 N.Y.S.2d 696, 703 (1952) (termination not allowed); In the Matter of Estate of Freiberger, 177 Misc. 592, 593, 31 N.Y.S.2d 456, 457 (1941) (termination not allowed); In the Matter of Estate of O'Keefe, 167 Misc. 148, 151, 3 N.Y.S.2d 739, 741 (1938) (termination allowed); In re Billet, 187 App. Div. 309, 311-12, 175 N.Y. Supp. 482, 483 (1919).
\end{itemize}
to compel termination;\textsuperscript{23} merger of the legal and equitable interests in the beneficiary does not destroy the trust;\textsuperscript{24} and an agreement between the beneficiary and the remaindermen is ineffective to effect termination\textsuperscript{25} as is an agreement between the beneficiary and the trustee.\textsuperscript{26} Unless deviation from the terms of the trust is necessary, by reason of circumstances unforeseen by the settlor, to prevent frustration of its purpose, courts usually will not permit an invasion of the corpus, unless discretion is given to the trustee to do so.\textsuperscript{27} However, modification or termination may be allowed, subject to court approval, by compromise of a valid will contest, when the compromise will protect the interests of other beneficiaries and is fair.\textsuperscript{28}

It is submitted that the current majority rule, as expressed in the noted case, that even a spendthrift trust may be renounced, is the best rule. An analogous situation is presented by will provisions providing for annuities, where the devisee seeks to obtain the cash instead. The majority of courts have held that the devisee may have the money.\textsuperscript{29} This is, perhaps, contrary to the testator's intent, but his intention would be equally frustrated if the legatee took the annuity and then sold it at a discount. In most cases, the testator has not foreseen the problem. Further, it would appear his intent is merely to give the beneficiary a life estate if the beneficiary so desires, but that the primary intent is that the principal should go to the remaindermen.\textsuperscript{30} Acceleration, when the remainder is subject

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\textsuperscript{23} Schoen v. Wagner, 231 S.W.2d 269 (St. L. Mo. App. 1950); Altemeir v. Harris, 403 Ill. 345, 86 N.E.2d 229 (1949); RESTATEMENT (SECOND), TRUSTS § 337, comment f (1959). This is merely one facet of the rule announced in Claffin v. Claffin, 149 Mass. 19, 20 N.E. 454 (1889), that the beneficiaries of a trust may not compel its premature termination if that would defeat a material purpose of the trust, which is followed in most American jurisdictions.

\textsuperscript{24} Adair v. Sharp, 49 Ohio App. 507, 197 N.E. 399 (1934); Moser's Estate, 270 Pa. 217, 113 Atl. 199 (1921); Wiegand's Estate, 28 Pa. Dist. 561, 563 (1919); RESTATEMENT (SECOND), TRUSTS, op. cit. supra note 23.

\textsuperscript{25} Chance's Estate, 29 Pa. D. & C. 586 (1937); 3 SCOTT, TRUSTS § 337.6 (2d ed. 1956); GRISWOLD, SPENDTHRIFT TRUSTS § 522 (2d ed. 1947).

\textsuperscript{26} Fletcher v. Los Angeles Trust & Sav. Bank, 182 Cal. 177, 187 Pac. 425 (1920); Rose v. Southern Michigan Nat'l Bank, 255 Mich. 275, 238 N.W. 284 (1931); In re Duigan's Will, 85 N.Y.S.2d 846 (1948). California and Michigan have followed the New York statute, supra note 21, and in these states any attempt to alienate the corpus is strictly void.

\textsuperscript{27} Tree v. Rives, 347 Ill.App. 358, 106 N.E.2d 870 (1952).


\textsuperscript{30} This was most certainly testator's intention in the noted case. Not only did he provide only a life estate for Mary, with no interest in the corpus, supra note 3, but indeed he did not want her to have even the life income if she remained married: "... to add the net income to the principal so long as my
to defeasance, usually gives the property to primary remaindermen whom the
testator knew and wished to benefit. He rarely knows or has much interest in the
substitutionary remaindermen whose contingent interests are defeated. In addi-
tion, the majority rule is in accord with the public policy favoring alienability
of property.31 If the testator wishes for some reason to prevent termination, he is
free to so provide by making it clear that the trust is to last for the beneficiary's
life whether or not the beneficiary accepts the benefits thereunder. But this should
not be the presumption, and no reason exists to bind an unwilling beneficiary. As
Professor Scott has pointed out:

It would seem, however, that if a person who is under no legal in-
capacity is unwilling to accept a beneficial interest under a trust he should
not be powerless to make an effective disclaimer, even though the intended
interest once accepted by him would be inalienable.32

CLIFFORD BROWN

BANKRUPTCY—EQUITABLE POWER OF BANKRUPTCY COURT TO
REFUSE ENFORCEMENT OF SECURITY AGREEMENT WHICH
IT FINDS UNCONSCIONABLE

In the Matter of Elkins-Dell Mfg. Co.1

In October, 1959, Elkins-Dell Manufacturing Company entered into a loan
agreement with Fidelity America Financial Corporation. In January, 1960, an
involuntary petition in bankruptcy was filed against Elkins-Dell, and in May it
was adjudicated a bankrupt.

Under the agreement Fidelity was to advance Elkins-Dell 75 per cent of
the value of accounts receivable assigned to it. However, the lender was required
to take only those accounts it deemed "acceptable"; and the bankrupt agreed
not to borrow from any other source, to sell or assign any accounts to anyone
else, or dispose of any assets, "without the written consent of [Fidelity] first
obtained."32 The interest rate was 15.8 per cent per year, with a monthly minimum
of $500.3

daughter . . . remains married (it being my intention that my daughter . . .
shall receive no part of the income so long as she remains and continues to be
married) . . . ." Brief for Appellant, p. 5, Commerce Trust Co. v. Fast, supra
note 1. Note, also, the caveat, supra note 4.

31. See, Costigan, Those Protective Trusts Which Are Miscalled "Spend-
thrift Trusts" Reexamined, 22 CALIF. L. REV. 471 (1934).
32. 3 Scott, TRUSTS § 337.7 (2d ed. 1956).
2. There were numerous additional provisions in the agreement which
tended to make it even more one-sided; e.g., Fidelity reserved the power to receive
delivery of the bankrupt's mail; the bankrupt could not request any extention
from creditors, file a voluntary petition in bankruptcy, or ask for an arrangement,
without Fidelity's consent; and Fidelity had unilateral power to change the terms
When the petition was filed, the bankrupt was indebted to Fidelity for $14,061. Fidelity continued to collect the accounts which had been assigned prior to bankruptcy, and by May, 1960, a balance of $10,678 stood to the credit of the bankrupt.

In March, 1961, the trustee demanded an accounting from Fidelity. This accounting was rendered in April and exceptions were filed in June. A special hearing was held on the exceptions, but because of delay by the parties, the referee did not rule on them until July, 1965. He found the contract unconscionable and ordered Fidelity to turn over to the trustee all of the money it had collected on accounts after the petition was filed, a $5,000 minimum interest fee (which had been charged in November, 1959, for the remaining ten months of the agreement), and the difference between the 15.8 per cent interest collected and the legal rate of 6 per cent.

On review, the district court held that it was within the scope of the "equitable powers" of a court of bankruptcy to refuse enforcement of a security agreement which it found unconscionable—even though the agreement was valid under applicable state law and not voidable under the provisions of the Bankruptcy Act. It suggested that where an agreement is unenforceable in bankruptcy, the court should adjust the equities of the case by granting the lender whatever relief it deems appropriate on a quasi-contractual theory. The matter was remanded to the referee for further consideration of the question of unconscionability in light of all relevant circumstances.

The court seems to have exceeded its jurisdiction in relation to determining the validity of security agreements. The "equitable powers" of a bankruptcy

of the agreement by giving written notice (subject to veto by the bankrupt). Id. at 866.

3. The court concluded the interest rate would have been usurious, except for a Pennsylvania statute which specifically precluded corporations from raising the defense of usury. Ibid. See 3 COLLIER, BANKRUPTCY ¶ 63.07(15) (14th ed. 1966) (hereinafter cited as COLLIER).


5. 253 F. Supp. at 867, 874.

6. In the Matter of Dorset Steel Equip. Co. was also decided in this opinion. It involved a similar financing agreement, similar facts, and a similar order by the referee. The court considers the two cases together in its opinion. They will be treated as one in this note.

The only major difference between the two cases was the manner in which they came before the court. Fidelity filed a secured claim in Dorset. No such claim was filed in Elkins-Dell. This distinction raises an interesting question as to how the referee obtained jurisdiction over the dispute in the latter case. The trustee must normally bring a plenary action to recover assets held as security by a party who does not file in bankruptcy. The court fails to reveal the source of its jurisdiction, and the question is beyond the scope of this note. Cf. Inter-State Nat'l Bank v. Luther, 221 F.2d 382, 389 (10th Cir. 1955).

7. See generally 9 AM. JUR. 2d, Bankruptcy §§ 432, 566-573 (1963); 3 COLLIER, ¶¶ 57, 63; Gleick, The Equitable Power of Bankruptcy Courts to Subordinate Claims or to Disallow Claims Entirely on Equitable Grounds: A Discussion of Developments, 33 Ref. J. 69 (1959); Herzog & Zweibel, The Equitable Sub-

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court relate to several different aspects of bankruptcy proceedings. Its authority to disallow claims, subordinate claims, and refuse enforcement of security agreements are not the same. The principle source of confusion in this area of the law is the failure of some courts to recognize this fact.

The Bankruptcy Act confers some jurisdiction in equity upon bankruptcy courts in the disposition of claims. Section 2(a)(2) grants jurisdiction in "law and equity" to allow and disallow claims, and to reconsider claims once allowed. Section 57(k) provides that "claims which have been allowed, may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case . . . ."

These provisions were construed in an early decision to give bankruptcy courts certain limited discretion in determining what claims to allow or disallow in cases involving gross misconduct on the part of a claimant. Sweeping statements about this discretion are to be found in a few decisions which are quoted in Elkins-Dell. However, such statements must be read in light of the entire body of bankruptcy case law. Most, if not all, of the cases which have disallowed claims for equitable reasons have dealt with the invalidity of such claims under state law. Those decisions which have involved determinations that conduct on the


8. See authorities cited note 7, supra.

9. Disallowance excludes a claim entirely from the bankruptcy proceedings, and makes it dischargeable. See Pepper v. Litton, 308 U.S. 295, 304-05 (1941); 3 Collier, ¶ 57.14.

10. Subordination relegates a claim to a position inferior to other claims in the right to receive dividends when the estate is liquidated. A subordinated claim is still recognized as a claim. It can be voted at creditors meetings, and is entitled to receive any excess remaining in the estate after payment of other claims. See Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941); 3 Collier, ¶ 57.14.

11. Although the court in Elkins-Dell was dealing with the validity of a security agreement, it cited cases which had reference to disallowance or subordination of unsecured claims. E.g., In re Laskin, 316 F.2d 70 (3d Cir. 1963) (disallowance); Costello v. Fazio, 256 F.2d 903 (9th Cir. 1958) (subordination). The court recognized in conjunction with this last citation that it was dealing with disallowance as opposed to subordination.


14. Pepper v. Litton, supra note 9. This decision clearly could have rested on other grounds.


16. Jaffke v. Dunham, 352 U.S. 280, 281 (1957); Matter of Terrance Lawn Memorial Gardens, 256 F.2d 398, 402 (9th Cir. 1958); Colonial Trust Co. v. Goggin, 230 F.2d 634 (9th Cir. 1955); In re Chicago R. Co., 175 F.2d 282, 287-88 (7th Cir. 1949); In re International Raw Material Corp., 22 F.2d 920 (2d Cir. 1927); Barks v. Kleyne, 15 F.2d 153, 154-55 (8th Cir. 1926); In re Falk, 83 F. Supp. 817, 820 (S.D.N.Y. 1949). Collier believes disallowance for equitable reasons should be completely governed by state law, leaving other equitable considerations to be disposed of in relation to subordination, 3 Collier, ¶ 63.03(3).
part of the claimant should bar his claim in bankruptcy, without regard for state law, are poorly reasoned and have not been followed. Further, they have been grouped into a small number of categories about which there is general agreement. These categories have one common denominator—they all contain an element of unconscionable conduct on the part of the claimant in relation to the other creditors of the bankrupt. This conduct would result in the claimant enjoying an unjust advantage in bankruptcy if his claim were allowed. Something more is required than a hard bargain with the bankrupt.

Subordination is the usual method of dealing with claims which are in some way the product of inequitable conduct. An order to subordinate deals only with the rights of the claimants in relation to the estate; there is no adjudication of the validity of their claims. Since there is no state law on the position a claimant is to be given in the distribution of a bankrupt estate, the power to subordinate valid claims is governed by federal law under the authority of the Bankruptcy Act. Bankruptcy courts, therefore, have more discretion in this area.

17. Hill categorizes these situations in the following manner: (1) where a fiduciary has sought to obtain unfair personal advantage; (2) where a corporate parent or other controlling person is estopped from demanding parity with other claimants, because of some conduct wrongdoing other creditors; (3) where a claimant is estopped as against the remaining claimants because of his conduct or misrepresentations upon which they have relied to their damage; (4) where a guarantor is estopped from competing with persons in the class to which his guarantee extended; and (5) where a controlling person mismanaged the bankrupt estate to the detriment of junior claimants. 


19. 9 Am. Jur. 2d, Bankruptcy § 566 (1963); Gleick, supra note 7, at 1039; Herzog & Zweibel, supra note 7, at 90. Most of the cases thus categorized have concerned subordination. A small number of decisions (which are generally poorly reasoned) have disallowed claims in these situations.

20. Matter of Kravitz, 278 F.2d 820, 822 (3d Cir. 1960) (While the Bankruptcy Act governs the respective rights of the parties, the initial relationships are created and determined by state law); In re Kansas City Journal-Post Co., 144 F.2d 791, 800 (8th Cir. 1944). See note 10 supra.

21. Heiser v. Woodruff, supra note 15, at 732, “In determining what judgments are provable and what objections may be made to their proof, and in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy, requires its rejection or its subordination to other claims which, in other respects are of the same class, the bankruptcy court is defining and applying federal, not state, law.” Accord, American Surety Co. v. Sampsell, 327 U.S. 269, 272 (1946); Prudence Realization Corp. v. Geist, 316 U.S. 89, 95-96 (1942); Sampsell v. Imperial Paper & Color Corp., supra note 10. See 9 Am. Jur. 2d, Bankruptcy § 567 (1963).

They are relatively free to subordinate because of inequitable conduct in order to achieve "fair and just results in relation to the amounts which creditors will realize from liquidation." 23

The power to adjust equities in deciding how an estate is to be divided among claimants must be distinguished from authority to determine the validity of agreements between creditors and the bankrupt. 24 Questions as to the legal existence of obligations are decided under applicable state law. 25 If a security agreement is valid under controlling state law, it should be enforceable in bankruptcy. 26 If it is challenged as invalid on equitable grounds, the propriety of the challenge should be determined with reference to state rules of equity. 27

Fully secured creditors have no right to share in the distribution of the estate. 28 Since allowance is the judicial determination that a claim is entitled to participate in the dividends of the estate, 29 and subordination changes the relative position of a claim in the distribution, 30 a fully secured debt should never be considered in either context. The bankruptcy court's jurisdiction in relation to such obligations is limited to a review of the validity of the security agreement. 31 Since

24. See 3 COLLIER, ¶ 63.05(3), 67.07(6); Herzog & Zweibel, supra note 7, at 85.
25. Manufacturers' Fin. Co. v. McKey, 294 U.S. 442, 448-49 (1935); In re American Metals Prods. Co., 276 F.2d 701, 705 (2d Cir. 1960); In re Alikasovitch, 275 F.2d 454, 457 (6th Cir. 1960); Hulsart v. Hooper, 274 F.2d 403, 406 (5th Cir. 1960); Matter of Kravitz, 278 F.2d 820, 822 (5th Cir. 1960); In re National Mills, Inc., 133 F.2d 604, 610 (7th Cir. 1943); In re Bell Tone Records, 86 F. Supp. 806, 809 (D.N.J. 1949); In re Calton Crescent, Inc., 80 F. Supp. 822, 824 (S.D.N.Y. 1948); 3 COLLIER, ¶ 67.07(6); Herzog & Zweibel, supra note 7 at 85. Cf. Jaffke v. Dunham, 352 U.S. 280, 281 (1957); Luther v. United States, 225 F.2d 495 (10th Cir. 1955); cases cited note 16 supra. But cf. Vanston Bondholders Protective Ass'n v. Green, 329 U.S. 156, 161 (1935); In re Magnus Harmonica Corp., 263 F.2d 515 (3d Cir. 1959); In re Leeds Homes, Inc., 222 F. Supp. 20, 33 (E.D. Tenn. 1963); In re De Moise, 87 F. Supp. 474 (N.D. Ohio 1949). This last group of cases is distinguished infra.
26. Manufacturers' Fin. Co. v. McKey, 294 U.S. 442, 448-49 (1935), "The mere fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right arising upon a contract valid and unassailable under controlling state law does not authorize that court to modify or ignore the terms of the legal obligation upon the claim, or because the court thinks, that these terms are harsh or oppressive or unreasonable. A party may stand upon the terms of a valid contract in a court of equity as he may in a court of law." Accord, In re International Raw Material Corp., 22 F.2d 920 (2d Cir. 1927) (approved in McKey); cases cited note 25 supra. Contra, In re Chicago Reed & Furniture Co., 7 F.2d 885 (7th Cir. 1925) (overruled in McKey).
27. In re Chicago R. Co., 175 F.2d 282, 288 (7th Cir. 1949), "We think it beyond question that the District Court, upon the issues presented, had precisely the same jurisdiction that a court of equity in the State of Illinois would have had, had bankruptcy not intervened." See also, 3 COLLIER, ¶ 63.03(3).
28. 3 COLLIER, ¶ 57.07(3.3); MULDER & FORMAN, BANKRUPTCY & ARRANGEMENT PROCEEDINGS 56 (1964).
29. 3 COLLIER, ¶ 57.02. See note 9 supra.
30. Id., ¶ 63.08. See note 10 supra.
31. 3 COLLIER, ¶ 57.07(3), 63.05, .07(6). In addition to considering the validity of security under state law (see notes 25-27 supra), the bankruptcy court has the authority to invalidate certain security transactions under the express pro-
the agreement between Elkins-Dell and Fidelity was enforceable in Pennsylvania, the court should have recognized it as valid.

. The opinion tries to avoid the effect of the McKey rule by reasoning that secured creditors are asking “a favor” of the bankruptcy court when they choose to rely on their security instead of filing an unsecured claim. Since its “affirmative aid” was requested, the court concluded it should be free to refuse to enforce the agreement which it found unconscionable. This conclusion was based on a statement in the McKey case that the maxim “one must do equity in order to get equity,” applies when a court of bankruptcy is considering the validity of a claim, if the claimant is seeking “purely equitable relief.”

This reasoning is vulnerable from two standpoints. First, even when the maxim is applicable in bankruptcy proceedings, the standards for determining what constitutes “doing equity” should be those of the state in which the transaction occurred. Second, the McKey decision cannot be read to include the election of a fully secured creditor to stand on his security among situations where a claimant is seeking “purely equitable relief.” Indeed, the right to make such an election is derived directly from the Bankruptcy Act.

Refusal to enforce the security agreement in Elkins-Dell was also based on Vaston Bondholders Protective Ass'n v. Green. That decision limited the scope of the McKey rule by holding that where the state law which determines the validity of a claim conflicts with “overriding federal law,” the federal law will control. Even if one assumes that this rule applies where no claim is filed on a secured debt, the court in Elkins-Dell offered no federal law, except its opinion that the agreement might be unconscionable, which could “override” the applicable state law. Vanston and the cases which have followed it have related to rules of federal law concerning the mechanics of administering bankrupt estates. When

visions of the Bankruptcy Act. See Bankruptcy Act §§ 60(a), 67(a) and (d), 70(c) and (e), 30 Stat. 562, 564, 565 (1898), as amended, 11 U.S.C. §§ 96(a), 107(a) and (d), 110(c) and (e) (1964). 32. 253 F. Supp. at 869, “We note that Pennsylvania, too, has held an agreement to pay usurious interest enforceable against a corporation even in equity.” See note 26 supra. 33. 253 F. Supp. at 869. 34. Ibid. 35. 294 U.S. at 449. 36. See note 27 supra. 37. 294 U.S. at 448. One of the principle points in the McKey decision, was that the case of In re Chicago Reed & Furniture Co., 7 F.2d 885 (7th Cir. 1925) (which disallowed the interest on a security agreement that the court deemed unconscionable—even though the creditor chose to stand on his security), was no longer good law. 38. Bankruptcy Act § 64(a), 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104(a) (1964). 39. Bankruptcy Act § 64(a), 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104(a) (1964). 40. 329 U.S. 156 (1946). 41. Id. at 161. Vanston can be distinguished on the ground that it was a reorganization case—however, the decision may be equally applicable to bankruptcy proceedings. 42. 253 F. Supp. at 869-70. 43. “The general rule in bankruptcy and in equity receivership has been that interest on the debtor’s obligation ceases to accrue at the beginning of proceedings.”
read in its entirety, the Vanston opinion offers support for the policy of determining the validity of claims, in all but the most unusual circumstances, "by reference to state law."\textsuperscript{44} This policy should be even more compelling when considering the validity of a security agreement where no claim has been filed.

The Elkins-Dell decision amounts to a determination that a court of bankruptcy can refuse to honor a contract which it finds harsh, and substitute another contract which is more in keeping with its view of fairness. The court in Elkins-Dell exceeded its jurisdiction. However, disregarding the problem of jurisdiction and the lack of precedent, the practice of refusing to enforce valid contracts where there is no inequitable conduct relating to the other creditors would create more inequities than it would cure.\textsuperscript{45}

Such a policy would impose two standards upon any firm or individual which became, or wished to become, the creditor of a financially unstable business. Any agreement would have to meet the standards required by state law if it were to be enforced in state courts; and if there were any possibility of bankruptcy, it would have to satisfy the requirements imposed upon claimants by federal bankruptcy courts. This double standard would conflict with the doctrine of \textit{Erie R. Co. v. Tompkins},\textsuperscript{46} and unduly burden both lenders and debtors.

The confusion would be compounded because a prospective creditor could not determine the disposition which would be given an agreement in bankruptcy by examining either statutes or prior decisions. The policy of "uniform Laws on the subject of Bankruptcies," articulated by the Constitution,\textsuperscript{47} would be replaced by the separate, differing, opinions of the respective district courts about what was unconscionable and inequitable.

As the court in Elkins-Dell observes,\textsuperscript{48} the uncertainty and confusion generated by such a policy would restrict credit to unstable businesses just when they most need it in order to survive as going concerns. It is unfortunate that the court concluded that contracts which are not "reasonable commercial devices\textsuperscript{49} should not be enforceable in bankruptcy, in spite of the "economic dubiousness and institutional difficulty inherent in judicially refusing to enforce \ldots otherwise valid agreements."\textsuperscript{50}

\textbf{Richard A. King}

\textsuperscript{44} 329 U.S. at 161.
\textsuperscript{46} 304 U.S. 64 (1938). For a full discussion of the effect of the \textit{Erie} doctrine on bankruptcy proceedings see Hill, \textit{The Erie Doctrine in Bankruptcy}, 66 \textit{Harv. L. Rev.} 1013 (1953); 3 \textit{Collier}, §§ 63.03 (3).
\textsuperscript{47} U.S. CONST. art. I, § 8.
\textsuperscript{48} 255 F. Supp. at 471-73 (a complete discussion of the problems inherent in the approach taken by the court).
\textsuperscript{49} \textit{Id. at} 874.
\textsuperscript{50} \textit{Id. at} 873.
ADMISSIBILITY OF EXTRINSIC EVIDENCE TO PROVE TESTAMENTARY INTENT

Chambers v. Younes

A note written on the back of a blank check found in the billfold of deceased read: "I Boyd Ruff request that all I own in the way of personal or real estate property to be my Wife Modene. Boyd Ruff." This was admitted to probate as a valid holographic will. The court said that where there is doubt, extrinsic evidence is admissible to establish that an instrument was executed with testamentary intent. The facts that he knew he did not have long to live and that his wife was the natural object of his bounty helped to establish that it was executed with animus testandi.

All courts agree that when the writing is ambiguous, extrinsic evidence is admissible to prove whether it was executed with testamentary intent. The problem frequently arises when a letter or note is offered as a holographic will. *In re Golder's Estate* concerned a letter from a son in the navy to his mother stating in a post script, "I have a surprise coming for you and hope it works out. This is all I can tell you. My insurance is made out to Alyse [wife] so should I get in this war and not come back I want my savings and stocks to go to you." The court held that circumstances such as the informal nature of the instrument and decedent's failure to provide for his child showed that this was not intended to be his will. Another ambiguous situation is where the paper appears to be notes, or a memorandum for a will, but is properly executed with all the statutory formalities. In one case deceased and her banker made notes for a will. A week later she approved it, signed it, and had it witnessed because she did not have time for a more complete version to be drawn. The court found that it was executed with testamentary intent because she thought she might soon die and

3. 31 Cal.2d 848, 849, 193 P.2d 465, 466 (1948).
4. *In re Kemp's Will*, *supra* note 2.
had made statements indicating that she regarded it as her will. In many cases the instrument is capable of being interpreted as a will or some other instrument. In a California case an instrument admitted to probate as a holographic will read: "I here by do give it Jim Smith, who live at 3444 Phelp St. all of the Junk around here in my Cabin and Yard and old Cars and Every thing." While it could have been interpreted as a deed of gift, the court said it was ambiguous because he would not likely make a present disposition of his entire estate. Deceased was unmarried and had little education. He gave the instrument to Smith, a close friend, one day before his death, and said it was his will. In Low v. Low an instrument which used the language of an ordinary bargain and sale deed was ambiguous because of the limitations it contained. The grantor reserved the right of possession and control for life and then the property went to his wife for life or until she remarried and then in fee to his children. The court considered the evidence and concluded that it was intended to be a deed.

Many courts hold that if there is nothing on the face of the instrument to raise doubt about its character, extrinsic evidence is not admissible to show the intent with which it was executed as this would violate the parol evidence rule. Some courts say that if the instrument purports to be a will and is executed with all the statutory formalities required for wills, then testamentary intent is conclusively presumed. Conversely, it has been held that if there is nothing on the face of the instrument to indicate that it is testamentary, then evidence of testamentary intent is not admissible.

6. Contra, In re Lloyd's Estate, 256 Mich. 305, 239 N.W. 390 (1931), where a bill of sale was invalid because of lack of delivery. The court said it was not ambiguous even though it disposed of everything he owned.
8. For a more complete discussion of what constitutes an ambiguity and the type of evidence admissible to prove testamentary intent see Annot. 21 A.L.R.2d 319 (1952).
9. Marsh v. Rogers, 205 Ala. 606, 87 So. 790 (1920); Tuttle v. Raish, 116 Iowa 331, 90 N.W. 66 (1902); In re Lloyd's Estate, supra note 2; Elliott v. Cheney, 183 Mich. 561, 150 N.W. 163 (1914); Ellison v. Clayton, supra note 2; Phifer v. Mullis, 167 N.C. 405, 83 S.E. 582 (1914); Low v. Low, supra note 7; Fenton v. Davis, 187 Va. 463, 47 S.E.2d 372 (1948); McElroy v. Rolston, 184 Va. 77, 34 S.E.2d 241 (1945).
10. Barnewall v. Murrell, 108 Ala. 366, 18 So. 381 (1895); In re Pagel's Estate, 52 Cal. App. 2d 763, 125 P.2d 853 (1942); Ward v. Campbell, 73 Ga. 97 (1884); Sweeney v. Trombley, 224 Ill. App. 562 (1922); Heaston v. Kreig, supra note 2; Nelson v. Nelson, 235 Ky. 189, 30 S.W.2d 893 (1930); Byers v. Hope, 61 Md. 269 (1883); In re Kennedy's Will, 159 Mich. 548, 124 N.W. 516 (1910); Cox v. Reed, 113 Miss. 488, 74 So. 330 (1917); In re Noyes' Estate, 40 Mont. 231, 106 Pac. 555 (1909); Rountree v. Rountree, 213 N.C. 252, 195 S.E. 784 (1938); Appeal of Thompson, supra note 2; Quesenberry v. Funk, 203 Va. 619, 125 S.E.2d 869 (1962); La Rue v. Lee, supra note 2.
11. Johnson v. White, 172 Ark. 922, 290 S.W. 932 (1927); In re Glass' Estate, 165 Cal. App. 2d 380, 331 P.2d 1045 (1958); Barnes v. Viering, 152 Conn. 243, 206 A.2d 112 (1964); In re Kemp's Will, supra note 2; Noble v. Pickles, supra note 2; Milam v. Stanley, 33 Ky. L. Rep. 783, 111 S.W. 296 (1908); Succession of Faggard, supra note 2; In re Boucher's Estate, 329 Mich. 569, 46 N.W.2d 577 (1951);
Some courts admit extrinsic evidence on the question of testamentary intent in two situations in which there is no ambiguity. First, extrinsic evidence is admitted to disprove that an instrument which is clearly testamentary on its face was executed animo testandi. In Shiels v. Shiels, deceased was being initiated into the Masonic Order. Each of the 150 candidates was required to make a will before initiation. Forms were supplied by the Order. Deceased’s protests were held admissible on the issue of testamentary intent. In another case evidence was admissible to show that deceased and two witnesses signed an instrument in the form of a will because they were told that it was a mortgage to cover deceased’s medical expenses. In the second situation, extrinsic evidence is admissible to show testamentary intent even if no language in the instrument indicates that it is to operate as a will. The leading case is Clarke v. Ransom, in which the note read “Dear Old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon.” While this gives no indication that it is testamentary, the court considered extrinsic evidence in holding that this was a valid codicil. In a few other cases courts have considered extrinsic evidence and concluded that testamentary intent was not established. The great bulk of the cases in this category arise when an unambiguous instrument is being considered by the court and it is claimed that, rather than being what it purports to be, it is void as an attempted testamentary disposition. Here usually without stating a rule the court considers evidence of intent of the parties and decides whether the transaction is valid. There are some cases holding that the evidence did not establish that the deeds, joint bank accounts, con-


12. In re Sargavak’s Estate, 35 Cal.2d 93, 216 P.2d 850 (1950); Brown v. Avery, 63 Fla. 355, 58 So. 34 (1912); Parrott v. Parrott’s Adm’x, 270 Ky. 544, 110 S.W.2d 272 (1937); Fleming v. Morrison, 187 Mass. 120, 72 N.E. 499 (1904); In re Cosgrove’s Estate, 250 Mich. 258, 287 N.W. 456 (1939); Prather v. Prather, 97 Miss. 311, 52 So. 449 (1910); Merrill v. Boal, 47 R.I. 274, 132 Atl. 721 (1926); Scott v. Atkins, 44 Tenn. App. 353, 314 S.W.2d 52 (1957); In re Williams’ Estate, 135 S.W.2d 1078 (Tex. Civ. App. 1940); Poindexter v. Jones, supra note 11; In re Watkin’s Estate, 116 Wash. 190, 198 Pac. 721 (1921).


15. 50 Cal. 595, 596 (1875). See also In re Mathew’s Estate, 234 Iowa 188, 12 N.W.2d 162 (1943); Wareham v. Sellers, 9 Gill. & J. 98 (Md. 1837) (remanded so lower court could consider extrinsic evidence); Stewart v. Stewart, 177 Mass. 493, 59 N.E. 116 (1901); Estes v. Estes, 200 Miss. 541, 27 So.2d 854 (1946).

16. In re Logan’s Estate, 29 Cal. App.2d 60, 84 P.2d 245 (1938); Dietrick v. Morgan, 179 Md. 553, 20 A.2d 175 (1941); In re George’s Estate, 208 Miss. 734, 45 So.2d 571 (1950); In re Sunday’s Estate, 167 Pa. 30, 31 Atl. 353 (1895); Dutra v. Davis, 70 R.I. 318, 38 A.2d 471 (1944); In re Zich’s Estate, 70 N.J. 622, 20 N.W.2d 229 (1945); Langehennig v. Hohmann, 139 Tex. 452, 163 S.W.2d 402 (1942); Smith v. Smith, 112 Va. 205, 70 S.E. 491 (1911).

tracts, notes, and gifts involved were intended to be testamentary. Other cases involving deeds, joint bank accounts, contracts, and gifts held that the evidence showed that these transactions were void as attempted testamentary dispositions.

It should be noted that, while the cases conflict in many jurisdictions, a court can logically let in extrinsic evidence in one unambiguous situation and refuse to admit it in another. In Poindexter v. Jones the body of the instrument read: "I give all that I possess to my beloved nephew Hendley Jones..." The court said that since there was nothing on the face of the instrument that could be interpreted to be testamentary, extrinsic evidence was not admissible. However, the court said that in situations where the instrument appears to be testamentary, extrinsic evidence on the question of testamentary intent is admissible. As an example the court said that a law professor might make a sample will as an illustration for his class. If this is offered for probate the opponent of this will could prove that it was never intended to operate as his will. Of course the proponent could then try to prove that it was executed with testamentary intent.

In conclusion Chambers v. Younes probably was properly decided as a case that falls within the general rule that evidence is admissible when the instrument is ambiguous.

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Iowa 607, 293 N.W. 25 (1940); Carter v. Dabbs, 196 Miss. 692, 18 So.2d 747 (1944); Clark v. Skinner, 334 Mo. 1190, 70 S.W.2d 1094 (1934); Westover v. Harris, 47 N.M. 112, 137 P.2d 771 (1943); Shaw v. Shaw, 282 P.2d 748 (Okla. 1955); Simmons v. Macomber, 60 Wash. 469, 111 Pac. 579 (1910); Watts v. Lawrence, 26 Wyo. 367, 185 Pac. 719 (1919).

20. McKnight v. Cornet, 143 So. 726 (La. 1932); Sheldon v. Blackman, 188 Wis. 4, 205 N.W. 486 (1925).
27. Supra note 1.
ENJOINING USE OF POLICE LINEUPS—EQUAL PROTECTION

Rigney v. Hendrick

Six prisoners awaiting trial for criminal offenses brought actions under the Civil Rights Act of 1871 to enjoin police and prison officials from compelling them to appear in police lineups. The lineups were to be used for possible identification by victims of other crimes not included in the original indictment. The actions were initiated in the United States District Court for the Eastern District of Pennsylvania with the injunctions denied.

On appeal, the actions were consolidated with the case of Roosevelt Morris selected as representative. Morris, awaiting trial for burglary, was in confinement because his indigency prevented him from posting bond. While he was so incarcerated, the police requested that Morris be viewed by the victim of a rape and burglary, offenses not in the original indictment. After affirming the lower court’s denial of the injunction, the court of appeals refused appellant’s petition for rehearing.

The main contention of appellants was that they were denied equal protection of the law. They contended that persons under indictment, but free on bail, could not be forced to appear in a lineup without an arrest for the new charge, while persons who could not make bail could be forced by the police to appear. Because such compulsion could not be applied to those free on bail, appellants urged that their indigency subjected them to an unreasonable classification, in violation of the equal protection clause of the fourteenth amendment.

Only a person in police custody can be compelled to appear in a lineup. A suspect free on bail is considered to be in the custody of the court. For the police to arrest such a suspect, a new warrant must normally issue even if the purpose of the arrest is pertinent to the original charge. On the other hand, the suspect without bail is confined in the custody of the police; he therefore has little choice but to appear in a lineup.

Equal protection means that no person or class of persons will be denied the

1. 355 F.2d 710 (3d Cir. 1965).
2. 42 U.S.C. § 1983. “Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.”
3. The lineup room is in the same prison complex as the cells, and is divided into two parts by a glass partition. The inmates are in the custody and control of the prison guards on one side of the partition while the police and victims of crimes are on the other side. The lighting is very strong on the inmates’ side making them visible while the viewers are less visible to them. The suspects respond to questions of name and age which are heard by the viewers.
5. Supra note 1 at 715. A dissenting opinion to the rehearing denial was written by Judge Freedman formerly of the district court and author of the opinion in Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964).
protection of the law enjoyed by other persons in like circumstances.\footnote{7} The trend in recent years has been to recognize a classification as unreasonable if based on indigency. In \textit{Griffin v. Illinois},\footnote{8} the United States Supreme Court held that refusal to furnish an indigent defendant with a free transcript of his trial for use at the appellate level deprived him of his fourteenth amendment rights, where a transcript was virtually required for successful appellate review. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."\footnote{9} In \textit{Douglas v. California},\footnote{10} the majority saw in California criminal procedure an unconstitutional discrimination between the rich man who can force appellate review no matter how frivolous, and the poor man who enjoys the benefit of appointed counsel at the appellate level only if the appellate court deems his appeal meritorious. While not basing its decision solely on the equal protection clause, the Court in \textit{Gideon v. Wainwright}\footnote{11} ruled that the fourteenth amendment extends the right of counsel in criminal prosecutions to indigent defendants in state courts.

The courts still recognize, however, that some classification is needed. "A state can consistently with the 14th amendment provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination."\footnote{12} In a recent case, petitioner sought release on a federal writ of habeas corpus. He had been fined five hundred dollars and sentenced to imprisonment for thirty days, or an additional sixty days if the fine was not paid. Petitioner contended he was denied equal protection because a prisoner who could pay the five hundred dollars could go free, while he, an indigent, had to remain confined. The court ruled that this classification was not a denial of equal protection.\footnote{13}

In \textit{Butler v. Crumlish},\footnote{14} petitioners obtained a temporary injunction on essentially the same facts as in the noted case. The court recognized, however, that "differences that necessarily result from imprisonment while awaiting trial and freedom on bail cannot be made the foundation for any constitutional objection because of discrimination, for the distinction itself is constitutionally recognized."\footnote{15} \textit{Butler} also recognized that lineups are not unconstitutional per se, but when prisoners awaiting trial for one offense were forced to appear in a lineup for other offenses, an invidious discrimination was found between bailed defendants and defendants without bail.

Another lineup case, \textit{United States v. Evans},\footnote{16} held that the defendants had not been subjected to invidious discrimination, because bail had not been fixed and the prisoner was awaiting hearings on two different charges. "Defendant was

\begin{thebibliography}{16}
\footnotesize
\bibitem{7} U.S. Const. amend. IV; U.S. Const. amend. XIV.
\bibitem{8} 351 U.S. 12 (1956).
\bibitem{9} Id. at 19.
\bibitem{10} 372 U.S. 353 (1963).
\bibitem{11} 372 U.S. 335 (1963).
\bibitem{14} Supra note 5.
\bibitem{15} Id. at 566.
\end{thebibliography}
not subjected to invidious discrimination as between those at large on bail and those held in custody for want of bail.\textsuperscript{17} The court correctly interpreted Butler as saying that the placing of a suspect in a lineup, or otherwise making him available for identification, was not per se a violation of constitutional rights.

\textit{State v. Jones}\textsuperscript{18} questions the holding in Butler. Strictly speaking, the issues in the two cases are different. In Jones, the defendant was arrested and placed in a lineup along with four other men for identification by the victim of the crime for which he was arrested and charged. In Butler, the lineup involved victims of other crimes.

Appellants in the noted case relied heavily on Butler to support their equal protection contention. Butler and the noted case are the only cases in which this exact issue has arisen. Contrary to Butler, the court in the present case ruled that the equal protection contention must fail along with the due process and self-incrimination contentions. The court felt the lineup procedure was reasonable and consistent with fairness, and was necessary to meet the demands of effective criminal investigation. The court recognized that a classification was involved, but ruled it was not so unreasonable or invidious as to be unconstitutional.

Appellants conceded the legality of the lineup if it concerned the offenses for which they were arrested. The court reasoned that since the purpose of an arrest was the taking of the accused into custody, and since the appellants were already in custody, the contention was based on a mere formality. Appellants also conceded the constitutionality of being viewed in their cells or in the prison yard. The court felt that "the appellants' objections boil down to whether they may be compelled to present themselves for observation in a particular place."\textsuperscript{19} The opinion approves of the trial court's holding that moving a suspect from his cell to another room for identification is necessary "because of the danger of harm to the viewers and the threat to the security of the prison."\textsuperscript{20}

The court made no effort to distinguish Butler, characterizing that holding as too broad. As contrary authority, the court cited \textit{Commonwealth v. Neal},\textsuperscript{21} where an application was made to remove a strand of hair from defendant's head for comparison with hair found at the scene of the crime. Although the identification issue was present in both Neal and Butler, Neal seems to be poor authority to cite in disapproval of Butler because the issues involved were quite different. No bail was involved in Neal and the defendant was charged with the crime in question.

The court ruled that the classification arose from the inherent characteristics of confinement, and could not constitute an invidious discrimination depriving appellants of equal protection.

The majority of the court denied the petition for rehearing, but three judges dissented, feeling that the case should be heard before the court en banc.\textsuperscript{22} The dissent concluded that the court had decided an unnecessary constitutional ques-

\textsuperscript{17} Id. at 557.
\textsuperscript{19} Rigney v. Hendrick, \textit{supra} note 1, at 715.
\textsuperscript{20} Morris v. Crumlish, \textit{supra} note 4, at 499.
\textsuperscript{22} \textit{Supra} note 1, at 715.
tion. Appellants had conceded the lineup would have been legal had they been arrested for the new offense. In the case of Morris, there was probable cause for his arrest on the second charge of rape and burglary, so his argument that a second arrest was needed to justify his appearance in the lineup was moot. The dissent felt that had the court decided the case on this basis, it would have decided all that was necessary to dispose of the equal protection issue, and would have observed the statement of Justice Brandeis in *Ashwander v. T.V.A.* that constitutional questions should not be decided in a case that can be determined without them.

Instead, the court decided the constitutional issue against appellants, and disapproved *Butler*. The dissent recognized that some distinctions are necessary between defendants on bail and those confined without bail, but felt that "the unequal subjection to lineups is in no way related to such confinement and therefore constitutes an invidious discrimination—a classification having no basis except the impermissible one of financial means." In defending *Butler*, the dissent said the principle against discrimination between those defendants bailed and those imprisoned for want of bail can be recognized and "yet made innocuous as to a lineup held in the customary interval between an arrest and the fixing of bail."

The dissent received some support from *Commonwealth v. Brines*, where the court refused to grant an order to the district attorney to move a defendant awaiting trial from his jail cell to the district attorney's office for possible identification by certain persons.

It seems to be forgotten that an accused is not a convict, and that it is only strong necessity that compels his detention before trial. It is a restraint of the liberty of his person which is unavoidable. It certainly should not be aggravated by the infliction of any unnecessary indignity.

An accused but, unconvicted, prisoner is not to be bundled about the county at the beck and call of every policeman or prosecutor who may wish to see him.

Had appellants succeeded in their attempts to obtain injunctions, the use of police lineups would be restricted to those crimes for which the suspect has been charged. Normally, there is only one suspect in a case against whom the police have enough evidence to arrest and detain. No others could be compelled to appear because they were not charged with the crime. The lineup would be limited to the suspect and volunteers, and it is unlikely that many would volunteer for such duty. However, this court apparently sanctions the unlimited use of police lineups, even in those cases where there may be no evidence at all of guilt. Such practice

23. The victim of a burglary and a rape, crimes not included in the original indictment, identified some of her belongings found in Morris' possession. There was also similarity in the modus operandi.
25. 355 F.2d at 717.
26. Id. at 716.
27. 29 Pa. Dist. 1091 (1920).
28. Id. at 1091.
does create a classification on its face unfair to indigent defendants. Although it is an entrenched part of our society today, this case, it is submitted, raises serious questions about the fairness of the bail system today.

PAUL TRAVIS LYON

REAL PROPERTY—INTERPRETATION OF SUBDIVISION RESTRICTIONS

Vinyard v. St. Louis County

Six residents of Saxon Manor No. 2, a subdivision, brought suit against St. Louis County and Cornet to enjoin alleged violations of subdivision restrictions.

Originally, Idamor Development Corporation owned two adjoining parcels of land. One tract was sold to M. Shapiro and Sons, Inc., which subdivided the land, built homes on the lots and sold the lots subject to the following recorded preamble:

"Whereas, it is the desire and purpose of the owners of the said subdivision, for the purpose of benefiting the several lots into which they have been subdivided, and the purchasers thereof and their successors and assigns to make said subdivision desirable residential area and to that end to impose the restrictions, conditions and provisions hereafter set out with respect thereto..." and restrictions:

Section 4 "All lots shall be known and described as residential lots. No structure shall be erected on any residential building lot other than one detached single family dwelling which shall not exceed two stories in height."

Section 9 "No residence shall be used directly or indirectly for business of any character or for any purpose other than that of an exclusive private residence of one family."

Lots 150 and 151 were platted wider than most, and when the lots were sold, Shapiro reserved twenty-five feet of each, creating a strip fifty feet wide between the two lots. Later, Idamor sold the adjoining tract (which was zoned for light industrial and multi-family residence use) to Cornet who then bought the fifty-foot strip from Shapiro for access. There were other routes available, but they were not financially practical. Cornet then began to build a number of apartment houses on his land, and a street on the fifty-foot strip. This suit followed, and the Circuit Court of St. Louis County found the restriction not to be violated.

On appeal to the Supreme Court of Missouri, plaintiffs contended "that the use of the 50-foot strip of land in this subdivision restricted to single family occupancy constitutes multiple dwelling use of the strip for business purposes because it will be used as a means of ingress and egress to and from a tract on

1. 399 S.W.2d 99 (Mo. 1966).
2. Id. at 106.
3. Id. at 105.
which multiple dwelling apartments are located.\textsuperscript{34} This question was not reached by the court, which held that the rule of strict construction would apply. "[N]either § 4 nor § 9 prohibits the use of any lot for other than residential purposes. It is not the use of the land that is restricted. The restriction goes to the type of structure to be erected upon the land and the use of the structure erected thereon."\textsuperscript{5} The court refused to look at the recital in the preamble as a part of the restrictions, or to consider it as reflective of the intent of the parties in imposing the covenant.\textsuperscript{6} The court also found that a street would not be included within the prohibited "structures."\textsuperscript{7} Thus, any use of the land that made no use of a building or structure would be permitted. There is then no question of whether a street violates the restriction, because as to such uses of the land, there are no restrictions at all.

The effect to be given a restrictive covenant may largely depend upon the language used in each case, but all courts purport to apply similar rules of construction. These rules are often stated as follows:

The intention of the parties is the paramount and controlling question. That intention is to be ascertained from the terms of the deed considered in light of the circumstances surrounding the parties. Restrictions, being in derogation of the fee conveyed, will not be extended by implication to include anything not clearly expressed . . . .\textsuperscript{8}

"[U]f there be ambiguity in the terms of the covenant, or substantial doubt of its meaning, such ambiguity should be resolved, if reasonably it can be, in favor of the use complained of . . . ." But, "when covenants in the nature of restrictions are reasonable, and within the policy of the law they are valid."\textsuperscript{9}

4. Ibid.
5. Id. at 106 (original emphasis).
6. "Recitals of this kind generally are not strictly a part of the contract and, while of value in determining intent, they do not extend and broaden the contract stipulations where, as here, the recitals are broader than the stipulations." Ibid. from Albrecht v. State Highway Comm'n, 363 S.W.2d 643, 646 (Mo. 1962). Albrecht relied on 17 C.J.S. Contracts § 314 (now 17A C.J.S. Contracts § 314 (1963)), which also says that "if the recitals are clear and the operative part is ambiguous, the recitals govern the construction." So it is only on a theory that the language is clear as written that C.J.S. will support the statement made by the court.
7. However, in State ex rel. Curators of Univ. of Mo. v. Neill, 397 S.W.2d 66 (Mo. En Banc 1966), the court held a parking lot to be a "structure" within the statute granting authority to the Curators of the University of Missouri to borrow money to build structures.
8. Gardner v. Maffitt, 335 Mo. 959, 965, 74 S.W.2d 604, 607 (1934).
These rules show that two competing interests are involved. It is this conflict between the intention of the parties and the free use of the land that causes the rule to be applied in different ways. Some courts take a very strict approach, and will only enforce those restrictions clearly set out. Others look to the intent and purpose of the parties, in addition to the literal interpretation. In recent years, Kentucky and Iowa have adopted the view that "under the modern view, building restrictions are regarded more as a protection to the property owner and the public rather than as a restriction on the use of the property, and the old-time doctrine of strict construction no longer applies."

The older Missouri cases emphasized the intent and purposes of the parties and the surrounding circumstances, but in recent years, the cases have more literally interpreted the language used.

The decisions are split as to the effect of the restriction that "no buildings to be erected on the land are to be used for other than residential purposes." In Albrecht v. State Highway Comm’n, principally relied on in Vinyard, there was such a restriction as well as a preliminary recital that the lot would be used for residential purposes only. The court ignored the recital and allowed a highway to be built across the lot, holding, as it did in Vinyard, that the restriction, "did not restrict the use of the land, but provided, in effect that any building on the lot should not be used for any purpose other than for a private residence."


15. Supra note 6.

16. Supra note 1.

17. Albrecht v. State Highway Comm'n, supra note 6, at 646.
There are no other Missouri cases in point, but other jurisdictions have reached similar results. The leading Washington case of *Granger v. Boullis*\(^1\) involved a restriction against building structures for other than residential use. Defendant built a hog house, a chicken house, and a cow barn, and kept rabbits, hogs, cows, and chickens. The buildings were ordered removed as violating the restriction, but the court allowed the animals to be kept on the land so long as no building was used. The court recognized that the purpose of the restriction was to segregate the land into a private residential district; but by the rule of strict construction, this restriction had not done so because restrictions will not be “enlarged or extended by construction, even to accomplish what it may be thought that the parties would have desired had a situation which later developed been foreseen by them at the time the restriction was written.”\(^2\)

In *Cooke v. Kinkead*\(^3\) an oil well in a residential neighborhood was permitted. The Oklahoma Supreme Court said that only when there is ambiguity on the face of the deed will the intention of the parties be considered. The language of the restriction was found to be clear and therefore applicable only to the buildings and not the land.\(^4\) Other cases have permitted a parking lot,\(^5\) a brick wall,\(^6\) and fairways for a golf course.\(^7\)

New Mexico adopted the opposing view in *Hoover v. Waggoner*,\(^8\) where the construction of a parking lot was enjoined as violating a restriction,\(^9\) also con-

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1. 21 Wash.2d 597, 152 P.2d 325 (1944).
2. *Id.* at 599, 152 P.2d at 326.
3. *Supra* note 9. “In dealing with this subject, equity does not concern itself with the form of the language in which the restriction is couched, but deals only with its substance. It disregards the inquiry whether it is a covenant or condition and enforces it where it is plainly intended by the parties that it should be for the benefit of the land held by plaintiff.” 179 Okla. 147, 153, 64 P.2d 682, 688 (dissent) quoted from Coughlin v. Baker, 46 Mo. App. 54 (St. L. Ct. App. 1891).
4. “[A]nd no building . . . shall ever be used or occupied except for that of residence exclusively.” Cooke v. Kinkead, *supra* note 9, at 148, 64 P.2d at 684.
5. Shaddock v. Walters, *supra* note 9, where a covenant “that no building shall be erected or maintained on any portion of the premises . . . ,” *id.* at 636, did not prohibit a parking lot because only buildings were prohibited, and this was not a building.
6. Himmel v. Hendler, 161 Md. 181, 155 Atl. 316 (1931), where a strip reserved between two lots was to be left open and not to be built upon. This case is based more upon the intention of the parties in not prohibiting all substantial use of the land. The purpose was not to cut off light and air.
7. Burton v. Douglas County, 65 Wash.2d 619, 399 P.2d 68 (1965). A covenant that “no building shall be erected on any building lot except one detached single-family dwelling,” *id.* at 620, 399 P.2d at 69, was construed as showing a clear intention that it would only apply to the buildings and not the land. The court said “had the intent been to restrict to residential use only, the parties could have so provided.” *Id.* at 622, 399 P.2d at 70.
8. 52 N.M. 371, 179 P.2d 991 (1948); see Note, 47 Mich. L. Rev. 1029 (1949).
9. “Not erect upon said premises . . . any tent house and no building other than dwelling houses and such barns, garages or outhouses as may be necessary in connection with the use of said premises for dwelling purposes nor more than one dwelling house to be erected on any one lot . . . nor shall any building erected on said lots be used . . . for any other purpose than as private dwelling places.” *Hoover v. Waggoner*, *supra* note 25 at 373, 199 P.2d at 992.
strued to apply to the land. The holding of Granger v. Boulls was specifically rejected, and the court said, "[E]ffect is to be given the intention of the parties as shown by the language of the whole instrument, considered with the circumstances surrounding the transactions, and the object of the parties in making the restriction." The court pointed out the absurdity of construing the covenant as permitting only residential buildings, and then allowing a hog lot or a junkyard to be maintained.

Similarly, Alexander Schroeder Lumber Co. v. Corona prohibited the stacking of lumber on the land, on the theory that the language clearly expressed the intent of the parties that the land was to be restricted. The rule of strict construction in favor of free use of the land was to apply only where there was ambiguity. The language found to be clear in this case was very much like language found to be ambiguous in other jurisdictions.

A slightly different approach was taken in Virginia in Whitehurst v. Burgess, where the land was found to be restricted by necessary implication from the whole instrument. The court concluded, "All courts profess to give effect to the plain intention of the parties, in imposing such restrictions, and should live up to their profession in good faith instead of seeking ingenious subtleties of interpretation by which to evade such restrictions." This approach does not conflict with the rule of not extending by implication for it is merely a statement that the plain and obvious meaning can include something more than could be derived from a literal reading. Other cases have held the land to be restricted.

If this latter interpretation were adopted, it would be necessary to reach the question, raised by plaintiff, whether the maintenance of a street across property restricted for residential purposes, to serve property either unrestricted or restricted for inconsistent purposes, would violate the residential restriction.

Several cases have held that the street or passageway could, in certain circumstances, be a non-residential use; but more often, the courts will look to

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27. Supra note 9.
29. Supra note 11.
30. "All lots . . . shall be known and described as residential lots. No structure shall be altered, placed or permitted to remain on any residential building plot other than one detached one-family dwelling . . . ." Alexander Schroeder Lumber Co. v. Corona, supra note 11, at 830.
31. 130 Va. 572, 107 S.E. 630 (1921).
33. Martin v. Weinberg, supra note 9 (parking lot would defeat the purposes of the parties); Wilber v. Wisper & Wetsman Theatres, supra note 11 (parking lot); Bohm v. Rogoff, 256 Mich. 199, 239 N.W. 320 (1931) (miniature golf course); Owenby v. Boring, supra note 11 (electric sign); Ragland v. Overton, 44 S.W.2d 768 (Tex. Civ. App. 1931) (suit to have the restriction declared void because of changed conditions); Traylor v. Halloway, supra note 9 (playhouse).
the use being made of the other land. In Laughlin v. Wagner, a restriction that any house erected be used only for residential purposes was construed to be a restriction on the land, as well as buildings. Defendant sought to build a walkway across his lot to be used as an entrance to a store on the adjoining lot, but this was enjoined by the Tennessee Supreme Court as non-residential. "In other words, any use of this lot which might be reasonably incident to its use for residential purposes is permissible, but it is not permissible to put the lot into service as an incident to the business houses on the adjacent portion of the lot."

Some cases where a street has been permitted have applied a consistent theory. In Bove v. Giebel, defendant sought to use his lot in an existing subdivision for access to a new subdivision on adjoining property. He agreed to impose identical restrictions, and the use was permitted. A later case suggests that this will not be allowed as a matter of course, but only after a determination of what effect the increased traffic, etc., will have on the land in the original subdivision. If the quiet residential character would be greatly changed, the use might be enjoined.

Most of the remaining cases permitting such use have found that it was the intent of the parties that such use be allowed, or that there was no restriction on the use of the land. Numerous cases are distinguishable on the facts.

(1916) (railroad); Wallace v. Clifton Land Co., 92 Ohio St. 349, 110 N.E. 940 (1915). Most of these cases only involve a question of one parcel of land and not the use of one parcel in connection with another.

35. Meltitz v. Sunfield Co., 103 Conn. 177, 129 Atl. 228 (1925) (access to a gas station); Bennett v. Consolidated Realty Co., 226 Ky. 747, 11 S.W.2d 910 (1928) (parking lot for a roadhouse); McInerney v. Sturgis, 37 Misc. 2d 302, 234 N.Y.S.2d 965 (1962) (access to a garage on unrestricted property); Cleveland Realty Co. v. Hobbs, 261 N.C. 414, 135 S.E.2d 30 (1964) (roadway across a golf course to a residential area); Starmount Co. v. Greensboro Memorial Park, 233 N.C. 613, 65 S.E.2d 134 (1951) (use for access to a cemetery to be built on adjoining land); State ex rel. Stalzer v. Kennedy, 46 Ohio App. 1, 187 N.E. 640 (1933) (driveway to a gas station); Braes Manor Civic Club v. Mitchell, 368 S.W.2d 860 (Tex. Civ. App. 1963); Duggan v. Buckner, 155 S.W.2d 661 (Tex. Civ. App. 1941) (access to other building property). See also Note, 49 Ky. L.J. 513 (1955).

36. 146 Tenn. 647, 244 S.W. 475 (1922).
37. Laughlin v. Wagner, supra note 9, at 658, 244 S.W. at 478.
38. 169 Ohio St. 325, 159 N.E.2d 425 (1959).
39. River Rouge Improvement Ass'n v. Thomas, 374 Mich. 175, 131 N.W.2d 920 (1965).
40. Threedy v. Brennan, 131 F.2d 488 (7th Cir. 1942); Callaham v. Arenson, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954). "Ordinarily the opening and maintenance of a street or right of way for the better enjoyment of residential property as such does not violate a covenant restricting the property to residential purposes." In this case, a large lot was to be resubdivided with identical restriction to be imposed so it would be similar to Bove v. Giebel, supra note 38; and River Rouge Improvement Ass'n v. Thomas, supra note 39; Cook v. Murlin, 202 App. Div. 552, 195 N.Y. Supp. 793 (1922) aff'd, 236 N.Y. 611, 142 N.E. 304 (1923); Lake Buelah Protective & Improvement Ass'n v. Christenson, 272 Wis. 493, 76 N.W.2d 276 (1956).
The rule is that the restriction will be violated if the use "seems to be inconsistent with the parties' intention in creating or agreeing to the restriction and the object sought to be accomplished thereby while if it does not interfere with the intention and purpose it will not violate."43

In Vinyard,44 Missouri has adopted a rule which defeats the clear intention of the parties. It is absurd to say that the intention of the parties will govern, and then read the covenant literally without considering that intent. Courts should not adopt "ingenious subleties of interpretation by which to evade such restrictions."45 It is submitted that a much better approach would be to look to the intention of the parties in all cases. In this case, there were strong elements of estoppel,46 and perhaps the restrictions should not have been enforced for that reason. However, this does not in any way justify deciding the case on the stated grounds.

JAMES T. NEWSOM

CRIMINAL LAW—PRELIMINARY HEARING: A CRITICAL STAGE OF CRIMINAL PROCEEDINGS WHERE DENIAL OF ASSISTANCE OF COUNSEL TO THE ACCUSED DEPRIVES HIM OF HIS CONSTITUTIONAL RIGHT TO COUNSEL

Sigler v. Bird4

The United States District Court for the District of Nebraska granted a writ of habeas corpus to Roland F. Bird,4 a state prisoner serving a seven year sentence in the Nebraska Penal and Correctional Complex.

A three-count complaint had been filed against Bird on October 4, 1962, charging assault, felonious breaking and entering of a dwelling house, and malicious destruction of property. On the same day Bird, without counsel and before effectively waiving counsel, appeared in court, pleaded guilty to the charges, and waived preliminary hearing. Bird repeated his plea at arraignment and on November 8, 1962, he was sentenced to a total of seven years' imprisonment.3 In the

43. Supra note 42, at 906.
44. Supra note 1.
45. Supra note 32.
46. The strip had been graveled and used for a roadway for other purposes for several years; water and gas lines had been installed without any complaint and the plaintiffs did not complain until a very substantial part of the apartment house had been completed.
1. 354 F.2d 694 (8th Cir. 1966).
3. There appears to be some conflict as to whether Bird had counsel or had effectively waived counsel at these later stages of his prosecution. The lower court,
period between his arraignment and sentencing, Bird talked with two attorneys. Both informed him that they would be unable to render him any effective legal service, apparently because Nebraska law permitted the guilty plea he had entered while waiving preliminary hearing to be used against him in a subsequent trial. The Supreme Court of Nebraska established an exception to this rule in 1964, holding that such a plea was not admissible against an accused who was neither represented by, nor had effectively waived, counsel at the time the plea was entered. Notwithstanding this decision the court of appeals affirmed the grant of habeas corpus, concluding that Bird's preliminary hearing was a "critical stage" since at the time it was held his plea was admissible at trial. The court held the lack of a subsequent trial to be immaterial, since the question was whether there was "likelihood of prejudice to the accused because of lack of counsel at the time when the plea was entered," not whether actual prejudice resulted.

The sixth amendment to the Constitution guarantees a defendant in a criminal prosecution the right "to have the assistance of counsel for his defense." Johnson v. Zerbst held that compliance with the sixth amendment was a jurisdictional requirement for the federal courts, and compelled those courts to appoint counsel for indigents who had not waived their right to counsel. Gideon v. Wainwright extended the requirement to the state courts, holding the presence of counsel was "fundamental and essential to a fair trial." Gideon overruled Betts v. Brady, which had concluded that the sixth amendment's guarantee of counsel was not such a fundamental right as to have been imposed upon the states under the due process clause of the fourteenth amendment.

Gideon greatly increased the need for guidelines to determine when in the criminal procedure counsel must be provided to avoid infringement of the accused's rights. Only in White v. Maryland has the Court been directly confronted with this question at the preliminary hearing stage. There, the accused had entered a plea of guilty at the preliminary hearing, and, although he was allowed to plead

which had consolidated four habeas corpus proceedings for the purpose of its opinion, observed at one point that all parties either had counsel or had effectively waived counsel and at another point that all parties had counsel at these stages. Bird v. Sigler, supra note 2, at 1010, 1014. The appellate court, however, stated, "Thus, it appears that at no stage of the prosecution did the appellee have the benefit of counsel." Sigler v. Bird, supra note 1, at 695. Whatever may have been the actual facts of the case, it is clear that the question of law asked and decided by both courts was whether the plea of guilty entered at the time the preliminary hearing was waived made this such a "critical stage" as to required the issuance of a writ of habeas corpus.

6. The appellate court held this proceeding "was a substitute for, and legal equivalent of, a preliminary hearing, within the meaning of the Nebraska law." Sigler v. Bird, supra note 1 at 697.
8. 304 U.S. 458 (1938).
10. 316 U.S. 455 (1942).
not guilty at trial, the prior plea of guilty was allowed in evidence. The Court held that Hamilton v. Alabama13 governed, "for petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel,"14 and further pointed out that it would not stop to determine whether prejudice actually resulted. Hamilton had entered a plea of not guilty at arraignment and had made no effort to show prejudice because of absence of counsel at that point.15 The Court, however, emphasized the fact that when a plea was entered it would not attempt to determine whether there was resulting prejudice. Taken in context, this statement seems to imply that the entry of any plea makes that stage critical. It would seem to make no difference whether the plea was guilty or not guilty. Hamilton cited three cases18 in support of this proposition. Only in Williams v. Kaiser17 did the Court hint that an accused might be prejudiced if he entered a plea of not guilty. Williams pointed out that only counsel could determine whether it would be more advantageous to the accused to plead guilty to a lesser offense or not guilty to the offense charged.

Since White only in Pointer v. Texas18 had the issue of denial of counsel at a preliminary hearing been before the Court. The Court avoided the issue, however, distinguishing the case from Hamilton and White on the ground that no plea was accepted. The Court did point out that there might be other aspects of a Texas preliminary hearing that could make it a "critical stage" of criminal proceedings, but it reserved the question and decided the case on other grounds.19

Since Hamilton and White, the lower federal and state courts have heard a substantial number of appeals and requests for writs of habeas corpus based on the denial of counsel at preliminary hearing. The Hamilton and White rationale has been extended to preliminary hearings where the accused was not represented by counsel and either a judicial confession20 or evidence of testimony21 was later admitted at trial. In Sparkman v. State22 the Wisconsin court did not reach the

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13. The Hamilton case ruled that an accused was entitled to counsel at a "critical stage" in criminal proceedings. While the court did not define "critical stage," it pointed out that an arraignment under Alabama law was such a stage since it is the time when the defense of insanity must be pleaded, pleas in abatement must be made, and the accused must plead to the charge. 368 U.S. 52 (1961).
14. White v. Maryland, supra note 12, at 60.
17. Supra note 16.
19. In this case a witness who had testified against the accused at the preliminary hearing was out of the state at the time of trial, so the transcript of the witness' prior testimony was introduced in evidence at trial. Since the accused was not represented by counsel at the preliminary hearing the court held that he had been denied his right to confront the witnesses against him when the transcript was introduced into evidence.
20. Harris v. State, 162 So.2d 262 (Fla. 1964).
21. Pettit v. Rhay, 62 Wash.2d 515, 383 P.2d 889 (1963). This case was decided before Pointer v. Texas, supra note 17, and would probably now be decided on the reasoning set out in that case.
22. 27 Wis.2d 92, 133 N.W.2d 776 (1965).
question of whether there is a constitutional right to counsel at a preliminary hearing. That court did adopt, for prospective application, the rule that an indigent is entitled to appointed counsel at or before a preliminary hearing, unless counsel was properly waived. This new rule is subject to the harmless error rule, however. While there has been much discussion of the possibility that a preliminary hearing is per se a "critical stage" in the criminal process, only one court has accepted this view as being within the rationale of *Hamilton* and *White*.

This court's reasoning was rejected on appeal and the judgment was vacated.

Despite the language in *Hamilton* and *White*, those courts which have ruled on the question have held that the entering of a plea of not guilty at the preliminary hearing is not sufficient to convert such a hearing into a "critical stage." Some courts have said that even the entering of a guilty plea is not sufficient to make a preliminary hearing a "critical stage" either where the accused pleaded not guilty at trial and his prior guilty plea was not brought out in any way, or where no use was made of the earlier plea and the accused later was sentenced on a guilty plea entered when he was represented by counsel. Among the cases cited in support of this proposition, only *Blake v. State* indicated that the guilty plea accepted without counsel could never be admitted in evidence at a subsequent trial.

Courts dealing with this problem have usually adopted one of three principles for determining what constitutes a "critical stage": any stage (a) not purely formal where the aid of counsel could affect the whole trial; (b) where events tran-

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That the defendant might have obtained a discharge at the hearing, thus avoiding the loss of his liberty until trial and having to stand trial; the cross-examination of the state's witnesses might have revealed some aspect of the state's case which would have enabled the defense to better prepare its trial strategy; and that the defendant might have been able to present his case in such a way as to influence the prosecution to accept a plea of guilty to a lesser offense, are included among the arguments presented for this view.


spire that are likely to prejudice the ensuing trial;\textsuperscript{30} (c) which resulted in such actual prejudice at trial as to enable the defendant to prove his trial was fundamentally unfair.\textsuperscript{31} Regardless of principle, virtually all the authorities agree that it would be a substantial advantage to a defendant to be represented by counsel at his preliminary hearing. Considering the importance of providing every defendant with a fair and equal opportunity to secure justice, it seems that counsel should be provided at this stage. The problem is to determine an appropriate remedy if counsel is not provided. If a preliminary hearing is declared to be a “critical stage” per se, the harmless error doctrine is inapplicable and any subsequent conviction must be held invalid. Whether this remedy would be too harsh in cases where no events have transpired which would prejudice defendant in his ensuing trial is a question that must be answered by balancing the value of having counsel at the preliminary hearing against the harm of invalidating a probable just conviction. Whatever might be the result of such balancing, it appears that the last principle cannot be justified either under the language of Hamilton and White, or from the standpoint of assuring the defendant his constitutional right to a fair trial. Only the last principle could rationally support a finding that the entering of a guilty plea would not convert a preliminary hearing into a “critical stage” where such a plea could be admitted into evidence at a subsequent trial.

The noted case clearly rejects the last principle and is the first case to hold that the entering of a guilty plea which could be admitted into evidence at accused’s subsequent trial is sufficient to convert a preliminary hearing into a “critical stage” despite the fact that the subsequent trial was never held. While the court pointed out that two attorneys had informed Bird that they could not effectively represent him because of his guilty plea, this does not seem to be a significant factor in the court’s decision. The rationale of the court’s holding seems to be that any time events occurred which would be “apt, or likely,”\textsuperscript{32} to impair the effectiveness of any legal counsel which might later be furnished, such a time was a “critical stage” in the judicial process regardless of what later might actually occur. This case is also significant in that it becomes the first United States court of appeals case significantly to extend the rationale of White beyond the facts of that case. This extension is a reasonable one that would seem to be required by the language of White. It is hoped that other courts will follow the lead of the noted case and further utilize the doctrine of the White case to help insure that each defendant receives the fair trial he is entitled to under the Constitution.

\textbf{ROBERT E. NORTHRIP}\n
\footnotesize{\textsuperscript{30} DeToro v. Peppersack, supra note 24. \textsuperscript{31} United States ex rel. Cooper v. Reincke, supra note 24. \textsuperscript{32} Sigler v. Bird, supra note 1, at 697.}
CONFESSIONS—ADMISSIBILITY IN MISSOURI UNDER ESCOBEDO

State v. Beasley1

Beasley was arrested in connection with a homicide and was taken to the police station, where he was interrogated. Before interrogation he was warned that anything he said might be used against him, but he was not told that he had a right to remain silent or to an attorney. He confessed during interrogation and was subsequently tried for first degree murder. Defense counsel objected to use of the confession at trial, but it was admitted into evidence. Beasley was found guilty of first degree murder and sentenced to life imprisonment. Defendant appealed to the Supreme Court of Missouri, arguing that the confession should have been excluded under the principle of Escobedo v. Illinois.2

Had Beasley been decided under the recent decision of Miranda v. Arizona,3 the confession would have been inadmissible. In Miranda the Court said:

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.4

Beasley was in custody at the time the statement was made and was not told that he had the right to the presence of an attorney, either retained or appointed. The prosecution did not show waiver of these rights; therefore, the confession would have been excluded had Miranda controlled.

However, Miranda was not the controlling case because Beasley was tried before Miranda was decided. Johnson v. New Jersey5 held that Miranda governed cases tried after June, 1966. Cases tried before June, 1966, and after June, 1964, were to be controlled by Escobedo.6 Beasley went to trial in the two year period between Escobedo and Miranda, and his case was controlled by Escobedo.

In Beasley, the Supreme Court of Missouri applied its interpretation of Escobedo ruling that the statement was properly admitted. The court distinguished Escobedo and Beasley on two factors. First, Beasley, unlike Escobedo, did not request counsel. Second, the court said:

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1. 404 S.W.2d 689 (Mo. 1966).
4. Id. at 444.
6. Cases decided before June, 1964, are not affected by either Escobedo or Miranda.
Escobedo did not hold that if no lawyer has been employed and no request to see a lawyer or anyone else has been denied that a specific statement must be made to one interrogated that he has a right to remain silent, before any statement would be admissible. . . . The lack of a statement to Escobedo of his rights was only one of five factors held to prevent use of his statements. . . .

The court held that unless circumstances involved were very similar to those in Escobedo, it would exclude a statement only if the totality of the circumstances indicated that the statement was not voluntary.

In Beasley, the Missouri court joined several others in holding that Escobedo made no substantial changes in the rules governing confessions. These courts limited Escobedo to the circumstances involved in that case and excluded statements only if a request to see a retained attorney had been denied. In all cases except those with circumstances very similar to Escobedo, these courts continued to use the totality of circumstances to determine voluntariness as the test for admission of statements by an accused.

There are other decisions based upon Escobedo that give it a different in-

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7. Supra note 1, at 692.

8. Two previous cases had held similarly. State v. Howard, 383 S.W.2d 701 (Mo. 1964); State v. Russell, 395 S.W.2d 151 (Mo. 1965). Beasley was followed in State v. Craig, 406 S.W.2d 618 (Mo. 1966).


10. This limitation was based on the holding in Escobedo. "We hold only that when the process shifts from the investigatory to the accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." Supra note 2, at 492.

These cases treat Escobedo as establishing a constitutional right to be informed that there is a waivable privilege of remaining silent and of assistance of counsel. Waiver of a constitutional right depends upon knowledge of that right, and there can be no presumption of waiver from a silent record. If at all other stages of the proceedings a defendant must knowingly and intelligently waive his rights, his rights at this stage should not depend upon a request. To make these rights dependent upon a request would discriminate in favor of the sophisticated and educated in dealing with the police, and against the less informed members of society. The reasoning and holding of these cases are similar to Miranda.

Escobedo indicated that it would not be limited to the circumstances involved in that particular case. The majority indicated that there was a right to counsel at the pre-trial level, and that use of the confession should be limited when it said:

The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the accused to be advised by his lawyer of his privilege against self-incrimination.

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . . .

Justice White, dissenting in Escobedo, indicated that the Court was abandoning the test of voluntariness to determine admissibility of a confession.

The Court indicated that Miranda was no innovation, but was merely a clarification of Escobedo. The Court said: "We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it." Johnson, decided one week later, also indicated that Escobedo and Miranda meant the same thing. The Court said: "We recognize that certain state courts have perceived the implications of Escobedo and have therefore anticipated our holding in Miranda."

Although the Supreme Court indicated that Miranda and Escobedo meant the same thing, it did not make Miranda retroactive. This gave lower courts an opportunity to interpret and apply Escobedo in a manner inconsistent with Miranda. Beasley is an example of this inconsistency.

14. Supra note 2, at 488-89.
15. Supra note 3, at 442.
16. Supra note 5, at 733.
Miranda was not retroactive because of the confusion which resulted from the unclear opinion in Escobedo. Both Miranda and Johnson recognized this confusion. In Johnson, the Court said:

As for the standards laid down one week ago in Miranda, if we were persuaded that they had been fully anticipated by the holding in Escobedo, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of Escobedo, however, have impelled us to lay down additional guidelines for situations not presented by that case.17

According to the Supreme Court of the United States, the Supreme Court of Missouri mis-interpreted Escobedo. However, because of the non-retroactivity of Miranda, decisions such as Beasley can remain controlling on this point in a jurisdiction, without violating constitutional doctrines. Unless the Missouri court changes its position, the Beasley interpretation of Escobedo is controlling for all cases that went to trial in the interval between Escobedo and Miranda. This will severely weaken the effect of Escobedo in Missouri.

George Lane Roberts, Jr.

INJUNCTION—RELIEF GRANTED AGAINST CONSPIRACY TO BREACH COVENANT NOT TO COMPETE, ANCILLARY TO A PATENT ASSIGNMENT

Contour Chair Lounge Co. v. Aljean Furniture Mfg. Co.1

This case involves an injunction enforcing a covenant not to compete. The defendants are the original covenantor and others who were not parties to the original covenant, including a closely held family corporation.

The original covenantor was an inventor named Laskowitz who designed and patented a chair with a movable contoured top which was mounted on a stationary base. In 1947, Laskowitz formed two corporations to manufacture and market the chair, the respective names of the corporations being “Contour” and “Contour Sales.” Final patents were issued to Laskowitz in 1950, and he subsequently assigned the exclusive rights under these patents to the corporations.

Until 1955, Laskowitz held stock in, and was an officer of, the two corporations he had formed to make and market his chair. Then, however, Laskowitz appears to have “pulled out” of the corporations, as the evidence indicated that in 1955 he transferred his stock and ceased to be an officer. The corporations continued to pay him royalties until 1958, which apparently derived from the exclusive rights previously assigned to them.

17. Id. at 734.
1. 403 S.W.2d 922 (St. L. Mo. App. 1966).
In December, 1958, however, Laskowitz apparently severed all connections with the "Contour" corporations. At that time he assigned to the corporation his patents to the chair for the sum of $180,000. He also executed a covenant not to compete with the "Contour" corporations for a period of ten years, which was approximately five years longer than the remaining life of the patents.

Shortly before the final severance of his connection with the "Contour" corporations in 1958, however, and before the assignment of his patents and his execution of a covenant not to compete, Laskowitz and his two sons-in-law formed the Aljean Furniture Manufacturing Co. While formed in 1958, it was not until March 11, 1964, that it began to market a chair similar to the one being manufactured and marketed by the "Contour" corporations. Although the covenant not to compete which Laskowitz had given to the "Contour" corporations was still in force at that time, the patents on the contour chair had expired.2

On January 2, 1964, prior to the patent's expiration, Contour brought suit against Laskowitz, his two sons-in-law and his daughter, Althea, alleging that they had conspired to breach Laskowitz's covenant with Contour, and had organized

2. The terms of the covenant required Laskowitz not to compete with Contour, not to franchise another dealer, except as to conventional furniture, not to invest in nor do research in the United States, its Possessions or Canada, relating to the chair, not to transfer any mechanical or design patents concerning a product of the nature involved, and not to use the term "Contour," to which Laskowitz acknowledged Contour's title. "In his separate answer Laskowitz attacked the validity of his contract . . . as being unreasonable as to area and time and therefore void, but in defendant's joint brief it is expressly stated that he did not press that defense below and does not do so here. That issue, therefore, is not before us." Contour Chair Lounge Co. v. Aljean Furniture Mfg. Co., supra note 1, at 925. Where a sale of a patent right occurs, the restraint on the patentee may ordinarily be unlimited during the life of the patent. Billings v. Ames, 32 Mo. 265 (1862). But the restraint must not be broader than is reasonably necessary for the protection of the covenantee. Reddi-Whip, Inc. v. Lemay Valve Co., 354 S.W.2d 913 (St. L. Mo. App. 1962). It has been held that a covenant not to compete extending territorially throughout the United States, ancillary to the sale of a patent, is reasonable. American Brake Beam Co. v. Pungs, 141 Fed. 926 (7th Cir. 1905). However, an agreement by a licensee not to compete with the patent after surrender of the license has been held to be against public policy. Henschke v. Moore, 257 Pa. 196, 101 Atl. 308 (1917).

The United States Supreme Court has held that a state may not validly restrain the copying of unpatented and unpatentable articles through the use of its unfair competition laws, limiting the states to the prevention of fraud and consumer confusion by such means as compulsory labeling laws. The rationale of these cases is that it is unconstitutional for a state to grant patent-like protection under its laws to an article incapable of a patent grant. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Daybrite, Inc., 376 U.S. 234 (1964). "The short of the rulings is that the recognition by the states of any rights in anything in the public domain conflicts with federal law." Product Simulation: A Right or a Wrong, 64 Colum. L. Rev. 1178, 1185 (1964). The scope of what constitute "state unfair competition laws" and what other means of control are open to state law is unsettled. Arguably these decisions could mean that ancillary covenants not to compete are no longer valid when involved with articles covered by these rulings. However, neither case involved private contractual relationships so that it remains an open question whether in the circumstances of Contour a private contractual arrangement protecting the economic utility of the subject matter of an expired patent is susceptible of enforcement under state law.
Aljean for that purpose. Contour also alleged that all of the defendants had engaged in research, development, manufacturing and sale of chairs similar to its own, in violation of the covenant. Finally, Contour alleged that the defendant’s chair was advertised and offered for sale as the Conform Lounge Chair, a name so similar to the plaintiff’s Contour Lounge Chair that it was calculated to and would mislead the public and plaintiff’s customers. Contour sought both temporary and permanent injunctions.

The trial court found that all of the defendants had knowledge of the covenant not to compete and had conspired to breach it or, alternatively, that Laskowitz’s sons-in-law had acted as his agents in carrying out the breach. The defendants were held jointly and severally liable for the breach; and they were enjoined from manufacturing, selling or offering for sale the “conforming chair” or any chair similar to the plaintiff’s until December 18, 1968. Another injunction was granted to prevent the use of “Conform,” “Conforming,” or any other word similar to “Contour” in connection with furniture.

The appellate court held that the conspiracy was clearly and convincingly proved as to Aljean, Laskowitz and Koerner (one of the sons-in-law), and that they were properly enjoined; however, it reversed the decree as to Laskowitz’s daughter, Althea, and her husband because it found that they held only “paper” corporate positions. There was no evidence that they had knowledge of the contract or had knowingly acted to further the conspiracy.

For many years Missouri followed the minority view, denying recovery for intentional interference with contracts unless the contract established a master-servant relationship, or unless the breach was procured by fraud, deceit or coercion so strong as to overbear the will of the contracting party. However, liability for conspiracy to breach a valid and existing contract was recognized in Rosen v. Alsie, Inc. In Downey v. United Weatherproofing, Inc., Missouri joined the

4. 248 S.W.2d 638, 643 (Mo. 1952), where the court recognized the cause of action in these terms: “A combination for the purpose of causing a breach of contract has been held to be an unlawful conspiracy. A person who by conspiring with another or by collusive agreement with him assists him to violate his contract with a third person and to obtain the benefit of that contract for himself commits an actionable wrong.” However, the plaintiff’s judgment was reversed for failure to make out a case. Accord, Falstaff Brewing Co. v. Iowa Fruit & Produce Co., 112 F.2d 101 (8th Cir. 1940); Motley, Green & Co. v. Detroit Steel & Spring Co., 161 Fed. 389 (C.C.S.D.N.Y. 1908); Mahoney v. Roberts, 86 Ark. 130, 110 S.W. 225 (1908); Wise v. Southern Pac. Co., 223 Cal. App.2d 50, 35 Cal. Rptr. 652 (1963); Luke v. Dupree, 158 Ga. 590, 124 S.E. 13 (1924); Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615 (1939); Nulty v. Hart-Bradshaw Lumber & Grain Co., 116 Kans. 446, 227 Pac. 254 (1924); Garst v. Charles, 187 Mass. 144, 72 N.E. 839 (1905); Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 214 N.W. 754 (1927); Charles v. Texas Co., 199 S.D. 156, 18 S.E.2d 719 (1942); Hendricks v. Forshey, 81 W.Va. 263, 94 S.E. 747 (1917).
5. 363 Mo. 852, 858, 253 S.W.2d 976, 980 (1953), where the court stated that “one who maliciously or without justifiable cause induces a person to breach his contract with another may be held responsible to the latter for the damages resulting from such breach . . . . [A]n existing contract may be a basis for greater
majority of jurisdictions, which allow recovery for intentional interference with contractual relations and recognize the need for legal protection of business expectancies short of contract.

Other jurisdictions are not in complete agreement. Louisiana holds that inducing a breach of contract is not actionable unless means unlawful in themselves are used, and Kentucky requires coercion, deception or violation of a master-servant relationship. A third view denies liability in the absence of direct fraud, force or coercion. Although New York recognizes the action for interference with contract against one who induces a party to breach his contract, it also holds that the defaulting party is not liable for conspiracy to breach his own contract. The theory of the New York rule is that the plaintiff may be made whole in an action on the contract, and that the action for inducing breach of contract is only designed to deal with interlopers in the contractual relationship. This view improperly characterizes an action en delicto as one ex contractu, and permits "a tortfeasor to use the contract as a shield, when in effect it is merely another of the plaintiff's swords." The proper inquiry should be into the duties which have been breached by the defaulting party. If only a contract duty has been breached, then his conduct cannot be characterized as tortious; but if duties arising by operation of law, apart from the contractual duties, have been breached, then his conduct is tortious.

Although the court followed the rule that a stranger can properly be enjoined from engaging in business with a covenanter who is in breach of the covenant, it did not distinguish between enjoining individuals and enjoining their protection, but some protection is appropriate against unjustified interference with reasonable expectancies of commercial relations, even where an existing contract is lacking." Under the majority view there are several preconditions which must exist before liability will be imposed. It is necessary that a contract exist. Rosenkoff v. Mariani, 207 F.2d 449 (D.C. Cir. 1953). The contract must be valid. Grimm v. Baumgart, 121 Ind. App. 626, 96 N.E.2d 915 (1951). The defendant must be aware of the contract. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941). Although some purported authority exists to the contrary, the interference must be intentional. See, PROSSER, TORTS § 123 (3d ed. 1964). Since the action sounds in tort it is not surprising that it is held that the defendant's act must be the proximate cause of the breach. United States v. Newberry Mfg. Co., 36 F. Supp. 602 (D. Mass. 1941). The plaintiff must be damaged. Royalty Realty Co. v. Levin, 244 Minn. 288, 69 N.W.2d 667 (1955). The act must be malicious. Van Wyck v. Mannino, 256 App. Div. 256, 9 N.Y.S.2d 684 (1939). Malice as used in these cases generally means legal malice, i.e., the intentional doing of a harmful act without justification or excuse. Reichman v. Drake, 89 Ohio App. 222, 100 N.E.2d 533 (1951).

13. Supra note 1.
corporations. The North Carolina view is that if a corporation is organized and supported by the covenantor, or with his assistance, it ought not to be enjoined from competing unless it appears that the corporation is his alter ego.\textsuperscript{14} One view goes so far as to deny injunctive relief against the covenantor, restraining him from violating the covenant where he has formed the corporation to conduct the business,\textsuperscript{15} a clear abuse of the corporate form by its use to avoid an existing contractual obligation. However, if the corporation only serves as a conduit for the covenantor’s business in violation of the contract, nothing in the \textit{Contour} decision would bar relief. The court clearly was not impressed by the fact that Laskowitz had conveyed his interest in the corporation, perhaps because the assignees were his relatives.

As to individual defendants other than the covenantor, the rule is that persons not parties to the contract cannot be restrained from engaging in a competing business on their own account, but that they may be restrained from so acting as agents or employees of the covenantor.\textsuperscript{16} There is a split of authority on the issue of liability for aiding and abetting a breach of contract, as distinguished from inducing breach or conspiring to breach. One line of cases holds that merely aiding and abetting a breach of contract is insufficient to give rise to damages.\textsuperscript{17} However, another view is that actively and knowingly assisting and encouraging the violation of a contract is actionable.\textsuperscript{18} It is only reasonable that persons not parties to the contract should not be bound by its terms. An injunction should only prevent them from acting as the covenantor’s agents, and should not prevent them from competing on their own. The purpose of an injunction is to prevent irreparable harm from the continued tortious conduct of the defendants, and to accomplish that end the defendants should only be enjoined from doing that which is tortious.\textsuperscript{19} “The law will not permit him [the covenantor] to do indirectly, or

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\item \textsuperscript{14} Sineath v. Katzis, 218 N.C. 740, 12 S.E.2d 671 (1941). But see, Cramer v. Lewes Sand Co., 16 Del. Ch. 66, 72, 140 Atl. 803, 806 (1928), stating that “it is not permissible for one who is under a restrictive covenant, to organize and own a corporation or utilize one already in existence and owned by him, for the purpose of engaging in the forbidden business without incurring liability for damages to those persons for whose benefit the restrictive covenant was imposed.”
\item \textsuperscript{16} Eisel v. Hayes, 141 Ind. 41, 40 N.E. 119 (1895).
\item \textsuperscript{17} Uhleln v. Cincinnati Car Co., 34 Ohio App. 52, 170 N.E. 178 (1929); Weinberg v. Schaller, 34 Ohio App. 464, 171 N.E. 346 (1929).
\item \textsuperscript{18} Auto Acetylene Light Co. v. Prest-O-Light Co., 276 Fed. 537 (6th Cir. 1921), \textit{cert. denied}, 258 U.S. 622 (1922); Holingsworth v. Texas Hay Ass’n, 246 S.W. 1068 (Tex. Civ. App. 1923).
\item \textsuperscript{19} Commission Row Club v. Lambert, 161 S.W.2d 732 (1941). Injunction may be granted to restrain a conspiracy to breach a covenant not to compete. \textit{Cf.}, Nokol Co. of Missouri v. Becker, 318 Mo. 292, 300 S.W. 1108 (1927). A showing that the damages that the plaintiff will suffer by reason of the defendant’s breach can be estimated only by conjecture is a sufficient showing of irreparable harm to authorize the granting of an injunction. But see, Pope-Turnbo v. Bedford, 147 Mo. App. 692, 699, 127 S.W. 426, 428-29 (St. L. Mo. App. 1910), where the court analogized breach of a restrictive covenant made ancillary to the revelation of a secret process to breach of a restrictive covenant in a deed and indicated that
\end{itemize}
through them, what he could not do directly, by himself." 20

Very often, a party's breach of his contractual obligations can be characterized either as unilateral, in which case he is liable solely in contract, or as conspiratorial, subjecting him to tort liability as well. Similarly, close examination may reveal that a third party's interference with contractual relations is done pursuant to a conspiracy. Under modern pleading it is permissible to plead both breach of contract and conspiracy to breach in the alternative. Several benefits not available in a contract action accrue to the plaintiff who pleads and proves the conspiracy theory. Punitive damages, not allowed in most contract actions, 21 may be allowed where circumstances of aggravation exist. 22 Co-conspirators are joint tortfeasors, subject to joint and several liability. 23 Finally, a failure to prove an allegation of conspiracy is not fatal to recovery, for the plaintiff may still prevail if he can show that the defendant is responsible for a tortious act, otherwise than by reason of the conspiracy, and the allegation will be treated as surplusage. 24

DEVON F. SHERWOOD

MECHANICS' LIENS—ARCHITECTS

Henges Co. v. Doctors' North-Roads Bldg., Inc. 1

An appeal was taken from a decree in a proceeding to marshal mechanics' liens on an office building. Appellants, the architects for the building project, had been joined with other lien claimants as defendants. They filed a cross-bill asserting a right to a mechanic's lien for their services under the Missouri Mechanics' Lien statute which gives a lien to "[e]very mechanic or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection or improvements upon land. . ." 23 The trial court denied the lien claim of the architects, holding that the mechanics' lien statute was not intended by the legislature to confer rights upon one furnishing the services of an architect. The court of appeals affirmed denial of the lien on the particular facts, but stated by way of dictum that, in a proper

possibly a showing of irreparable injury was not necessary to the granting of an injunction to restrain breach, although sufficient irreparable harm was found "if it is essential."


22. Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615 (1939); Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942). Cf. Hart v. Midkiff, 321 S.W.2d 500 (Mo. 1959), where the court analyzed the problem of granting punitive damages in an action involving conspiracy to perpetrate a fraud in terms which may be equally applicable to the action for conspiracy to breach a contract.

23. Rogers v. Rogers, 265 Mo. 200, 17 S.W. 382 (1915).

24. Medich v. Stippec, 335 Mo. 796, 73 S.W.2d 998 (1934).

1. 409 S.W.2d 489 (St. L. Mo. App. 1966).

2. § 429.010, RSMo 1966 Supp.
case, architects could fit themselves within the provisions of the mechanics' lien statute.

There has been practically no law on an architect's right to a mechanic's lien in Missouri since the St. Louis Court of Appeals stated in 1879 that "it seems clear enough that an architect is not a mechanic, and that he cannot be said to 'do or perform any work or labor upon a building' when he draws and designs the plans according to which it is constructed." This decision put architects completely outside the statute. The essential provisions and language of the statute have remained virtually unchanged since Raeder. Research discloses no decision or dicta by the Missouri Supreme Court on the question. The problem would seem to be an important and recurring one in this era of mass construction.

In the principal case, the court expressly rejected the holding in Raeder that architects, under the doctrine of *eiusdem generis*, were not within the class protected by the statute. In opening the door for architects to claim liens under the statute, however, the court denied the lien claimed by appellants. The reasons for denial were first, that no lien could be had for preparation of plans and specifications because such services had no "physical connection" with the land; and second, that although supervision of construction by the architects "might be found to satisfy the requirements of the lien statute," there was no contractual basis for imposing such lien here. This latter holding was because the architects' contract was not shown to be divisible so that a specific amount or percentage of their total fee could be designated as compensation for services in supervision.

This decision points up two important considerations for lawyers representing architect-clients: first, the distinction between the kinds of services provided by architects in a construction project; and second, the need for divisibility of the architect's compensation to allocate specific portions of the overall fee for each type of service.

The opinion plainly indicates that preparation of plans and specifications will not be considered "work or labor upon . . . any building, erection or improvement upon land," within the present statute. This is based upon the conclusion, from cases cited in the opinion, that the "irreducible minimum" necessary to bring a claim within the statute is that the services have a "physical connection" with the land. This seems to be a mechanical requirement inconsistent with the conclusion that architects can come within the provisions of the lien statute. Certain-

5. *Supra* note 1, at 491. In practice, titlemen have anticipated such a holding by including an architect's waiver in forms for waiver of mechanics' liens.
6. Id. at 495.
8. The standard form contract of the American Institute of Architects, which was used in the principal case, is not divisible in this respect. See "Article 2. Compensation" of the standard form in *Modern Legal Forms*, § 1721, at 294 (1965).
ly the preparation of plans and specifications for a building are basic "work upon an improvement." Plans and specifications are the fundamental and necessary first step in the construction of almost any "building, erection or improvements upon land." To hold that the architect qualifies as an "other person" under the lien statute, and then to deny a lien for the basic services he renders because of insufficient physical connection with the land, seems an unduly strict application of a statute which is to be "liberally construed." It sounds much like the court in *Raeder*, speaking in 1879. However, the court refused to go beyond the "limits of liberal construction" of the statute which it "reached" in two earlier cases. Both of these cases had allowed liens for services not actually performed "upon" the improvement itself. The services were, however, performed "adjacent to" the property being improved, or at the "same site." The court felt the real distinction was the absence in the principal case of "an actual physical connection" between the services and the land in question. Except for this test, the language in the two earlier decisions could have supported judicial inclusion of preparation of plans and specifications within the lien statute.

Other states have included the services of architects in drawing plans and specifications under the protection of mechanics' lien statutes, either by judicial construction of existing statutes or by legislative amendments. Neither the decisions nor the statutory provisions distinguish between architects' services in preparing plans and specifications and in supervising construction.

With the basic obstacle to architects' liens overcome by the rejection of *Raeder*, allowance of liens for all architects' services is possible in the Supreme Court of Missouri or in another court of appeals. The "physical connection" re-

10. The court rejected the appellants' argument that the true test of lienable is whether or not the services are a "direct and integral part of the overall construction plan for the building," saying, "The difficulty with this position is that the statute, neither directly, nor by implication, speaks in such terms." *Supra* note 1, at 492.


12. "The statute, whilst it speaks of mechanics and other persons who perform work or labor upon a building, plainly does not include men of the learned professions who contribute by work not at all mechanical toward its erection." *Supra* note 3, at 447.

13. Ladue Contracting Co. v. Land Dev. Co., *supra* note 9, at 585 (grading and paving street and turn-around, curbs and gutters, driveways and sanitary sewer jetting); Arthur Morgan Trucking Co. v. Shartzer, *supra* note 9, at 228 (wrecking and removing old building prior to construction of new building on same site).


15. Wash. Rev. Code § 60.04.40 (1959) ("Any person who, at the request of the owner of any real property, his agent, contractor or subcontractor, clears, grades, fills in or otherwise improves the same . . . and . . . every person who . . . furnishes materials . . ."); Gould v. McCormick, 75 Wash. 61, 134 Pac. 676 (1913).


quirement ought to be abolished—or found to be satisfied—in the case of architects, in view of their role in construction of "buildings, erections and improvements upon land."

The architects in the principal case contended, however, that even if preparation of plans and specifications was not lienable, their supervisory services were. Their evidence showed that statements rendered to the owner were prepared on the basis of allocating twenty-five per cent of their fee to the supervision of construction. The court rejected this claim, not finding that the architects had shown their contract was divisible. Therefore, the court expressly declined to pass upon the question of allowing a lien for architectural supervision alone. Its dictum, however, strongly suggests such allowance if the contract had been divisible. If a lien is to be allowed for, but limited to, claims for supervisory services, it will be important to draft contracts for architect-clients which will procure for them the maximum benefits possible under the lien statute.

The contract used by the appellants was the standard form of the American Institute of Architects. Article 2 (Compensation) of this contract provides for a fee of a percentage of the "project construction cost" for "basic services." Basic services (Article 3) include checking and approving "samples, schedules, shop drawings and other submissions," and visits to the site and observations "to guard the Owner against defects and deficiencies in the work of Contractors . . . ." All such supervisory services, then, are part of basic services covered by the "percentage" fee, and are clearly not divisible as the form contract is presently drawn. A suggested modification to entitle the architect to a lien for supervisory services in Missouri, hopefully, would be to specifically set out such services—either separate from the "basic services" or as a definite part thereof—and to state separately the amount of compensation therefor. This could be done in a number of ways. The safest method probably would be to modify Article 2 (Compensation), Article 3 (Basic Services) and Article 8 (Payments to the Architect), so that each distinctly reflects the separate supervisory services, and a contemplated portion of the total fee for such services. If there is a provision for a full-time project representative in the contract, the compensation for his services

18. Supra note 1, at 495.
19. Ibid. "The consideration above given to the question of the divisibility of the architects' contract in this case suggested that some types of architectural services might be found to satisfy the requirements of the lien statute and therefore it was intended to leave open the question of their lienable in particular cases."
20. Cf. § 107.070, RSMo 1959, requiring a contractor to furnish to the state, or its subdivision, a bond on public works contracts. It presents the same question as to coverage of architects. It is submitted that the problem is much less serious than that under the lien statute, however, as the state is the "owner" on public works projects and the architects presumably will be paid.
21. Modern Legal Forms, § 1721 (1965). Peterson and Eckhardt, Missouri Legal Forms § 578 (1962 Supp.) is a completely different form of contract for architects' services, and is designed to afford more protection to the owner.
23. Id. at p. 294.
should be separately stated in Articles 2 and 7. Such divisibility of services and compensation therefor might have entitled the architects in the principal case to a lien for eight thousand dollars.

It may be some time before the Missouri statute is legislatively amended or judicially construed to permit architects' liens for preparation of plans and specifications. Allowance of liens for supervisory services appears likely, however, for architects whose lawyers use the foresight to draft divisible contracts. 

Ronal C. Spradley

WORKMEN'S COMPENSATION: A NARROW VIEW OF THE TERM "ACCIDENT"

Harryman v. L-N Buick-Pontiac, Inc.
Mason v. F. W. Strecker Transfer Co.

In the noted cases, the appellants appealed circuit court judgments affirming denial of workmen's compensation by the Industrial Commission. Both suffered back injuries in the course of their normal job routine, and they claimed that these injuries were compensable under the Missouri Workmen's Compensation Act. The St. Louis Court of Appeals affirmed both judgments, holding that the evidence was insufficient to support findings that the claimants had suffered "accidents" of the sort contemplated by the Compensation Act.

25. The present provisions lump such services together in "Direct Personnel Expenses," which includes a number of non-lienable items which might well defeat any lien for the supervisory services of the project representative. The amounts for these services could easily be substantial on a large project.

26. Peterson and Eckhardt, op. cit. supra note 21, was not drawn with the mechanics' lien problem in mind, and also would need appropriate modifications. An alternative to a mechanic's lien for the architect would be an express provision in the architect's contract of employment granting him a lien on the land and improvements for his services. No form contract has been found including such an express lien. It is suggested that the use of such an express provision would raise formidable legal problems, including possible waiver of any rights under the mechanics' lien statute and subordination of such a contractual lien to rights of claimants under the statute.

27. For a general discussion and recommendations for other revisions of the present Mechanics' Lien Statute in Missouri see Chaney, The Missouri Mechanics' Lien Statute—Is it Adequate?, 26 Mo. L. Rev. 53 (1961).
1. 402 S.W.2d 828 (St. L. Mo. App. 1966).
2. 409 S.W.2d 267 (St. L. Mo. App. 1966).
4. Section 287.120, RSMo 1959, which provides that: "The employer shall be liable to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment."
Missouri is one of a few states which have attempted to define the word "accident" by statute. In construing this section, the Missouri courts have determined that injury or death, in and of itself, does not constitute an "accident" or "event," but is merely the result thereof. Consequently, Missouri courts will not allow compensation for injury, even though the injury arises out of and in the course of employment, unless there is some evidence of an accidental cause which produced it. Injuries resulting from a slip or fall are clearly compensable. In addition, injuries resulting from abnormal strain were held to be compensable by the Missouri Supreme Court in Crow v. Missouri Implement Tractor Co.

The tendency appears to be to award compensation where there is some evidence of unusual strain, but it is absolutely necessary that there be some external fact other than the injury which can be pointed to as the cause. Courts have had great difficulty in distinguishing between usual and unusual (or abnormal) strains, and have reached some startling results.

In Harryman, the court of appeals held that a back injury, suffered while claimant was removing the head from the engine block of a 1963 Pontiac, was not an "accident," because it was not preceded by a slip, fall or abnormal strain.

The court said an injury suffered as a result of a strain while the employee is engaged in his normal or customary duties, without variance from his normal routine, is not compensable within the meaning of the statute. The same deci-
sion was reached in Mason, where the claimant, a receiving clerk in a freight company, injured his back while assisting in heavy lifting.13

In attempting to find a workable definition of "abnormal strain," the courts of appeals have narrowly construed the term, perhaps unreasonably. The requirement that a strain, in order to be classified as "abnormal," must arise while the employee is engaged in some unusual activity not within the scope of his normal routine, is completely arbitrary and not in harmony with the language of the Missouri Supreme Court.14 This language indicates that the emphasis in Crow was on the character of the strain, not on the character of the activities. The court seemed to be adopting by implication a very logical meaning of the term "abnormal strain," i.e., a strain in excess of the ordinary strains of life and sufficient to produce a sudden injury as a direct result. This definition retains the underlying concept of section 287.020(2), RSMo 1959, that an event, in order to be compensable, must occur suddenly and traumatically on the job, as distinguished from a natural disability arising in the course of life, and yet allows compensation for work-related injuries, which is the purpose of workmen's compensation.15 Under this approach, both Harryman and Mason should have been awarded compensation since their injuries were clearly work-related, arose swiftly and traumatically, and were the result of strains considerably in excess of those encountered in ordinary life.

In addition, the supreme court in Crow expressly overruled Howard v. St. Louis Independent Packing Co.,16 where the employee was denied compensation for an injury received as a result of abnormal strain while performing his usual task in the ordinary way. In another case, the Springfield Court of Appeals noted this and decided that the abnormal strain may be one which arises while the employee is engaged in his normal activities; it does not have to be one which can be produced only when the employee is doing his work in an abnormal manner.17


14. Crow v. Missouri Implement Tractor Co., supra note 9, at 405, wherein the court said: "where an employee's injury is the result of an unusual or abnormal strain arising out of and in the course of employment, the injury is compensable." See Miller v. Lever Bros. Co., 400 S.W.2d 625, 629 (St. L. Mo. App. 1966), wherein the court, in talking about Crow, supra, said: "Such a statement by-passes any specific consideration of the statutory requirement that there must be an unexpected or unforeseen event happening suddenly and violently and, in and of itself, equates abnormal strain to an unexpected or unforeseen event."

15. For a Missouri case discussing the purpose of workmen's compensation, see Smith v. Home Builders, Inc., 363 S.W.2d 11, 14 (K.C. Mo. App. 1962), wherein the court said: "We are commanded by Section 287.600, RSMo 1959, to liberally construe all provisions of this chapter with a view to the public welfare; and it has been held that where there is any doubt as to the right to compensation, the doubt should be resolved in favor of the employee. The law is designed to protect employees who may be injured while performing labor in the furtherance of society's benefit and economic progress. The theory is that industry should bear the entire cost of its operations, including that of injuries to human beings."

16. 260 S.W.2d 844 (St. L. Mo. App. 1953).
In the latest supreme court decision on the matter, the employee was engaged in performing his ordinary duties as a delivery driver. The court considered the character of the worker's activity in this case and found a compensable accident because the workman was required to assume an extended position with his body which placed him completely out of a normal lifting position. This caused an abnormal strain which was unexpected in that it was more severe than claimant anticipated.

Thus, it can be seen that under the supreme court's approach, there is no rule of thumb which can be applied to determine the presence or absence of abnormal strain. In the absence of statutory change or judicial legislation, compensation for injuries will continue to be granted only on a showing of accidental cause, i.e., a slip, fall or abnormal strain, in addition to the normal requirements that the injury must arise out of and in the course of employment. The supreme court should further clarify what it means by the term "abnormal strain" and how it is to be determined for the benefit of the courts of appeals. The court should point out that the character of the workman's activities is important only in determining whether or not the strain suffered is in excess of that of ordinary life. The character of the activities was never intended to be a limitation upon the finding of abnormal strain. Such strain could arise because of the unusualness of the daily routine, e.g., where an employee is required to lift objects of varying shapes, sizes and weights, or where he is required to pull or lift while in an unusual position, as well as where the employee is doing something which varies from his normal duties.

The St. Louis Court of Appeals has simplified the problem of determining abnormal strain, but it is questionable whether these decisions are in keeping with the purpose of workmen's compensation.

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19. Id. at 298.
20. See Industrial Comm'n v. Milka, —Colo.—, 410 P.2d 181 (1966), which retained the accidental result theory in spite of a statutory change seemingly to the contrary. Colo. Rev. Stat. Ann. § 81-2-9, Colo. Sess. Laws 1963, ch. 180, § 1. This statute was amended again in 1965 to give the term "accident" a more liberal definition, Colo. Sess. Laws 1965, ch. 210, § 1. See also Fla. Stat. § 440.02(19) (1959); and Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla. 1962) for Florida's interpretation of the word "accident"; Harding v. Idaho Dep't Store, 80 Idaho 156, 326 P.2d 992 (1958), which held that Idaho Code Ann. § 72-201 (1949), a definition section similar to Missouri's, was broad enough to include any injury incurred on the job, so long as it arose out of the employment; and Gilbert v. Keller, 8 Ohio Misc. 31, 218 N.E.2d 646 (1966), where an Ohio statute, Ohio Rev. Code Ann. § 4123.01 (1953), which was amended in 1963 to embrace any injury whether caused by accidental means or accidental in character and result, was upheld.
21. Note the unusual shape and weight of the objects as described in Mason v. F. W. Streecker Transfer Co., supra note 2, at 269.
22. Note the unusual lifting position as described in Harryman v. L-N Buick-Pontiac, Inc., supra note 1, at 830.
23. See Miller v. Lever Bros. Co., supra note 14, at 631, where compensation for abnormal strain was upheld only because of the unusualness of the task and the fact that the employee was not required to do it often.
PARKING GARAGES AND LOTS—BAILMENT—AUTOMOBILES

Weinberg v. Wayco Petroleum Co.¹

Plaintiff-respondent Weinberg held a “Parkard” issued by defendant-appellant Wayco Petroleum Company for which plaintiff paid $10.50 per month, entitling plaintiff to park his automobile in defendant’s five-story garage. The card stated that the holder was licensed to park one automobile at his own risk, that he should lock his car, that the licensor was not responsible for care of the car or its contents, that only a license was granted, and that no bailment was created. This was a “self-park” garage and entrance was gained by placing the “Parkard” in a mechanical device which caused the entrance gate to open. Plaintiff parked his car late at night when there were no attendants on duty in the garage, locked it, and retained the keys. Apparently no specific stall was assigned to plaintiff, and he could park anywhere in the garage. The automobile was broken into and certain personal property of the plaintiff was stolen.² The court of appeals reversed a judgment for plaintiff, holding that as there was no delivery of the vehicle to defendant, there was no bailment, and accordingly no duty of reasonable care was owed to plaintiff.

The case is significant because it involves a “self-park” garage. There are many cases involving parking lots, both of the “self-park” and “attendant-park” type, and many involving garages where an attendant parks the automobile.³ The “self-park” garage, however, is a relatively recent phenomenon. These garages may take several forms. There may be an advance payment for an identification card which will activate a machine or will serve as identification to an attendant. A ticket may be dispensed by a person or a machine upon entering the garage and then presented with payment on removal of the car; or payment may be made on entering without restriction on removal.


1. 402 S.W.2d 597 (St. L. Mo. App. 1966).
2. Since the court found no bailment, the liability of the parking garage proprietor for loss or damage to the contents of the automobile did not become an issue. See Annot., 27 A.L.R.2d 796 (1953); Note, 10 BAYLOR L. REV. 216 (1958). For a hypothetical examination of parties and witnesses at a trial involving theft of the contents of a bailed automobile see Chapman, Bailment—Articles Stolen From Automobile in Commercial Garage, 1965 TRIAL LAW. GUIDE 356 (1965).
The traditional "parking lot" cases fall into two groups. In one a bailment is created. Usually the owner turns the automobile over to an attendant who parks it and retains the keys. The owner cannot retrieve his automobile without first getting the parking lot proprietor's permission, and thus the proprietor has control over the vehicle. In the other group there is no bailment. The owner usually parks the automobile himself and retains the keys. When he returns, he can take the automobile without permission of the proprietor. Here the proprietor does not have control over the vehicle. The most significant factor in determining whether there is a bailment is whether it is the automobile owner or the parking lot proprietor who keeps the keys. The courts do, however, consider other factors. The amount of the fee may indicate how much protection the automobile owner could reasonably expect. Whether the fee is paid on entering or removal, what sort of receipt the customer gets, and whether the lot is enclosed aid in determining who has control. Further, either group of cases may be affected by the existence of a special contract to protect the automobile, or by a disclaimer of liability.

Once a bailment is established, other considerations may help in determining whether the bailee proprietor was negligent. These include the number of attendants available to supervise the lot, the lighting conditions, the type of enclosure, the physical condition of the lot, whether the attendant caused the damage within the scope of his employment, and whether the attendant was qualified for his job. The same approach is used whether the case involves theft of the automobile or its contents, either by strangers or by parking lot employees; damage to the automobile by strangers, parking lot employees, or other customers; or misdelivery of the automobile. If no bailment is established, the relation between the owner and the proprietor is traditionally one of license or lease.

In past cases it has generally been assumed that the parking garage proprietor was a bailee. Since most of the garages were of the "attendant-park" in-


5. Taking the keys but leaving the ignition switch in the "on" position to permit operation, for automobiles which have this sort of ignition switch, is equivalent to leaving the keys. See, e.g., Phoenix Assur. Co. v. Royale Inv. Co., 393 S.W.2d 43 (St. L. Mo. App. 1965); Nuell v. Forty-North Corp., supra note 3.


7. Whether disclaimers of liability for negligence by a bailee are against public policy in Missouri is not clear. Phoenix Assur. Co. v. Royale Inv. Co., supra note 5. It is clear that for such a clause to be effective it must be called to the bailor's attention. Nuell v. Forty-North Corp., supra note 3. As to the effect of a disclaimer of liability for automobiles in lots and garages in other jurisdictions, see Annot., 7 A.L.R.3d 927 (1966). As to disclaimers of liability generally, see 175 A.L.R. 8 (1948). Disclaimers of liability for negligence by a bailee are effective in England and apparently do not have to be called to the bailor's attention. See Ashby v. Tolhurst, [1937? 2 K.B. 242 (C.A.); and Borrie, Car Parks and Cloakrooms, 111 L.J. 753 (1961).

stead of the “self-park” type, this assumption was usually valid.\textsuperscript{9} If the reasoning of the “parking-lot” cases is applied to the “self-park” garage, however, the result should be that there is no bailment.\textsuperscript{10} The automobile owner parks the automobile himself, retains the keys, and can remove the automobile at will. The parking garage, like the parking lot in the same situation, lacks control over the automobile required for a bailment. The problem is whether the proprietor of the garage or lot should have such limited responsibility. In many metropolitan areas street parking is non-existent and the “self-park” garage or lot is the only place available. The automobile owner is forced to pay for parking in an off-street facility, and yet receives no more protection than if he had parked on the street.\textsuperscript{11} The automobile owner has no bargaining power, and the result is a contract of adhesion without the benefit of bargaining. The multi-story parking garage or the unenclosed lot can be entered at will by pedestrians. Unless the proprietor is willing to patrol the grounds, there is no control of trespassers. This is an invitation to thieves from the outside, or to fraud by the parking garage or its employees from the inside.\textsuperscript{12} To say that the question is merely one of determining which insurer pays is no answer when most losses could be prevented by a minimum of care by the proprietor.\textsuperscript{13} However, without a bailment, there is no liability on the part of the proprietor, unless he owes some duty of care to the owner.

If there is no bailment, the relationship between the proprietor and the automobile owner almost automatically becomes that of license or lease. Yet, neither

\textsuperscript{9} Motors Ins. Corp. v. Union Mkt. Garage, \textit{supra} note 4, involving a “self-park” garage, is an example of misapplication of the assumption. There the court assumed, without discussion, that there was a bailment, but affirmed a judgment holding the defendant-bailee not negligent.

\textsuperscript{10} Weinberg v. Wayco Petroleum Co., \textit{supra} note 1. New York has taken a contrary view. In Sherber v. Kinney Systems, Inc., 42 Misc. 2d 530, 248 N.Y.S.2d 437 (1964), the automobile owner parked his automobile in a three-story, thousand car garage, locked it, and took the keys. The car was stolen. The parking garage proprietor contended that there was no bailment. The court said the fact that the automobile owner locked the car and took the keys did not absolve the parking garage proprietor of his responsibility as a bailee. In Nargi v. Parking Associates Corp., 36 Misc. 2d 836, 234 N.Y.S.2d 42 (1962), the automobile owner parked his car in a partially unfenced parking lot, locked the car, and took the keys. The car was stolen. The court said that there was no bailment but that whether there was a bailment or license was immaterial to liability since the parking lot proprietor did not exercise sufficient care to protect the automobile. The court did not say why this duty of care exists though it did refer to a New York City ordinance, not applicable to the particular parking lot, which says it is evidence of negligence if parking lots are not fenced.

\textsuperscript{11} On the street there is the normal police protection and the further protection of the general public reporting suspicious events and vandalism to the police.

\textsuperscript{12} These factors, not the existence \textit{vel non} of a bailment, are what seemed to concern the New York courts in Sherber v. Kinney Systems, Inc., \textit{supra} note 10; and in Nargi v. Parking Associates Corp., \textit{supra} note 10.

\textsuperscript{13} But see 1965 \textit{CAMB. L.J.} 186 (1965), suggesting that where damage to insured property or its theft is in question there should never be any recovery against a merely negligent defendant. Instead the property insurer should be liable. This would avoid the necessity of two insurers for the same piece of property.
relationship withstands analysis. A licensee is privileged to enter on the land only
by virtue of the possessor's consent.\textsuperscript{14} A lessee takes possession of the leased
property.\textsuperscript{15} The automobile owner is more than a licensee because he is invited
on the property for a purpose connected with the business of the possessor. He is
not a lessee because normally he has no right to possession of the place in which
he parks to the exclusion of the proprietor. The relationship is more akin to
invitor-invitee.\textsuperscript{16} The parking garage or lot proprietor clearly has a duty to use
ordinary care to make the premises safe to the person of the invitee.\textsuperscript{17} This duty
extends to protect the invitee's person from harmful acts of third persons,\textsuperscript{18} but to
provide any protection to the automobile, some duty must be established to use
ordinary care with respect to it. There are two theories for establishing this duty.

First is a theory extending the duty of the invitor to the property of the in-
votee. There is some authority placing on the invitor a duty to use reasonable
care to avoid injury to property of the invitee which is on the premises.\textsuperscript{19} Further,
this theory can be fitted within the \textit{Restatement of Torts, Second}. Its rules de-
termining negligence threatening another's interest in chattels are the same as
those determining negligence threatening bodily harm.\textsuperscript{20} The automobile owner
fits within the \textit{Restatement}'s definition of invitee.\textsuperscript{21} The invitor under the \textit{Restate-
ment} is liable to invitees for physical harm caused by the "accidental, negligent,
or intentionally harmful acts of third persons."\textsuperscript{22} The invitor has a duty to dis-
cover that such acts are likely to be done, to give adequate warning to the visitors,
or to otherwise protect them.\textsuperscript{23} Since this applies to the invitee, it applies to his
property.\textsuperscript{24} The problem of separation of the invitee from the location of his

\textsuperscript{14} \textit{Restatement (Second), Torts} § 330 (1965), defines licensee as a per-
son "who is privileged to enter or remain on land only by virtue of the possessor's
consent."

\textsuperscript{15} \textit{Restatement (Second), Torts} § 355 (1965). Rudolph v. Riverdale Man-
agement, Inc., 202 Misc. 586, 113 N.Y.S.2d 524 (1952) is a good example of a
lease. There the automobile owner besides keeping the keys to the car was
assigned a specific stall in the garage, had the keys to the garage, and signed a
formal lease contract.

\textsuperscript{16} \textit{Restatement (Second), Torts} § 332 (1965) defines an invitee:
(1) An invitee is either a public invitee or a business visitor.

\textsuperscript{17} A business visitor is a person who is invited to enter or remain on
land for a purpose directly or indirectly connected with business dealings
with the possessor or the land.


\textsuperscript{19} \textit{Restatement (Second), Torts} § 344, comments b, f, and g, (1965).

\textsuperscript{20} Royal Ins. Co. v. Mazzei, 50 Cal. App. 2d 549, 123 P.2d 586 (1942);
Frontier Theatres Inc. v. Brown, 362 S.W.2d 360 (Tex. 1962), rev'd on other
grounds, 369 S.W.2d 299 (1963); 65 C.J.S. Negligence § 63 (56) (1966).

\textsuperscript{21} \textit{Restatement (Second), Torts} § 497 (1965).

\textsuperscript{22} \textit{Restatement (Second), Torts} § 499 (1965).

\textsuperscript{23} Id., comments f and g.

\textsuperscript{24} \textit{Restatement (Second), Torts} § 497 (1965). An English court, however,
has rejected this theory. Tinsley v. Dudley, [1951] 2 K.B. 18 (C.A.). There
plaintiff had left his motorbike in a covered yard which formed part of the
premises of a tavern. No bailment was created. Jenkins, L.J., stated:

\url{https://scholarship.law.missouri.edu/mlr/vol32/iss2/9}
property can be met by the argument that since possession was never delivered to the parking garage or lot proprietor, then the invitee still has possession. To avoid creation of bailment, the landlord must admit that possession was not delivered; so that he either admits bailment, or he admits one of the elements of the invitee status, i.e., no delivery of possession.

The other approach is by analogy to the common law duty of an innkeeper to safeguard the luggage of his guest.\textsuperscript{26} The position of the parking garage customer is similar to that of the guest in the inn because both leave their property largely at the mercy of the proprietor. The liability here should not be the strict common law liability, but instead liability for negligence similar to that imposed on innkeepers by statute.\textsuperscript{26}

If a duty to use ordinary care is established by either the "invitee" or "innkeeper" theory, the automobile owner must face the problem of unavailability of evidence. A solution is employment of res ipsa loquitur.\textsuperscript{27} Res ipsa loquitur in Missouri only gives rise to an inference of negligence which the jury can accept or reject, but it does get the automobile owner to the jury.\textsuperscript{28} The effect is to put a burden on the parking garage proprietor to produce evidence that he was not negligent, unless he is willing to take the chance that the jury will not accept the inference of negligence.

A duty to use ordinary care in respect to the parked automobile does not place a great burden on the parking garage proprietor. He is not made an insurer

There is no warrant at all on the authorities, so far as I know, for holding that an invitor, where the invitation extends to goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party. That implied liability, so far as I know, is one unknown to the law.

Tinsley v. Dudley, \textit{supra}, at 31. This apparently remains the rule in England even though the Occupier's Liability Act, 1957, 5 & 6 Eliz. 2, c. 31, § 1(3), provides that the rules in relation to occupier and visitor also apply to regulate the obligation of the occupier in respect to damage to the visitor's property. See Payne, \textit{The Occupier's Liability Act}, 21 \textit{Modern L. Rev.} 359, 371 (1958), which concludes that car park operators will still enjoy the immunity of Ashby v. Tolhurst, \textit{supra} note 7, holding that if there is no bailment the relation is that of licensor and licensee, and that even if there is a bailment, liability can be disclaimed.


26. See, \textit{e.g.}, N.Y. GEN. BUS. LAW. § 201; 43 C.J.S. \textit{Innkeepers} § 17 (1945). Section 419.010, RSMo 1959, is not a good example because it makes the innkeeper liable only for "willful negligence." See Modeer, \textit{supra} note 3.

27. There are three usual conditions for the application of the res ipsa loquitur doctrine: (1) an event which ordinarily does not occur in the absence of negligence; (2) an event caused by an agency or instrumentality within the exclusive control of defendant; (3) an event not due to any contribution on the part of the plaintiff. \textit{Prosser, Torts} § 39 (3d ed. 1964). The control element is met here because the concern is with control over the premises and not control over the automobile.

28. See \textit{e.g.}, Oliver Cadillac Co. v. Rosenberg, 179 S.W.2d 476 (St. L. Mo. App. 1944). Also plaintiff must be careful not to allege specific negligence if he expects to rely on the res ipsa loquitur doctrine. Bommer v. Stedelin, \textit{supra} note 3.
of the automobile; he is liable only for negligence. The use of a reasonable number of watchmen patrolling the premises, adequate lighting, and some means of controlling entrance and exit of both automobiles and pedestrians should be sufficient to meet the duty of ordinary care.

The theories of recovery where there is no bailment are unsupported by case precedent. They would logically extend to parking lots as well as to parking garages, and this would run afoul of very solid precedent. Accordingly, the better solution might be a statute making the proprietor liable for negligence but perhaps limiting his liability to the value of the automobile and, in the case of the contents of the automobile, to a fixed maximum sum. This would provide protection to most automobile owners, would encourage the use of care by the parking facility proprietor, and would discourage theft and fraud without placing too heavy a burden on the parking garage or lot proprietor.

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