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Recent Cases

TORTS—LANDOWNER'S LIABILITY TO A LICENSEE—ACTIVE-PASSIVE NEGLIGENCE DISTINCTION

*Cupp v. Montgomery*

Defendant Robert Montgomery invited plaintiff and his wife to help sow grass seed in defendant's yard. After working through the afternoon plaintiff was injured about 6:00 p.m. when he slipped upon mud which had been left on a back porch that was adjacent to the doorway entrance of defendant's home. Plaintiff had entered the home earlier at about 3:00 p.m. to get a drink of water. The mud was tracked upon the porch by defendant Montgomery at about 5:00 p.m. Defendant testified that he knew he had tracked the mud and that the mud was not easy to see because it was similar in color to the porch. Plaintiff obtained a judgment of $5,000 in circuit court and defendant appealed. The St. Louis Court of Appeals, reversing the judgment on other grounds, announced that the act of tracking mud onto the porch combined with the defendant's knowledge thereof and his failure at least to warn plaintiff of the danger, presented facts from which a jury could find active negligence. It could, therefore, find for the plaintiff regardless of whether plaintiff was an invitee or licensee.

The duty of care that a landowner owes to a person coming upon his premises depends upon whether he is categorized as a trespasser, licensee, or invitee. It has been said that a person classified as a licensee in such a case is "about the least favored in the law of men who are not actual wrongdoers." The explanation of this view lies in the common law reluctance to impair the sovereign rights of the landowner by imposing duties running to those from whose presence the land-

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1. 408 S.W.2d 353 (St. L. Mo. App. 1966).
2. The court reversed on the ground that giving a plaintiff's instruction which did not require a finding that plaintiff had no knowledge of the muddy condition of the porch was prejudicial error.
3. The term "landowner" will be used herein to describe that person upon whom the duties and liabilities in this area fall. He will not necessarily have either legal title or possession but will be the person with primary control over the land at the time and place of the injury. See Lansing, The Liability of Land Occupiers For Negligence to Persons on the Land, 1 WILAMETTE L.J. 314, 315-317 (1960).
4. A trespasser . . . is one who comes upon the premises without the consent of the possessor and without a privilege to do so created by law. . . . A licensee . . . is one who enters the premises for his own purpose and with the express or implied consent of the possessor. . . . An invitee . . . is one who enters the premises with the express or implied consent of the possessor and for some purpose of real benefit or interest to the possessor or for the mutual benefit of both.

(93)
owner derives no benefit. Consequently the rule prevailed that a licensee took the premises as he found them; that short of "wantonness and willfullness" on the part of the landowner, the licensee would be unable to recover for injuries incurred upon the premises. This view made the right of the licensee no better than that of a trespasser.

Modifications broadened this rule. An affirmative duty was imposed upon the landowner to warn the licensee of hidden pitfalls or traps and the presence of harmful chemicals, explosives, or other inherently dangerous substances when the licensee would not be expected to know of their presence or effect. With the advent of modern machinery the landowner was also held liable when the licensee was injured as a result of the landowner's "active negligence."

Thus it has been said that in Missouri a landowner will incur no liability so long as he is inactive and warns the licensee of known ultrahazardous conditions and dangerous substances. This means that when, as in Cupp, there are no ultrahazardous conditions, the licensee's only prospect for recovery lies in his ability to show that his injury resulted not just from the landowner's negligence, but from his active rather than passive negligence.

Active negligence is generally considered to be the failure to use reasonable care in the commission of an act resulting in harm to another. More specifically, in Missouri landowner cases it is said to be negligence occurring in connection with activities conducted on the premises while the licensee is present and his presence is known or should be known to the licensor. This would clearly be the proper label for the negligence involved when the defendant fails to drive his truck or train, operate his elevator or ice machine, or fire his rifle with reasonable care. Passive negligence on the other hand denotes a failure to do something that should have been done, or, in Missouri landowner cases, negligence which permits

6. The court in Cupp did not consider whether the plaintiff was an invitee. To the effect that he might have been found to be so on a benefit theory see Glaser v. Rothschild, 221 Mo. 180, 184-186, 120 S.W. 1, 3 (En. Banc. 1909); Kinder, Licensee-Invitee-Test, 32 Mo. L. Rev. 123 (1967).

7. Glaser v. Rothschild supra note 6, at 185, 120 S.W. at 3.


11. Menteer v. Scalzo Fruit Co., 240 Mo. 177, 184, 144 S.W. 833, 835 (1912); see 6 Wayne L. Rev. 270 (1960).


defects upon the property. This would accurately describe the negligence involved when a landowner fails to cover a hole, repair a guardrail, or warn of a weak bank near his pond.

But the distinction is not always this easy to make, for there exists a "shadow-land where active and passive negligence coalesce." Illustrative of this "shadow-land" is Bohlen's example of a defendant who, without checking into its fitness for the task, otherwise carefully uses a chattel for a particular purpose and harms another. The problem is that the defendant's negligence is both active in the sense that the harm results from the use of the chattel and passive in that there has been a failure to inspect for defects.

It is submitted that the court inadequately analyzed the "shadow-land" situation in Cupp in that it did not look closely enough at the distinction which Missouri cases have made so important. The act of tracking mud onto a porch, unlike carelessly driving a truck, or even the unreasonably ignorant use of a chattel, does not in itself necessarily involve a failure to use reasonable care in connection with activities conducted on the premises. The court inadvertently helps make this point when it says:

We are aware that the failure to warn, standing alone, is negative in nature; however, when it is coupled with an affirmative negligent act arising out of the activities defendant, Robert Montgomery, was engaged in on the premises, the act being the tracking of the mud on the porch and his knowledge thereof and his failure to correct the condition or to warn plaintiff of the danger, it presents facts from which a jury could find active or affirmative negligence.

Defendant's initial act of tracking mud onto the porch was either negligent or innocent. If it was negligent, a failure to warn does not need to be "coupled" with it in order to establish affirmative negligence. If it was innocent then the defendant has no duty to prevent the harm from occurring until he becomes aware of the risk he has innocently created. The fact that the court apparently considers knowledge and a failure to warn necessary to make the act of tracking mud negligent indicates that the act itself did not create an unreasonable risk of harm and

27. It is difficult to grasp the concept that the failure to warn must be coupled with a negligent act to achieve affirmative negligence when the negligent act itself includes as a necessary ingredient the failure to warn.
29. Standard Oil v. Crowl, 198 F.2d 580, 582 (8th Cir. 1952); RESTATEMENT (SECOND), TORTS § 321 (1965).
was not wrongful. An unreasonable risk existed only after the defendant obtained knowledge and failed to warn the plaintiff. But the breach of duty to prevent this latter risk of harm does not mean that negligence was connected with defendant's activity merely because defendant's activity created the risk. The duty is to act, to at least warn, and since it is passively breached, the negligence is connected with inactivity.

The result in Cupp, however just, appears artificial when it is considered how little the situation need be changed in order for the defendant to avoid liability. The act deemed to be negligent, the tracking of mud onto the porch, took place one hour before plaintiff slipped, fell, and was injured. Because plaintiff was already on the premises when the activity occurred, the court found active negligence and liability. But if a second plaintiff-licensee had entered the premises only five minutes after the defendant had tracked mud onto the porch and slipped upon the mud at precisely the same time the first plaintiff did, he would be unable to recover. Because the defendant's activity of tracking mud would not have occurred while this licensee was present as to him the mud would be a dangerous condition or defect about which, in Missouri, the licensee is not entitled to a warning.

The great strain under which the active-passive negligence distinction was placed in order to accommodate the only slightly broadened liability in the Cupp case points to the need for a better approach. One suggestion has been to employ the ordinary rules of negligence so that the extent of the landowner's liability would depend upon the foreseeability of the plaintiff, i.e., whether the harm that occurred was within the scope of the foreseeable risk, rather than the peculiar classification the plaintiff receives. Such an approach was argued in Wolfson v. Cheliste.

There the plaintiff, a social guest in the defendant's home, slipped and fell upon a grease spot created when defendant fed her cat on a porch prior to plaintiff's entry into the home. Unable to recover because the grease spot was considered a condition for which there was no duty to warn, plaintiff argued that the attempt to classify visitors to the land as trespassers, licensees, and invitees should be abandoned and replaced by an ordinary negligence analysis. Plaintiff listed a number of factors that should guide a jury in determining due care, among which were: the invitation or permission, the benefit to the visitor or occupier, the foreseeability

30. "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant." (emphasis supplied).

Bohlen, supra note 26, at 219.


32. Ziegler v. Elms, 388 S.W.2d 839, 841-2 (Mo. 1965).

33. This suggestion was made to the English Parliament by the Law Reform Committee in its Third Report. Law Reform Committee, Third Report, CMD No. 9305 (1953). The committee proposed that the landowner have a uniform duty of "reasonable care to see that the premises are reasonably safe" running to every person coming onto the premises at his invitation or by his express or implied permission. Comment, 1955 Camb. L. J. 1, 8.

34. 284 S.W.2d 447 (Mo. 1955).
of the harm, and the ease of correction or warning.\textsuperscript{35} The Missouri Supreme Court rejected this proposal, primarily on the ground that the factors suggested were the same ones that determined the status of the entrant. The rejection was not firm, however, since the court said:

\ldots we believe the duties and liabilities in occupier—entrant cases will be quite as justly if not more justly considered and with less confusion determined by generally continuing the existing classification of relationships of occupiers-entrants and by generally continuing the use of terminology long employed by the profession and by the courts in advising and in determining what is right as between occupier-entrant adversaries, although we take no austere and unrelenting position on these matters.\textsuperscript{36}

If the familiar classifications are to be retained, however, a derivative of the above proposal could deal with part of the problem. This is the suggestion that the social guest be treated as an invitee. Since the landowner has an ordinary duty of care as to the invitee, including the affirmative duty to make the premises safe, the active-passive negligence distinction would not be needed. The rationale of this suggestion is that both the landowner and the social guest are aware of the custom of landowners to prepare as carefully for the social guest as for the business visitor. Also, the social visit is quite often to the mutual advantage of the parties.\textsuperscript{37} Courts have resisted this position, noting that the social guest should expect to be placed upon the same footing as the family\textsuperscript{38} and that the benefit of social relations is not a sufficient basis upon which to impose affirmative obligations with respect to the condition of the premises.\textsuperscript{39}

Another proposal that would avoid the active-passive negligence distinction has acquired considerable support.\textsuperscript{40} The Restatement of Torts imposes a duty to warn of dangerous conditions unknown to the licensee when the landowner (1) knows of the condition, (2) realizes that it involves an unreasonable risk of harm to the licensee, and (3) should expect that the licensee will not discover the danger.\textsuperscript{41} The great desirability of this rule lies in the fact that it entitles the licensee to equal knowledge of the dangers existing upon the premises rather than requiring him to assume unknown risks "in the face of a misleading silence."\textsuperscript{42}

\textsuperscript{35} Id. at 449.
\textsuperscript{36} Id. at 452.
\textsuperscript{37} McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45, 58 (1936).
\textsuperscript{39} Wolfson v. Cheslist, 284 S.W.2d 447, 450 (Mo. 1955); McCleary, supra note 38, at 58.
\textsuperscript{41} RESTATEMENT, TORTS § 342 (1934).
\textsuperscript{42} Prosser, TORTS 390 (3 ed. 1964).
Also, the duty imposed to accomplish this is a narrow one that does not greatly impair property rights. The landowner must give a warning which, while it is affirmative in nature, still does not approach the burden of the inspection that the landowner owes the invitee.

The Missouri Supreme Court, however, has flatly rejected this rule. In Ziegler v. Elms the plaintiff tripped on metal stripping loosely affixed to the edge of the defendant's basement steps. The defendant knew of the condition but the court found that it did not amount to a hidden pitfall or trap and that defendant's failure to warn of its existence was not active negligence. The Restatement rule was held inapplicable because "the matter of a licensee taking the premises as he finds them would no longer be the law if Sec. 342 were adopted in this state."44 Assuming that the traditional rule is worth preserving, it is not clear how the Restatement position would destroy it. Requiring the licensee to take the premises as he finds them does not seem to be incompatible with requiring a warning of known dangers on those premises. Since there is no duty to correct the situation, the premises would not undergo any change due to the licensee's presence and would remain as they were found.45

The courts clear announcement in Ziegler followed its less positive rejection of the broader negligence approach in Wolfson. This fact would seem to indicate a retrenching of the lines of defense in Missouri's strict adherence to the three duty categories and their unfortunate offspring, the active-passive negligence distinction. The strained analysis of Cupp is the natural result for a court concerned with a just result. The tracking of mud, the awareness of danger, and the failure to warn establish the sort of fault for which liability normally follows.

It is submitted, however, that the liability would be better imposed by adopt-

43. 388 S.W.2d 839 (Mo. 1965).
44. Id. at 842.
45. The rejection of the Restatement approach as a broad rule applied to licensees suggests its use as a partial solution. In Scheibl v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951), the Ohio Supreme Court considered a social guest as neither a licensee nor an invitee but as a new fourth duty category. The duty of a host to his guest was that which the Restatement says is owing the licensee, a warning of all known dangerous conditions. While this narrow rule has been suggested in Missouri, it has been dismissed with little discussion. Wolfson v. Chelist, 284 S.W.2d 447, 452 (Mo. 1955).

Another solution, similar to the Restatement approach, is partial in that it deals only with some of the dangerous conditions rather than some of the plaintiffs. There is a line of cases imposing liability upon the landowner who, without adequate notice, alters his premises so as to create a new danger even though he knows licensees are in the habit of entering. Wheeler v. St. Joseph Stock Yards & Terminal Co., 66 Mo. App. 260 (1896); Rooney v. Woolworth, 78 Conn. 167, 61 Atl. 366 (1905); DeTarr v. Ferd. Heim Brewing Co., 62 Kan. 188, 61 Pac. 689 (1900); Corby v. Hill, 458 C.B.N.S. 556, 140 Eng. Rep. 1209 (1858). This rule is very narrow, however, in that it applies only to premises for which there is a public use. Annot., 20 A.L.R. 202 (1922). While these cases are recognized in Missouri, they do not appear, as the Cupp court suggested, Cupp v. Montgomery, 408 S.W.2d 353, 356 (St. L. Mo. App. 1966), to stand for the proposition that a change in the premises is equivalent to active negligence. They rather clearly base liability upon the passive negligence involved—the failure to warn of a known danger. Frosser, op. cit. supra note 42, at 392.
ing a general negligence analysis, the Restatement approach, or at the least, one of the derivatives of either. Each of these proposals would, when applied to the facts, reach the same result as the court did in Cupp. While each would create a broader scope of liability than present Missouri law affords, none departs from present law so radically as to disregard the rights of the landowner. The most extreme, the proposal rejected in Wolfson, would consider property rights in the traditional negligence formula which is recognized as the criteria for governing one's rights and duties with respect to most situations. The Restatement approach is recognized by the “overwhelming weight of authority” as working towards a just result with a minimum destruction of landowner immunity. Each approach has the beneficial characteristic of dispensing with the cumbersome and unduly nice active-passive negligence distinction and the arguably anomalous result it offers.

ALAN L. ATTERBURY

TORTS—ANIMALS—DOGBITES—VICIOUS PROPENSITIES—SUFFICIENCY OF THE EVIDENCE

Gardner v. Anderson

Plaintiff, a nine-year old girl, was severely injured when bitten by defendant's ninety-pound German shepherd dog. At trial plaintiff offered evidence to prove that prior to the occasion when she was bitten, the dog possessed dangerous and vicious propensities and that defendant kept or harbored the dog after he had actual or constructive knowledge of such propensities. At the close of all the evidence defendant's motion for directed verdict was overruled. The jury returned a verdict for plaintiff. On appeal, the Kansas City Court of Appeals reversed, holding that defendant's motion for directed verdict should have been granted because plaintiff's evidence was not sufficient to allow reasonable men to conclude that dog possessed vicious or dangerous propensities prior to the time plaintiff was bitten.

There are four common bases of liability for injuries caused by dogs:

Negligence in keeping or controlling the dog is one basis for liability, but is seldom used because the more refined and specific tests traditionally employed by courts with respect to such bases (e.g., nuisance, or knowledge of vicious propensities) either by-pass or displace inquiries relevant to the standard of care to which defendants should be held; in addition, the negligence theory is subject to the defense of contributory negligence.

46. McCleary, supra note 37, at 45.
47. PROSSER, op. cit. supra note 42, at 390.
A second basis of liability is statutory liability, applicable only where a statute defines the circumstances in which an owner may be held liable. Often, such statutes impose absolute liability on the owner. In a jurisdiction having such a statute, the injured plaintiff typically need not prove that the dog possessed vicious propensities of which the owner had knowledge.

A nuisance basis has been accepted in some jurisdictions, the nuisance being the "harboring or keeping of a vicious dog after knowledge of the dog's vicious propensities." The fourth basis, scienter, is based upon the dog owner's prior knowledge of the dog's vicious propensities.

The distinction between nuisance and scienter is more a matter of words than of substance, and whether the theory is called nuisance or scienter, "the gist of the action is the keeping of a vicious dog after knowledge of his vicious propensities." The liability of the owner under either theory is strict.

Missouri adheres to a traditional finding of liability based on nuisance, which means liability is imputed only where a vicious dog is kept after actual or constructive knowledge of the dog's viciousness. On this basis the owner is not allowed to avoid liability by showing that he has exercised reasonable care. One who chooses to keep a dog, which by its nature can cause injury, impliedly chooses to be fully responsible; he keeps him at his peril. Negligence may co-exist with the maintenance of a nuisance, but it is not a necessary element of the wrong. If a nuisance exists, the issue of due care is immaterial.

   Liability for damage caused by dog. If any dog shall do damage to either
   the body or property of any person, the owner or keeper, or if the owner
   or keeper be a minor, the parent or guardian of such minor, shall be liable
   for such damage, unless such damage shall have been occasioned to the
   body or property of a person who, at the time such damage was sustained,
   was committing a trespass or other tort, or was teasing, tormenting or
   abusing such dog;
   The owner or keeper of any dog which shall have injured or caused the
   injury of any person or property or killed, wounded or worried any horses,
   cattle, sheep, ranch mink or lambs shall be liable to the person so injured
   and the owner of such animals for all damages so done, without proving no-
   tice to the owner or keeper of such dog or knowledge by him that his dog
   was mischievous or disposed to kill, wound or worry horses, cattle, sheep,
   ranch mink or lambs; but when ranch mink are killed, wounded or worried,
   it shall be proven that the dog forcibly entered the enclosure in which they
   were kept.
5. E.g., Nelson v. Hansen, 10 Wis.2d 107, 102 N.W.2d 251 (1960).
7. Patterson v. Rosenwald, 222 Mo. App. 973, 976, 6 S.W.2d 664, 666 (K.C.
   Ct. App. 1928).
9. Clinkenbeard v. Reinert, 284 Mo. 569, 578, 225 S.W. 667, 668 (En Banc
   1920).
10. Id. at 578, 225 S.W. at 669.
12. Patterson v. Rosenwald, 222 Mo. App. 973, 976, 6 S.W.2d 664, 666
Although nuisance traditionally involved the use or misuse of land, in Missouri it is broadly defined to cover any wrong arising out of the misuse of real or personal property which interferes with the rights of others.\textsuperscript{14} The mere possession or keeping of dogs does not constitute a nuisance or a nuisance per se since it is lawful to possess and keep dogs.\textsuperscript{16} However, the keeping of a vicious dog may constitute a nuisance, and the fact that it is lawful does not justify it.

Ordinarily the motive, due care, fault or knowledge of a landowner is immaterial in determining liability for a nuisance. It is peculiar that in the case of dogs, the fact of a vicious injury alone does not make the dog a nuisance. In order for the keeping of a dog to constitute a nuisance, the dog must have vicious propensities, and the dog's owner must know or have reason to know of the dog's vicious propensities. Thus, the one maintaining the "nuisance" must be culpable. He must know the dog is vicious, and then must keep the vicious dog. A special state of mind, scienter, is required of the owner or keeper of the dog.

In most cases involving injuries caused by dogs, the controversy centers upon the issue of the knowledge of the owner and upon the issue of the actual viciousness of the dog. At times the issues are not clearly separable, since establishing the viciousness of the dog will often invoke the owner's knowledge.

In the noted case, \textit{Gardner v. Anderson}, the knowledge of the defendant was not in issue. For the purpose of ruling on whether or not defendant's motion for directed verdict at the close of all the evidence should have been sustained, the Kansas City Court of Appeals assumed that the jury was authorized to charge defendant with knowledge of everything in plaintiff's evidence and all reasonable inferences deducible therefrom.\textsuperscript{18} Thus, on appeal, the sole issue was whether the evidence was sufficient to support an inference that defendant's dog was possessed of vicious or dangerous propensities.\textsuperscript{17}

The terms "vicious propensities" and "dangerous propensities" have been defined as the tendency of a dog to injure persons, connoting a quality of the dog which could or would cause harm to a person.\textsuperscript{19} In addition, "the injury complained of must result from the exercise of the dangerous propensity."\textsuperscript{19} But whether the dog acted out of playfulness or anger is immaterial as far as the liability of a knowledgeable owner is concerned.\textsuperscript{20}

In the noted case, plaintiff's evidence consisted of testimony of Sandra Hughes, age 12, that on one occasion the dog jumped out of a window, and that on a second occasion the dog growled and either bit or scratched her; testimony of Sandra's mother that the dog growled and that defendant told them not to pet the dog too much; testimony of Sandra's father that the dog had growled at him, that he had asked defendant to keep the dog at home, and that defendant had told him he was training the dog as a watchdog and did not want the dog to be

\textsuperscript{14} 66 C.J.S., \textit{Nuisances} § 1 (1950).
\textsuperscript{15} \textit{Id.} at § 32.
\textsuperscript{17} \textit{Ibid.}
\textsuperscript{18} \textit{Bush v. Anderson}, 360 S.W.2d 251, 256 (St. L. Mo. App. 1962).
\textsuperscript{19} \textit{Mitchell v. Newsom}, 360 S.W.2d 247, 249 (St. L. Mo. App. 1962).
\textsuperscript{20} \textit{Bush v. Anderson}, 360 S.W.2d 251, 256 (St. L. Mo. App. 1962).
friendly; testimony of plaintiff that defendant’s children had once “sicced” the dog on plaintiff and had then held the dog to keep it in the yard; and testimony that she was kneeling and drawing with chalk on the road when the dog attacked and bit her. Plaintiff denied having teased or provoked the dog.21

The Kansas City Court of Appeals specifically denies that “[A] dog is entitled to one bite” before the owner can be held liable.22 A prior bite by the dog, however, does not in and of itself establish the vicious propensity. There must be evidence disclosing vicious propensities for biting, or for assault, or for other vicious propensities. It remains to be determined what evidence Missouri requires to prove such propensities.

In Merritt v. Matchett23 evidence of a dog’s habit of assailing people with the “appearance of ferocity and viciousness, and subjecting them to great fear of bodily injury,”24 in fun or in earnest, was sufficient to establish vicious propensity. There was sufficient evidence to submit the question to a jury in Carrow v. Haney, where defendant posted a “beware of dog” sign and defendant had told the injured child’s father to be careful because the dog was vicious.25

In Dansker v. Gelb,26 plaintiff sustained injuries falling down a flight of stairs when she was frightened by defendant’s dog who lunged at her. Evidence that the dog was kept tied; that the dog was large; that garbage men were afraid of the dog; that the dog had lunged at a neighbor; and that the family had talked about getting rid of the dog was sufficient evidence to support the verdict for plaintiff. The court stated that where a dog has a tendency to injure persons, it is immaterial whether the dog’s actions arise from anger or from playfulness.27

In Maxwell v. Fraze,28 however, the Kansas City Court of Appeals ruled that defendant’s motion for judgment notwithstanding the verdict was properly granted. The plaintiff’s evidence that the dog had previously grabbed her arm with his teeth in play; that she did not consider the dog ferocious or mean; and that defendant had told plaintiff that the dog had bitten him in a fold of fat on the side of his stomach was not sufficient to submit the case to the jury. And in Mitchell v. Newsom,29 the St. Louis Court of Appeals ruled that defendant’s motion for directed verdict was properly granted. Defendant’s dog bit and injured plaintiff, an eight-year old boy. Plaintiff’s evidence that the dog barked violently at the trash man and that the dog previously had jumped and snapped at an older boy was not evidence sufficient to submit the case to a jury.

In Boyer v. Callahan,30 evidence that the dog had jumped at and scared an

22. Id. at 135.
24. Id. at 182, 115 S.W. at 1068.
27. Id. at 17.
elderly lady, and that the dog barked and growled when playing with children
was not submissive to a jury. The Court of Appeals stated: "It is true that it was
a large dog capable of jumping fences as high as six feet and could easily be
expected to frighten and annoy old ladies."31 But this evidence, "standing alone
devoid of any evidence as to the circumstances giving rise to such occasion, is
insufficient evidence to warrant a finding that this dog had vicious propensities for
biting..."32

Thus, the decision in Gardner v. Anderson33 is not surprising, in that the result
is not inconsistent with prior Missouri dogbite cases. While the Missouri test for
vicious propensities is a strict one, the Kansas City Court of Appeals has clearly
given it its strictest interpretation. Earlier cases, while overturning judgments
n.o.v. or directed verdicts for defendants, never reached the reversal of a jury
verdict.

In the noted case, the Kansas City Court of Appeals ruled as a matter of law
that no reasonable men could conclude that defendant's dog was likely to injure;
therefore, the verdict of the jury was overturned. The court conspicuously omits
references to the traditionally limited scope of appellate review of jury verdicts,
and simply states its conclusion that reasonable men could not find for the plaintiff.

In non-dogbite cases, however, the Missouri courts have often set forth tests
for overturning jury verdicts that greatly restrict review by appellate courts. The
findings of the jury have been said to be conclusive as to questions properly
submitted34 and judgments thereon should not be set aside unless clearly errone-ous.35 There should not be any interference with the jury's verdict unless the
verdict is so palpably unreasonable and unwarranted that reasonable minds can
reach no other conclusion about it.36 On the question of the propriety of over-
ruling defendant's motion for a directed verdict, the appellate court cannot interfere
with the action of the trial court if there is any substantial evidence to support
a verdict for plaintiff.37 It is immaterial that the appellate court might reach a
contrary conclusion once an evidentiary basis for the jury's verdict becomes ap-
parent.38 Indeed, it is only when there is a complete absence of facts to support
the verdict that reversible error appears.39 But regardless of the terms used to
describe the effect of the jury's verdict, the very least that can be said is that a
jury verdict will not be reversed where there is substantial evidence to support it.
And evidence is substantial when it has such probative force upon the issues that
the jury can reasonably decide the case.40

The noted case does not adequately explain why the plaintiff's evidence had

31. Id. at 810.
32. Ibid.
35. Sebree v. Rosen, 393 S.W.2d 590, 599 (Mo. 1965).
547, 554 (1950).
39. Hatfield v. Thompson, 252 S.W.2d 534, 542 (Mo. 1952).
40. Zeigenbein v. Thornsberry, 401 S.W.2d 389, 393 (Mo. 1966).
no probative force, or why the court could not reasonably decide the issue of vicious propensities based on that evidence. Moreover, in other jurisdictions which impose the same Missouri requirement of vicious propensities, it is doubtful if such a result is possible.

In the Rhode Island case of Young v. Cunningham,41 a minor girl was bitten by defendant’s dog injuring her. Prior to this occasion, the dog had snapped at people two times and plaintiff’s mother had requested defendant to tie the dog, which defendant did. The Rhode Island Supreme Court upheld a verdict for plaintiff: “Where the evidence is such that different minds would naturally and fairly come to different conclusions the trial justice has no right to disturb the verdict although his own judgment might incline him the other way.”42 In Gardner,43 the Kansas City Court of Appeals might just as easily have concluded that the evidence that the dog had either bitten or scratched another child and that defendant had been asked to keep the dog at home was evidence upon which reasonable men might differ as to their conclusions.

In Pennsylvania, in Groner v. Hedrick44 a Great Dane jumped on an old lady, breaking her arm and leg. The verdict for plaintiff was affirmed, the court indicating that the size of the dog is a consideration.45 In Gardner46 the dog weighed ninety pounds, a fact which could have been considered “probative” in determining whether or not the dog was likely to cause injury.

In another California case, Radoff v. Hunter,47 the fact that the large German Shepherd which injured plaintiff was a watchdog was sufficient to support the finding that defendant should have anticipated an attack by the dog. In Gardner48 plaintiff offered the testimony of a neighbor to the effect that defendant said he was training his dog to be a watchdog and did not want the dog to be friendly. This was certainly some evidence to be considered in determining whether or not the evidence was sufficient. The Kansas City Court of Appeals did not mention this in its summary of the evidence.49

The decision in Gardner is not supported by Vermont precedent. In Davis v. Bedell50 plaintiff was bitten by defendant’s dog as she was walking along a public highway in front of defendant’s residence. Prior to plaintiff’s injury the dog had not injured any person, nor had defendants received any complaints. The dog barked, snarled and growled at pedestrians. A neighbor had told defendant that she thought a boy had thrown stones at the dog and made it “ugly.” The Vermont court found that defendant’s motion for directed verdict was properly overruled. The evidence was sufficient for the jury to find for plaintiff.51 In Gardner, evidence

42. Id. at 381, 181 A.2d at 110.
45. Id. at 151, 169 A.2d at 303.
49. Id. at 135.
51. Id. at 443, 194 A.2d at 68.
was presented that defendant's dog growled at neighbors and was manually restrained after having been "sicced" on plaintiff. Nevertheless, the Kansas City Court held that reasonable men could not conclude from this evidence that the dog was possessed of dangerous or vicious propensities.

Despite its formal renunciation of the "every-dog-has-one-free-bite" rule, the Gardner case establishes standards closely approaching such a rule. It is difficult to imagine what evidence would establish a vicious propensity for biting short of a prior bite.

Finally, it should be noted that the Kansas City Court of Appeals, in overturning plaintiff's jury verdict in Gardner, professed to consider plaintiff's evidence in the most favorable light and to disregard defendant's evidence if not helpful to plaintiff. And yet, in summarizing the evidence to be considered, the court mentions evidence presented by defendant that the dog never bit or attacked groups who picnicked on defendant's land, while wholly failing to consider plaintiff's evidence that the defendant was training the dog as a watchdog. Evidence of the dog's intended "occupation" would seem to be relevant to a determination of whether or not reasonable men could conclude that the dog was likely to bite someone.

A final anomaly may be noted. If defendant's dog had attacked a sheep or other domestic animal in Missouri, with similar injuries to the animal as sustained by plaintiff in Gardner, by statute, defendant would be liable for all damages and would be required to kill the dog, regardless of prior vicious propensities of the dog, or of defendant's knowledge thereof. But in Gardner, where plaintiff is a human infant, and, thus, does not come within the terms of the statute, plaintiff must establish the dog's prior vicious propensities in order to recover.

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53. Ibid.
55. Section 273.020, RSMo 1959.
ESTATE PLANNING—FEDERAL ESTATE TAX MARITAL DEDUCTION
TRUSTS "SPECIFIC PORTION" INTERESTS

Northeastern Pa. Nat'l Bank & Trust Co. v. United States

Plaintiff was executor of the estate and testamentary trustee for a residuary trust having a corpus valued at $69,246 on the date of the decedent's death. The trustee was directed to pay the decedent's widow, from the income and corpus of the trust, $300 a month until decedent's youngest child reached 18 and thereafter $350 a month for the remainder of the widow's life. The widow had the power to appoint to her estate or others the principal of the trust remaining at the time of her death. The executor included the trust corpus in the gross estate and claimed the maximum allowable marital deduction on the ground that the value of the trust at the date of decedent's death qualified for the deduction either as an entire trust interest or as a portion gift in trust, where the surviving spouse was entitled to all the income from the trust, or a specific portion thereof, and had the power to appoint the trust, or such specific portion thereof, to her estate or others.

The Commissioner of Internal Revenue found the widow's trust interest did not qualify either as an entire trust interest or under his regulations requiring a "fractional or percentile share" of the total trust income, and he disallowed any deduction for the trust corpus. After timely payment of the resulting deficiency and disallowance of a refund claim, the executor brought an action in the district court and prevailed on cross motions for summary judgment. The district court held that the present worth of a life annuity for $300 a month qualified for the marital deduction as a portion gift. The Third Circuit en banc reversed, with three judges dissenting, finding any computation of the amount qualified for the deduction to be too speculative. The United States Supreme Court granted certiorari based on a conflict between the Third and Seventh Circuits. With three Justices dissenting, the Court reversed and remanded, holding the $300 a month provision for the widow qualified a "specific portion" of the income from the trust corpus for the marital deduction. However, that portion of the trust corpus qualified as the income interest "specific portion" was to be determined by capitalization of the $300 a month provision using a rate of return available

1. 387 U.S. 213 (1967). Hereinafter all decisions in this case will be referred to generally as Pa. Bank, with appropriate reference to designate the Supreme Court, Third Circuit en banc, and Pennsylvania District Court decisions.
3. INT. REV. CODE OF 1954, § 2056(c) (one-half the decedent's adjusted gross estate).
5. Supra note 4, at 942.
under reasonable investment conditions. Therefore, the case was remanded to
the lower courts for trial and determination of the issues presented.

Differences in the estate tax impact on property interests of taxpayers residing
in community property and common law states were ignored in the 1939 Code. Spouses located in community property states split the estate between themselves for federal estate tax purposes, while in a common law state all the estate was taxed to the owner, most often the husband. In 1942 Congress attempted to equalize federal tax burdens by reaching previously untaxed community property interests with special provisions, but it was apparent by 1948 that these special provisions created greater inequities than those they were intended to correct. Also, Congress felt it no longer necessary to hold down property acquisitions with wartime (or any other type) taxing controls. Therefore, in 1948 Congress executed an “about face,” repealed the special community property taxing provisions, and enacted for residents of common law states a kind of tax-splitting for incomes, estates, and gifts. The estate tax marital deduction came into the law at this
time.

The effect of the deduction was to allow transfer of a maximum of one-half of
non-community property from the estate of the deceased spouse to the surviving
spouse free of estate taxation. Terminable interests, such as life estates not subject to taxation in the estate of the surviving spouse, did not qualify for the deduction. However, “in recognition of one of the customary modes of transfer of property in common law States,” a deduction was allowed for life estates given to the surviving spouse where such spouse had a power of appointment sufficient to place the property interests in such spouse’s estate at his or her subsequent death. This exception to the terminable interest rule was limited to whole interests

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transferred in trust. By the 1954 Code was enacted, the exception was expanded to include legal and "specific portion" interests. By a 1958 amendment these two criteria were made retroactive to 1948. Thus, from its 1948 inception, the estate tax marital deduction can be considered to include:

An interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof . . . with power in the surviving spouse to appoint it, alone and in all events, by will or during life, the entire interest, or such specific portion, . . . and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse . . .

In 1958 the Commissioner issued regulations giving his interpretations of the term "specific portion." These regulations: (1) provided a single, standard definition of "specific portion" for both the income and the power of appointment branches of the statutory qualification summarized above; and, (2) allowed complete qualification of a "specific portion" to the extent of the smaller branch, should the income and the power "specific portions" be found qualified for unequal interests. The definition required either a "fractional or percentile share" and expressly excluded a specific monetary sum or dollar amount. This distinction was grounded on language found solely in the legislative history for the original 1948 marital deduction. A committee report stated the marital deduction would be


28. Id., (b).

29. Id., (c).
available "where the surviving spouse, by reason of . . . right to income and a
power of appointment, is the virtual owner of the property." The Commissioner
reasoned such virtual ownership must include essentially all ownership hazards if
equality was to be obtained between common law and community property states.
In effecting this view, the Commissioner apparently was concerned with the
problem of potential inflation in value of assets during passages of time inherent in
marital deduction gifts. Specifically, monetary or fixed sum per month "specific
portion" gifts, due to the time lag inherent in the surviving spouse's subsequent
death, would allow the spouse to be protected from depressions in value, but
allow appreciations due to inflation of the "specific portion" to pass untaxed to
others along with the remainder of the total gift out of which had been carved the
monetary "specific portion." This, asserted the Commissioner, would allow the
"others" to receive assets appreciated not only by their own values but also by the
appreciation in value of the "specific portion" monetary interest, which would
be appointed and taxed unappreciated in the surviving spouse's estate. Accordingly, he considered this result to be estate tax avoidance not allowable within
Congress' virtual ownership criteria. The Commissioner anticipated this situation

Cong. Service 1222, 1238 (1948).
221-222 (1967).
32. A dollar amount per month to be paid from income and corpus could not
vary, except where the income production capacity dropped and the corpus de-
preciated to the extent it was totally paid out before the surviving spouse's sub-
sequent death.
33. This assumes the "specific portion" for power of appointment purposes
also is a fixed dollar amount. See also Int. Rev. Code of 1954, § 2041 (estate taxes
on powers of appointment held by the decedent).
34. There seem to be three potential problem areas under the "virtual owner"
rationale. They differ in terms of time and cause, as follows: (1) Fluctuations in
value of assets during estate administration which might allow the decedent's
personal representative to vary the proportionate actual value of pecuniary (but
not residuary or fractional) gifts distributed to the widow as compared to gifts
distributed to others out of the same group of assets; (2) Fluctuations in value
of the income interest or power of appointment interest of the surviving spouse
due to discretionary powers in the trustee; and, (3) Fluctuations in value of trust
assets due to mere passage of time during the period between the decedent's and
the surviving spouse's subsequent death.
The first of these areas, potential value changes during estate administration,
was asserted by the Commissioner to result in indeterminability of the amount
actually passing to the surviving spouse. I.e., the gift amount "passing" as of the
decedent's date of death might be appreciably less or more than the amount
actually distributed by the personal representative. Accordingly, the marital de-
was met by Rev. Proc. 64-19, 1964-1 (pt. 1) Cum. Bull. 682, providing a com-
promise to allow correction of past "drafting errors" by written agreements de-
signed to control the personal representative's distributions. It also served as a
warning on all future pecuniary amount disposition drafting. However, it is often
most difficult to determine whether a given limitation is "pecuniary," or "residuary
or fractional." Compare Estate of Althouse, 404 Pa. 412, 172 A.2d 146 (1961)
(pecuniary), with Estate of Nicolai, 232 Ore. 105, 373 P.2d 967 (1962) (fractional).
See also, e.g., Trachtman, Estate Planning Handbook (Practicing Law Institute)
by the adoption of regulations requiring the “specific portion” gift to be a “fractional or percentile share” and not a specific monetary sum.35

Before “specific portion” questions may be reached, threshold issues grounded in state law must be decided.36 These are the existence and requisite extent (without reaching appropriateness of such extent) for both the income and the power of appointment interests set up in the decedent’s disposition.37 In most cases presented, these threshold issues have been decisive.38 Therefore, when the Supreme Court accepted certiorari in Pa. Bank some twelve years after the addition of the “specific portion” language to the marital deduction statute, only three

44 (1965). Query—In Pa. Bank, could not the trustee’s selection of assets for liquidation to meet monthly amount payments in excess of current trust income be akin to this problem?

The second area, trustee’s discretionary powers to vary the life estate beneficial income enjoyment and (conversely) to vary the corpus assets available for appointment by the surviving spouse, was also met by the Commissioner’s regulations. Treas. Reg. § 20.2056(b)-5(f), 1958-2 Cum. BULL. 432, severely controls the surviving spouse’s right to her actual beneficial enjoyment or life estate income interest. If the trustee is given “too much” discretion to limit the income (for benefit of future remaindermen appointees), the trust interest as to income is disqualified as indeterminable. Cf., the same rationale as for Rev. Proc. 64-19 disqualification, supra. However, if the income were to be enhanced or maintained to the detriment of continued corpus valuation, the rationale would necessarily be different. This situation would result in an effective power in another (the trustee), directly disqualifying any life estate with power annexed interest under the requirements of § 2056(b)(5). Treas. Reg. § 20.2056(b)-5(j), 1958-2 Cum. BULL. 432. As observed above, this and the first situation seem at least akin, if not equivalent. However, where the agency of disqualification does not vary the amount at the date of the decedent’s death, indeterminability cannot be found to disqualify, only the effect of a “power” in someone other than the surviving spouse over the amount for which she has an otherwise qualifying power of appointment.

The third situation, fluctuation of values due to mere passage of time (without any human agency effecting the variances), was the situation presented in Pa. Bank. This is the situation the Commissioner sought to control with the “fractional or percentile share,” but not specific sum, requirements of Treas. Reg. § 20.2056(b)-5(e), 1958-2 Cum. BULL. 432.

35. See the final paragraph of the preceding footnote.

36. The “specific portion” issue rests solely in federal law, whereas interpretation of the life estate income and power of appointment interests rests in state law. Treas. Reg. § 20.2056(b)-5(e), 1958-2 Cum. BULL. 432. Quite logically, the federal issue is reached only after the state law issues are decided. See, e.g., Flesher v. United States, 238 F.Supp. 119 (W.D. W.Va. 1965) (rationale employed but not stated).

37. See generally, Annot. on § 2056(b)(5), INT. REV. CODE OF 1954, 90 A.L.R.2d 414 (1963) and later case service citations.

38. This is particularly true for cases where existence of an appropriate power of appointment interest is in issue. INT. REV. CODE OF 1954, § 2056(b)(5). E.g., Commissioner v. Bosch, 387 U.S. 456 (1967) (only decisions of highest state court bind federal courts in tax cases involving interpretation of state law; In issue: release to destroy § 2056(b)(5) power of appointment); Estate of Pierpont v. Commissioner, 336 F.2d 277 (4th Cir. 1964), cert. denied, 380 U.S. 908 (1965); Estate of Peyton v. Commissioner, 323 F.2d 438 (8th Cir. 1963); Geyer v. Bookwalter, 193 F.Supp. 57, 59 (W.D. Mo. 1961); Gordon v. United States, 163 F.Supp. 542 (W.D. Mo. 1958). See also, Annot., 90 A.L.R.2d 414, 419 (1963) and later case service citations.
other lower court cases existed on the general "specific portion" matter. None of the decisions in these cases applied expressly to both the income and power of appointment branches of the "specific portion" requirement.\textsuperscript{39}

As applied to power of appointment interests, the leading 1962 case of \textit{Gelb v. Commissioner}\textsuperscript{40} expressly overruled the Commissioner's interpretation of "specific portion." The surviving spouse had been given the entire income for life and a testamentary power of appointment to her estate over the principal remaining at her death. The extent of this testamentary power at the time of the decedent's death was in question since an annual $5,000 power of invasion had been given jointly to the surviving spouse and a co-trustee for the maintenance and education of a minor daughter of the spouses.\textsuperscript{41} For the spouse's power to be fully qualified under section 2056(b)(5), all powers concurrently exercisable by or with others had to be for her benefit alone, and all powers exercisable by the spouse alone had to be unqualifiedly exercisable.\textsuperscript{42} However, the estate alleged that her overall testamentary power was cut back to a "specific portion" of the trust corpus by the unqualified invasion power for which a value was calculable.\textsuperscript{43} The Commissioner alleged such a calculation would conflict with his regulations excluding specific sums.\textsuperscript{44} The Second Circuit disapproved the monetary amount exclusion of the Commissioner's regulation, approved actuarial computation of the present worth of the maximum amount which the trustees might distribute for the daughter pursuant to the power, and approved subtraction of this amount from the spouse's total testamentary power of appointment interest to find a qualified "specific portion" interest.\textsuperscript{45} In 1965, a district court in Missouri approached the Commissioner's restriction from another direction. In \textit{Allen v. United States},\textsuperscript{46} the surviving spouse had been given a life estate in the income but denied any power of appointment except $5,000 annually to herself.\textsuperscript{47} The court, found the $5,000 monetary amount unambiguously "specific" in accordance with the dictionary definition of that term, overruled the Commissioner's regulation excluding


\textsuperscript{40} Supra note 39. This case arose under the 1939 Code as retroactively amended in 1958. See note 24, supra.

\textsuperscript{41} Id., at 545-546 n.1.

\textsuperscript{42} See also, Treas. Reg. § 20.2056(b)-5(a), (g) and (f), 1958-2 CUM. BULL. 432, which are identical to the 1961 revision of the 1939 Code regulations actually applicable in the case, Treas. Reg. 105, § 81.47a(c)(1949), as amended, T.D. 6529, 1961-1 CUM. BULL. 753, 776.

\textsuperscript{43} Gelb v. Commissioner, 298 F.2d 544, 549 (2d Cir. 1962).

\textsuperscript{44} Id., at 550.

\textsuperscript{45} Id., at 551-552. The court also suggested the invasion power might in fact be qualified to the extent exercisable during the daughter's minority. Treas. Reg. 105, § 81.47a(c)(9), added by T.D. 6529, 1961-1 CUM. BULL. 753, 776 (now Treas. Reg. § 20.2056(b)-5(j)(1958)).

\textsuperscript{46} 250 F.Supp. 155 (E.D. Mo. 1965).

\textsuperscript{47} Id., at 156.
specific sums, and qualified the trust for the marital deduction to the extent of a 
§5,000 power of appointment interest.\(^48\) No actuarial computation was necessary 
since the future years' powers did not exist at the decedent's date of death.

The two income interest cases reaching the "specific portion" issue were \(Pa.\) 
Bank and Citizens (the case upon which certiorari in \(Pa.\) Bank was predicated). 
The basic equitable limitation to the surviving spouse in both cases was: a monthly 
amount payable for life from income and corpus, increasing to a larger amount on 
a specified later event; and, a testamentary power of appointment to the spouse's 
estate or others over the entire trust corpus remaining at the spouse's death.\(^49\) 
The life income interests alone might have been considered annuities for life and 
approached as specific legacies which were separately qualified for the marital 
deduction.\(^50\) However, for both trusts, the income limitation was drafted and 
claimed as a qualified "specific portion" of the income from the trust corpus under 
section 2056(b)(5).\(^51\) A power of appointment, concurrent at least as to the 
"specific portion" income interest, obviously existed for each trust since the power 
given the surviving spouse extended to the entire trust corpus out of which the 
"income" specific portion was alleged to have been carved.\(^52\) Therefore, as limited 
to the trust income "specific portion," three basic questions were raised: (1) Was 
the Commissioner's regulation defining "specific portion" as a fractional or percentile 
share, but not a specific sum, a correct interpretation of the statute? (2) Was the 
proper valuation method for the "specific portion" to determine: (a) the present 
value of an annuity based on the age of the surviving spouse at the decedent's 
date of death; or, (b) the amount of corpus needed to produce income equal to the 
"annuity" amount the surviving spouse was entitled to receive? And, if (b) were 
correct, the method of computation became critical and this in turn raised the 
third issue. (3) Was the valuation to be made: (a) solely on the basis of the 
situation existing at the time of the decedent's death; or, (b) reflecting potential 
future inflation or depression in value of the corpus?

To avoid repetition between the questions in \(Pa.\) Bank and Citizens, only the 
three decisions and two dissents in \(Pa.\) Bank will be discussed in detail.\(^53\) The

\(^{48}\) Id., at 157.

\(^{49}\) \(Pa.\) Bank, 387 U.S. 213, 216 n.2 (1967); United States v. Citizens Nat'l 
Bank of Evansville, 359 F.2d 817 (7th Cir. 1966), cert. denied, --- U.S. ---, 
87 Sup.Ct. 2072 (1967) (memo), the limitation for which is summarized in \(Pa.\) 
Bank, supra, at 217 n.3. The Seventh Circuit's affirmation in Citizens was upon a 
district court decision virtually identical to that of the district court in \(Pa.\) Bank. 
Therefore, since the Supreme Court did not accept this rationale (annuity valuation) 
fully in \(Pa.\) Bank, the effect of denial of certiorari in Citizens would seem to 
indicate no retroactivity for \(Pa.\) Bank.

\(^{50}\) Cf., the otherwise unreported stipulated judgment in Tax Court for prior 
proceedings summarized in Willson v. United States, 343 F.2d 929, 938 (Ct.Cl. 
1965).

\(^{51}\) \(Pa.\) Bank, 235 F.Supp. 941, 945 (M.D. Pa. 1964); Citizens, CCH 1965 

\(^{52}\) Id., \(Pa.\) Bank at 942.

\(^{53}\) The district court decisions in \(Pa.\) Bank and Citizens were essentially 
identical. The Seventh Circuit affirmation in Citizens reflects essentially the same 
views as those summarized later for the Third Circuit dissent in \(Pa.\) Bank.

https://scholarship.law.missouri.edu/mlr/vol33/iss1/12
district court first recognized the monthly payment to the widow might not include all the income earned by the trust. Thus, the issue was whether such a monthly amount might describe all the income from a "specific portion" of the trust. Relying heavily on Gelb, supra, the court disapproved the Commissioner's elimination of specific sums and computed the present worth of the $300 per month interest using actuarial methods specified by the Commissioner for life annuities. Finding the sum to be in excess of that required to fulfill the maximum marital deduction, the court allowed the executor's claim for refund in full. The Third Circuit, en banc, reversed in a divided decision. The five judge majority found any valuation inappropriate since the future rate of income production of the corpus was purely speculative. "The determinative factor," in their view, was "what income the trust corpus could produce and not what is now being produced, or what ultimately will be produced." In short, the "specific portion" was indeterminable. On the other hand, the three judge dissent would have considered future fluctuations in corpus value or income production irrelevant since the marital deduction, in their view, should be determined solely on the situation existing at the decedent's date of death.

The Supreme Court resolved all issues in the executor's favor. It expressly rejected the Commissioner's fractional or percentile share regulation; it found the virtual owner rationale of the Commissioner (as here applied) to be taken out of context and given a meaning not supported by Congress' subsequent intent "to afford a liberal 'estate-splitting' possibility to married couples . . . ." Specifically, the virtual owner rationale was found only in the 1948 legislative history and then to eliminate the deduction in situations where someone other than the surviving spouse had power over the income or corpus of the purported marital deduction interest. However, since the virtual owner argument as applied to the power of appointment "specific portion" was not present in Pa. Bank, the majority expressly declined to decide this issue. Liberality was found in Congress' intentions by its 1954 expansion of the limited 1948 qualification to include legal and "specific portion" interests. Also, Congress was found to have reaffirmed its liberal intentions in 1958 by making the 1954 amendments retroactive to 1948.

The other two basic issues presented in Pa. Bank—valuation method and time
element in determining value—were considered together. First, the uniform rule of Jackson v. United States⁶⁰ that qualification for the marital deduction must be determined as of the date of the decedent’s death⁷⁰ was found expressly to limit consideration to the $300 a month amount specified as of the date of death and to eliminate the larger monthly amount to be received by the surviving spouse at a later time.⁷¹ Second, the court recognized that valuation of the “specific portion” income interest must be made solely at the time of death, but held that time-variation in the income producing capacity of the trust corpus must be adequately reflected.⁷² The valuation method required was capitalization of the monthly income amount as of the decedent’s date of death; the time element was recognized by requiring such capitalization to be at “an estimated realistic rate of return which a trustee could be expected to obtain under reasonable investment conditions . . . .”³³

Treating the limitation to the surviving spouse as an annuity for life was not expressly rejected, only annuity computation when a “specific portion” interest was clearly in issue.⁷⁴ However, if the surviving spouse is either quite young or quite old, the annuity computation result might vary considerably from that arrived at by capitalization; the annuity present worth method of valuation simply not reasonably approximating the more precise valuation estimate possible for the kind of limitation presented.⁷⁶ Therefore, it would seem this express rejection is to be anticipated when it arises.

The dissent objected strongly to what it felt was the majority’s loose construction of legislative intent.⁷⁶ It noted particularly that the statute’s repeated reference to “such specific portion” for the power of appointment obviously indicated a standardized or common approach to the “a specific portion” required for the income interest.⁷⁷ Therefore, the dissent considered the majority had necessarily decided that a similar description of the power of appointment “specific portion” would be fully qualified for the marital deduction; e.g., “a power of appointment to that amount of corpus with respect to which the surviving spouse has income rights by virtue of a fixed monthly amount for life of (amount) dollars from income and corpus.” Accordingly, the dissent believed the majority had allowed the surviving spouse to be protected from depressions of value, but allowed

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⁷⁰. Id., at 508.
⁷². Id., at 220 n.5, 224.
⁷³. Id., at 224 n.15.
⁷⁴. Id., at 225.
⁷⁵. I.e., assuming the $300 a month “annuity” of Pa. Bank, this would have an annuity present value of $80,437 if the widow were aged 21, but only $18,238 if she were aged 80. Treas. Reg. § 20.2031-7(b) (1958). However, assuming capitalization at rates of return from 3½% to 6%, the “specific portion” would vary from over $100,000 down to $60,000. (Treas. Reg. § 20.2031-8, as amended, T.D. 6680, 1963-2 Cum. Bull. 411, was also cited by some of the courts as applying to the annuity computation. E.g., Citizens, CCH 1965 Stand. Fed. Tax Rep. (65-1 U.S. Tax. Cas.) ¶ 12,302 (S.D. Ind. Mar. 4, 1965). However, it is believed only the regulation cited above is properly applicable.)
⁷⁷. Id., at 227 n.2 (dissent).
appreciation due to inflation of the “specific portion” to pass untaxed to others. Since this approach would be limited, by its nature, to transfers in trust and unavailable to residents of community property states (except as to their non-community property), the dissent believed the majority had allowed more favorable estate tax treatment to common law state spouses than to those in community property states. This, they argued, was contrary to the intent of Congress to equalize estate tax incidence.  

Pa. Bank presents two major unanswered problems affecting marital deduction estate planning. First, potential extension of Pa. Bank’s rationale to the power of appointment “specific portion” interest and, second, the rate of return to be used in capitalizing the approved monthly amount “specific portion” interest.

May the rationale of Pa. Bank be extended to a power of appointment limited to the same “specific portion” of corpus determined by the capitalized monthly amount interest? The majority expressly declined to decide this issue. In addition, it expressly declined to allow drawing this conclusion as did the dissent. Therefore, it is possible that the Court, in a future case, might apply different rules to the income and the power of appointment branches of the statute qualification. Also, while Pa. Bank seems to stand clearly for the proposition that changes in corpus value due to mere passage of time do not bar deduction, the Court’s decision expressly left for future review the other branch of the Commissioner’s virtual owner assertions—the existence of an effective (but not express) power in someone other than the surviving spouse to vary the actual value of the power of appointment “specific portion” interest.

In its opinion the Court made two references as to how the proper capitalization interest rate was to be determined. (1) The observation in Gelb that “the United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work” was quoted in support of the theory that estimation of future economic conditions is now common. Accordingly, the lack of precision in valuation which led to the Third Circuit’s finding of indeterminability of the monthly amount “specific portion” interest was found not fatal. (2) A Gelb footnote presenting an extensive review of the Commissioner’s development of actuarial methods for estimating property interest valuations was


78. Id., at 226-228 (dissent). It may be observed that prior to this decision the deduction applied to the non-community property of both common law and community property states spouses. Since decedents’ net taxable estates in community property states probably often involve both community and separate property, it would be an interesting exercise for the Internal Revenue Service’s Georgia computer to determine whether Pa. Bank’s decision would actually result in equalization or overcorrection of the differences in incidence of estate taxes on spouses in community and common law property states.


80. See extensive discussion of the three “virtual owner” situations in note 34, supra.


82. Pa. Bank, supra note 81, at 224.
cited\textsuperscript{88} for comparison.\textsuperscript{84} A review of these and other references shows the Commissioner has almost universally used a standard rate of interest in tables he specifies in his regulations for computation of present worths for future monetary amounts.\textsuperscript{86} This rate of return was reduced on January 1, 1952, from the 4% used for many years to the current 3\% rate.\textsuperscript{86} Since the time elements for annuities, life estates and remainders, and the life estate interests involved with "specific portion" gifts would be equivalent, the Court may have indicated the Commissioner's current 3\% rate of interest would meet the Supreme Court's test for an average realistic rate of return to be expected in all reasonable events. However, the Court attached a provision that the trustee's directions must not specify trust management conditions which would obviate the reasonability of such a 3\% interest rate.\textsuperscript{87} Therefore, a substantial problem was presented for the bar—What types of trust management provisions will be considered to fit within the qualifying "all reasonable events" so that the 3\% capitalization rate can be assumed for planning purposes? Also, conversely, if trust management provisions are employed which might be considered contrary to expected future economic reality, what capitalization rate should be used to determine the corpus "specific portion" defined by a monthly amount income interest? Notwithstanding

\textsuperscript{83} Id., citing Gelb v. Commissioner, 298 F.2d 544, 551 n.7 (2d Cir. 1962).

\textsuperscript{84} By indicating "comparison" rather than support, the Court used an appropriate mode of reference since admissions of the Commissioner's regulations are merely prima facie correct, subject to proof of more accurate data in any given situation. See citations in the following two footnotes.

\textsuperscript{85} E.g., Bowden v. Commissioner, 234 F.2d 937, 942 (5th Cir. 1956), cert. denied, 352 U.S. 916 (1956), stating:

(1) The 4\% rate of interest used by the Commissioner's tables (up to 1952—see following footnote) is usually correct, but it may be shown erroneous. Estate of Green, 22 T.C. 728 (1954); and,

(2) The Supreme Court took judicial notice that "4 per cent. was generally assumed to be the \textit{fair value or earning power of money safely invested} in 1901. Simpson v. United States, 252 U.S. 547, 550 (1920). (Emphasis added).

\textsuperscript{86} Current regulations uniformly require a 3\% interest factor. \textit{E.g.}, Treas. Reg. §§ 1.1014-5(a) (1957), 20.2031-7 (1958), 25.2512-5 (1958). The 3\% interest factor was also required subsequent to December 31, 1951, by the prior regulations. \textit{E.g.}, Treas. Reg. 105, § 81.10(i), as amended, T.D. 5906, 1952 Cum. Bull. 155. Prior to this time a 4\% interest factor was required. \textit{E.g.}, Treas. Reg. 105, § 81.10(i) (1942). See also 1 MERTENS, \textit{LAW OF FEDERAL GIFT \& ESTATE TAXATION} 423 n.36 (1959), indicating similar provisions in Treas. Reg. 80, art. 13(10) (1934).

MERTENS, supra, at 442-452 (§ 7.09), also summarizes that the rate currently required by the Commissioner is generally used (\textit{e.g.}, Bowden v. Commissioner, supra note 85), the only exceptions arising on clear proof of its inaccuracy. \textit{E.g.}, Hanley v. United States, 63 F.Supp. 73, 82 (Ct.Cl. 1945) (3\% rate); Estate of Sills v. Commissioner, 35 B.T.A. 815, 822 (1937) (6\% rate). \textit{Cf.}, Hipp v. United States, 215 F.Supp. 222 (1962) (lower rate asserted by Commissioner rejected).

\textsuperscript{87} Pa. Bank, 387 U.S. 213, 224 n.15 ("absent specific restrictions upon the trustee's investment powers"). Of course, this raises the question as to the particular "base-line" powers to which the Court has reference. Presumably, this would indicate "restrictions" on those powers specified by state statutory or common law. Treas. Reg. § 20.2056(b)-5(e) (1958).
the apparent bar of *Nebbia v. New York*\textsuperscript{88} and *West Coast Hotel Co. v. Parrish*\textsuperscript{89} to the Court's assertion of its own views on economic matters, it may take several more cases to answer these questions with any degree of usefulness for the estate planner.\textsuperscript{90}

In summary, *Pa. Bank* holds monthly amount interests, if valued on the date of the decedent's death by capitalization at a realistic rate of return to be expected in all reasonable events, are qualified as "specific portion" income interests in trust corpus for the estate tax marital deduction. However, substantial problems are anticipated in determining just what will be a realistic rate of return to be expected in all reasonable events or, the rate to be expected in "unreasonable" events. Also, without further litigation on the power of appointment branch of Section 2056(b)(5), a new estate planning technique using solely a monetarily described "specific portion" of a trust corpus cannot be asserted safely.

Richard N. Brown

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\textsuperscript{88} 291 U.S. 502, 537-538 (1934), "A state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it."

89. 300 U.S. 379, 399 (1937), "Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

90. Providing extensive references on where setting the national economic policy may rest (or what it is), by virtue of Congress' enactments, seems needless to highlight the horrendous problems posed. In fact, the result might be interesting if the Court does not continue to place the burden of proving propriety of interest rates other than those published by the Commissioner in his regulations upon he who asserts differently—and this would seem to include the Commissioner himself. See note 85, \textit{supra}.
ATTORNEY—CLIENT RELATION—LEGAL CONCLUSIONS MADE BY AN ATTORNEY MAY NOT BIND THE CLIENT

Kansas City v. Martin

The principal case arose out of an earlier tort action which was maintained by Martin against Kansas City, Missouri, for personal injuries resulting from the city's negligence. After Martin had filed the first suit, but before trial, he presented himself at a city hospital center and was admitted. It was determined that he was indigent and could not pay for treatment. Over a period of months he received about $3,000 worth of medical treatment for nervous and mental disorders connected with his personal injuries.

During the trial of the first suit, while Martin was on the stand, the following was received into the record:

Q. (Attorney for the city) This hospitalization you have told us about here in Kansas City at the Psychiatric Research Center, a period of five and a half months a year ago, and a couple of months ago for thirty days, that treatment has been entirely without cost to you, hasn't it?
A. (By Martin) Yes, sir.
ATTORNEY FOR MARTIN: If the court please, he is liable to pay the city should he receive any award in this case, and I object to that question.
THE COURT: Overruled; he says he has not paid them now.
ATTORNEY FOR MARTIN: Of course, he hasn't, but he is liable to pay them, liable for that should he get a judgment.

This trial resulted in an award of $30,000 to Martin which was affirmed on appeal.

The present case arose out of the $3,000 medical bill, for which the city sued Martin. The trial court found for Martin and was affirmed by the Kansas City Court of Appeals. The controlling issue was whether Martin was bound by the statements of his attorney made in the first suit.

The court of appeals decided that the jury in the first case had taken the $3,000 for medical treatment into consideration and the $30,000 judgment did not include expenses for medical treatment. In other words, had Martin obtained the treatment from a private hospital, rather than from the city, there would have been an award of $33,000 since the city was liable for the medical expenses. The court then concluded that the issue of medical expenses, once litigated, could not be relitigated and that the doctrine of res judicata applied.

The court discussed two of the city's contentions in detail. First, it held that Martin was not bound by the statement made in the first trial by his attorney,

1. 391 S.W.2d 608 (K.C. Mo. App. 1965).
2. See Martin v. Kansas City, 340 S.W.2d 645 (Mo. 1960).
viz, that Martin would be liable for his hospital care if he received a judgment. Second, Martin was not estopped from denying liability under the rule that a person cannot maintain inconsistent positions in successive legal proceedings.6

In rejecting the city's first contention the court stated the following rule:

Distinct and formal admissions of fact made by counsel during the progress of a civil or criminal trial are binding on the client when made for the express purpose of dispensing with formal proof.7

This is a well settled rule and has been announced with approval in several Missouri cases.8 It should be noted, however, that it only applies to statements of fact. Statements of law made as admissions by counsel are not binding on a client.9

In Couch v. Landers,10 cited in the present case, the court refused to hold the admission of a debt by an attorney binding on his client. The decision was based on the theory that an attorney cannot affect the substantial rights of a client without authority.11 The court stated that an attorney must have special authority before he can acknowledge the indebtedness of a client.12 Following this line of authority, the court in the present case was correct in holding that Martin was not bound by his attorney's statement.

As applied to statements of fact, the above rule may have been broadened in the case of Hurst v. Montgomery Ward & Co.,13 an action for false imprisonment. There the court stated:

Counsel for defendant in referring to the testimony of Mrs. Hoffman makes this statement: "This evidence clearly shows that Mrs. Hoffman's suspicions were rightfully aroused, and she could lawfully make an investigation without liability to herself or to her employer." This we take as an admission by defendant that what Mrs. Hoffman did was within the scope of her employment.14

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6. The city contented that Martin could not tell the jury in the first trial that he would be liable if he got the judgment and then in the second suit deny the liability.
8. Moore v. Carter, 356 Mo. 351, 201 S.W.2d 923 (1947); Hurst v. Montgomery Ward & Co., 107 S.W.2d 183 (Spr. Mo. App. 1937); Cantrell v. Knight, 72 S.W.2d 196 (Spr. Mo. App. 1934); McNatt v. Wabash Ry. Co., 335 Mo. 999, 74 S.W.2d 625 (1934); Cole v. St. Louis-San Francisco Ry. Co., 332 Mo. 999, 61 S.W.2d 184 (En Banc 1933); Hampe v. Versen, 224 Mo. App. 1144, 32 S.W.2d 793 (St. L. Ct. App. 1930); Eaton v. Curtis, 319 Mo. 660, 4 S.W.2d 819 (1928); Pratt v. Conway, 148 Mo. 291, 49 S.W. 1028 (1899). See also 20 Am. Jur., Evidence, § 592 (1939).
10. 316 S.W.2d 588 (Mo. 1958).
14. Id. at 189.
The court seemingly reached a factual conclusion from a statement which was not intended to be an admission. Apparently the attorney for the defendant, while talking about one element of his case, admitted an element of the plaintiff’s case, viz., that the agent of the defendant was acting in the scope of her employment.

As to the city’s second contention, that Martin was estopped to deny the indebtedness because a party cannot maintain inconsistent positions in successive legal proceedings, the court found the basic requirements missing.

An estoppel may come into existence because of the conduct or action of a person in a court, and it is generally recognized that a party who knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. Accordingly, it has frequently been stated that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a position to the contrary...

The court went on to say that the city, not Martin, prevailed in the first trial on the issue of the hospital bill. It found that the city induced the jury to believe that no demand would be made on Martin and that the city therefore suffered no prejudice from the remarks by Martin’s attorney. The court also held that the “inconsistent position” doctrine applies only to factual matters and not contentions of law. Here there was no change in the facts, only the ultimate legal conclusion.

The Kansas City Court of Appeals placed emphasis on the fact that Martin did not prevail on the issue of the hospital bill. The court undoubtedly considered only that issue and not the outcome of the trial, since Martin did prevail in the suit. It would seem that a party may win a lawsuit and not be estopped as to certain issues considered at the trial. Likewise, it has been held that a party may lose a suit and still be estopped on certain issues. The court relied on the rule that estoppel may prevent a party from changing factual, but not legal, positions. Apparently, however, when it would result in prejudice to one party, the other party cannot change factual or legal position.

One Missouri case which went directly to the question of prejudice was Runnels v. Lasswill. In that case the plaintiff owned land upon which defendant was cutting trees. Plaintiff sued for treble damages in trespass. The defendant denied

16. Palm Beach Co. v. Palm Beach Estates, 110 Fla. 77, 89, 148 So. 544, 548 (1933):
   “To ‘successfully assume a position to the prejudice of an adversary,’ within the stated rule, does not at all require that the party to be estopped shall prevail in getting a successful result by way of a judgment against his adversary. Whether he wins or loses his case, he may just as effectually become estopped from later changing his factual position to the injury of his adversary.”
17. This view is also followed in Charter Oak Inv. Co. v. Felker, 60 S.W.2d 655 (St. L. Mo. App. 1933).
   See also 28 Am. Jur., 2d Estoppel and Waiver, § 70 (1966).
19. 219 S.W. 980 (Spr. Mo. App. 1920).
trespass and defended on the ground that a contract with plaintiff gave defendant the right to enter and cut the trees. The court found that the contract was valid and entered judgment for the defendant. The plaintiff then sued on the contract for his share of the profits as set out in the contract. In this action the defendant denied the validity of the contract. The court held that the defendant was estopped to deny the validity of the contract due to his contrary position in the first action. This was an attempted change of legal position which the court would not permit due to its prejudicial nature.

It is difficult to draw any firm conclusions from decided cases in the area of estoppel. Courts have applied equitable principles and the rules have become clouded and vague. An example of this confusion is the contrast between Runnels and the principal case. In Runnels the defendant was held to be estopped from advancing an inconsistent legal argument, no mention being made of any distinction between factual and legal position. In the present case such a distinction was used to justify allowing a change of legal position, and the Runnels case was not distinguished.

The numerous uncertainties which are present in the law of estoppel in Missouri must be explained as resulting from the Supreme Court's failure to articulate any general guidelines. In the opinion of the Court "it is better to leave its definition to the gradual process of 'judicial inclusion and exclusion.'" 21

WILLIAM ROBERT COPE

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THE ATTORNEY-CLIENT PRIVILEGE IN THE PREPARATION OF TAX RETURNS

Canaday v. United States

Defendant Canaday was prosecuted for willful evasion of federal income taxes and was convicted on two of five counts. On appeal, he asserted among numerous other assignments of error that his attorney-client privilege had been violated. This claim was premised on the fact that C. O. Smith, the attorney who prepared defendant's income tax returns, testified as a government witness at the trial. Defendant sought to exclude this testimony with a pre-trial motion to suppress evidence. The United States District Court for the Western District of Missouri, after a hearing, decided the privilege was not applicable because no attorney-client relationship existed between Smith and the defendant. There was no such relationship because Smith acted as a mere scrivener in filling out defendant's tax returns, not as an attorney.

The Eighth Circuit Court of Appeals held that the district court had correctly determined that no attorney-client relationship was established, and that under these circumstances "any communications to Mr. Smith or documents in his custody were not subject to the privilege." Attorneys and their tax clients may question this decision in several respects.

The attorney-client privilege is an exception to the proposition that the public has a right to every man's evidence. The essence of the privilege is that a client may require his lawyer to remain silent about the confidential communications of the client, even when the attorney is asked to disclose them in a civil or criminal proceeding.

Historically, there has been no single explanation or rationale for the attorney-client privilege. Early cases offered diverse explanations for the privilege. It was justified as belonging to an attorney because he was a gentleman and as such had a right not to violate a vow of secrecy; because a lawyer was identified with his client and thus it would be "contrary to the rules of natural justice and equity for an individual to betray himself;" and because the abolition of the privilege might destroy business for which attorneys are necessary.

1. 354 F.2d 849 (8th Cir. 1966).
2. Defendant alleged that his attorney-client privilege was violated in three separate incidents, but the appellate court decided that only this incident (Smith's testimony) merited discussion. Id. at 857.
5. 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961) (hereinafter cited as Wigmore).
6. Comment, 71 Yale L. J. 1226 (1962); 8 Wigmore § 2300a.
9. Id. at 1241.
As explanations these reasons became untenable. The attorney-client privilege was nevertheless retained in order to assure full disclosure by the client and a competent defense by his attorney. Under this rationale, the attorney-client privilege is a necessary aid to a lawyer in preparing his client's case for trial. Proper representation by the attorney must be based on a complete and frank disclosure by the client of all facts relevant to the litigation. To insure such disclosure, the attorney must be able to assure his client of confidentiality; thus the need for the privilege. This justification is only partially adequate. It demonstrates a need for a privilege of confidential communication between a client and his lawyer in anticipation of trial. It also explains why the privilege has come to be regarded as belonging to the client—it is he who needs the assurance of confidentiality. It fails to explain, however, why the privilege is necessary for communications not made in anticipation of litigation. Unquestionably today, the attorney-client privilege is not so limited.

It is not surprising that early justifications for the privilege fail to explain its application to communications not in anticipation of litigation, for when the privilege was being developed the attorney "was primarily a litigator." The broader application of the privilege is supported by the argument that neither the attorney nor the client can be certain that litigation will not result from a particular situation.

Courts frequently fail to consider any of these historic explanations for the privilege, and base their acknowledgement or denial of the privilege on Wigmore's standards. Applying his rationale, no privilege exists unless the following standards are met:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

These standards are extremely ambiguous and vague. If given literal application, the result would probably be a vastly expanded privilege. However, the courts, with one possible exception, have not interpreted the standards literally, and

10. Comment, supra note 6, at 1228.
12. 8 WIGMORE §§ 2294-95.
13. Comment, supra note 6, at 1232.
14. Ibid.
15. 8 WIGMORE § 2285.
have not used them to extend the privilege. The standards seem to be used more to announce a given result than to explain the reasoning which produced it.

Even a cursory examination of current decisions involving the attorney-client privilege reveals the inability of courts to agree on a single explanation for the privilege, their failure to apply the existing rationales in any consistent manner, and their tendency to lump together factual situations which should be distinguished. Courts do, however, agree upon certain fundamental tenets. Confidential disclosures made while seeking legal advice from a lawyer cannot be revealed without the client's consent. On the other hand, it is universally agreed that the privilege does not extend to every communication made by a client to his attorney.

A number of courts have taken definitive positions in deciding cases involving the privilege. These courts allow or disallow the assertion of the privilege on the basis of the nature of the work the attorney is employed to do. The privilege is to be allowed only when the client's communication is made "for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." All courts do not use these criteria; but many emphasize when denying the assertion of the privilege, that the task to be performed by the attorney is not one that is called "legal," and that the client knew or should have known that his communication did not relate to a legal purpose.

There is nothing about the service of a lawyer in filing an income tax return that would necessarily prevent it from fulfilling the above criteria. It is "sufficiently within the professional competence of an attorney to make ... [i] . . . prima facie subject to the attorney-client privilege." However, when the attorney acts only as an accountant in preparing the tax return, the general trend (in the absence of a statutory privilege for accountants) is to hold any communications not privileged.

17. 8 WIGMORE § 2286.
19. See, e.g., NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965); Falsone v. United States, 205 F.2d 734, 739 (5th Cir. 1953), cert. denied, 346 U.S. 864 (1953); Debolt v. Blackburn, 328 Ill. 420, 159 N.E. 790 (1927).
24. Olender v. United States, 210 F.2d 795 (9th Cir. 1954), cert. denied, 352 U.S. 982 (1957); Himelfarb v. United States, 175 F.2d 924 (9th Cir. 1949),
Regardless of the criteria established by particular courts as necessary for the privilege to apply, most recognize the need to examine in detail the facts of a given case before deciding to allow or deny the assertion of the privilege.25

Considering the importance which should be attached to the variance in factual situations of individual cases, it is unfortunate that the court of appeals fails to recognize the distinction between the facts of the Canaday case and the facts of those cases relied upon as authority for rejecting the defendant’s claim. The first of the two cases cited for support, Colton v. United States,26 involved the refusal of a tax attorney to answer certain questions posed by special agents of the Internal Revenue Service and to produce documents in his possession. The Second Circuit Court of Appeals acknowledged the attorney-client privilege for confidential communications, but held that such privilege extends only to matters communicated to an attorney in professional confidence, and not to the identity of the client or the fact that he became a client.27 Since the latter were the objects of the forced disclosure in the Colton case, the privilege was held inapplicable. The court added that special circumstances might extend the ambit of protection afforded by the attorney-client privilege, but found no such circumstances present.28 Since the testimony of Canaday’s tax attorney revealed more than the identity of his client, it is difficult to see how the decision in Colton is sound authority for holding that such testimony was not violative of the attorney-client privilege.

The factual situation presented in Falsone v. United States,29 also differs significantly from the Canaday case. In Falsone, an accountant was compelled to testify, in an investigative proceeding conducted by Internal Revenue agents, concerning the tax liability of the taxpayer whose tax return the accountant had prepared. The Fifth Circuit Court of Appeals, in deciding that the accountant could be compelled to testify and produce records, refused to extend the common law attorney-client privilege to communications made to accountants.30 Thus the ratio decidendi of Falsone seems inapplicable to the noted case, because a common law privilege of confidentiality does exist for communications made by a client to his attorney and is recognized by federal courts even when the law of a particular state is not being followed.31

The court failed to examine the nature of the work actually done by Canaday’s attorney. It merely announced the result by designating income tax preparation as the work of a scrivener. The fact that a layman may lawfully

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26. Supra note 11.
27. Id. at 637.
28. Ibid.
29. Supra note 19.
30. Id. at 740.
perform certain service does not necessarily mean that it would not be professional service when rendered by an attorney. In fact, lawyers are often employed to render such service because the client feels it can be better rendered by a lawyer.

One who seeks assistance from an attorney in an income tax problem certainly expects the attorney to employ his professional knowledge and judgment in furnishing such assistance. In this capacity the lawyer perceives and solves legal problems not recognized by the client. It is impossible accurately to draw a line between professional and nonprofessional income tax service when that service is performed by a lawyer.

The client ought not be required to make the difficult distinction between those tax services which are legal and those which are nonlegal at the risk of losing his privilege of confidentiality. To require this places an unfair burden on him by forcing him to render a decision he is not qualified to make. Forcing such a choice on the client will defeat the very purpose for which the attorney-client privilege was intended because it will result in inhibiting rather than encouraging full disclosure. Once the client decides to consult an attorney for solutions to his tax problems he should be free to make full disclosure with knowledge that the attorney-client privilege will protect his confidential communications from forced disclosure in the same way as other disclosures to his attorney are protected.

Richard D. Kinder

EXERCISE OF A POWER OF APPOINTMENT WITHOUT MENTION OF THE POWER

Seltzer v. Schroeder¹

Anna Craig died in 1948 bequeathing the bulk of her estate to her chauffeur. The two heirs at law of testatrix, Anna Niemer and another, commenced suit to set aside the will of the testatrix. Subsequently the heirs at law and the chauffeur entered into a “Settlement Contract.” In this contract the chauffeur agreed to convey to a trustee all the real estate devised to him by Anna Craig. The trustee was to hold in trust for the chauffeur, his attorney, and each of the heirs at law. In return the heirs at law agreed to drop the will contest. A subsequent amendment to the trust provided for a testamentary power of appointment in each beneficiary. In default of such appointment the beneficiary’s share would pass to those persons entitled to his personal estate under the law of intestate descent. Before the execution of the settlement contract Anna Niemer’s will had devised and bequeathed to Frederick and Cecile Schroeder any property that would come to her through the will of Anna Craig. After the execution of the settlement contract Anna Niemer rewrote her will five times. In each will the residue was given to Frederick and Cecile Schroeder. The will further provided that the residue was to include “any property that may be coming to me or my heirs, or such persons

1. 409 S.W.2d 777 (K.C. Mo. App. 1966).
as may be named in my will, from Anna K. Craig of Chicago, Illinois, or her
estate, or under the terms of her will, and which may not have been paid to or
received by me at the time of my death.” After Anna Niemer died the trustee
brought a declaratory judgment action to determine who was entitled to the share
of the trust funds belonging to Anna Niemer.

The question presented was whether or not Anna Niemer by her will had
exercised the power of appointment created in the amended trust instrument.
The trial court declared that she did exercise the power of appointment. Judge
Blair speaking for the Kansas City Court of Appeals affirmed. The opinion recog-
nized that an execution of the power of appointment will be held to have been
intended by a will which (1) refers to the power itself, (2) makes a reference to
the subject of the power or, (3) cannot operate except as an execution of the
power. Judge Blair also conceded that the general rule is that a power of appoint-
ment, in the absence of a statute, is not executed by a general residuary clause in
the will of the donee. But it is sufficient if the reference made in the will is really
to the subject matter of the trust when considered in the light of the competent
extrinsic circumstances thus bringing it within the second category above. Judge
Blair decided that Anna Niemer regarded the proceeds of the trust estate as com-
ing to her from the estate of Anna Craig. And there is a presumption that testators
intend to dispose of their entire estate and not to die intestate, and where a will
is fairly open to more than one construction, the construction resulting in partial
intestacy will not be adopted if it can be avoided by any reasonable construction.
So the court adopted the construction that when Anna Niemer said property coming
from Anna Craig she meant the beneficial share in the trust corpus which had
come through the chauffeur. This was therefore a reference to the subject matter of
the trust and so an exercise of the power of appointment.

The common law rule was that a power of appointment is exercised if the donee
of the power intends to exercise the power. That intention may be manifested
expressly or it may be implied from surrounding words, acts, or deeds. Justice Story
in the often cited case of Blagge v. Miles set out three classes of cases which
have been held to be sufficient demonstrations of an intended execution of a
power. They are the same as set out by Judge Blair in the opinion as noted above.
These have been recognized in Missouri both as to wills and deeds. The
second and third categories will usually apply to the same fact situations. The

2. Blagge v. Miles, Fed. Cas. No. 1,479 (1841); Simes and Smith, The Law
of Future Interests § 973 (2nd ed. 1956).
5. It was held in Papin v. Piednoir, 205 Mo. 521, 104 S.W. 63 (1907) that
a power of appointment is executed by a residuary clause, where express reference
to the trust property appeared in the will and the provision would be inoperative
without the property involved in the power.
6. Reilly v. Chouquette, 18 Mo. 220 (1853); Porter v. Scofield, 55 Mo. 56
(1874). The problem has often arisen in Missouri when the donee has both the
power of appointment and a legal interest of his own such as where the donor
has a life estate plus a power to convey the fee. See for example: Campbell v.
Johnson, 65 Mo. 439 (1877) and subsequent cases.
typical situation they apply to is where $A$ conveys Blackacre to $B$ in fee simple with a power in $C$ to appoint the property by will. $C$'s will provides: "I devise Blackacre to $D$ in fee simple." Since there is a reference to the property which is the subject on which the power is to be executed and this provision would otherwise be ineffectual, it fits both the second and third category, and the intention to exercise the power will be implied.\(^7\)

Under common law a general devise or bequest such as "all my property" or "all my estate" was not considered to be a sufficient reference to the subject of the power of appointment to be an exercise of that power.\(^8\) The same was held to be true of the normal residuary clause wording: "all the rest and residue of my estate."\(^9\) This is simply a recognition of the fact that these words do not indicate an intention on the part of a donee to exercise the power since there are many good reasons for mentioning the "residue" besides exercising a power of appointment. On the other hand where a testator devises Blackacre when he has no interest in it other than a power of appointment, the only reason for mentioning Blackacre is to exercise the power. Missouri has followed this rule as to general devises, bequests, and residuary clauses.\(^10\) Thus there would not have been an exercise of the power of appointment if Anna Niemer had ended her residuary clause after the standard recital.\(^11\) By adding: "Such residue . . . shall include . . . any property that may be coming to me or my heirs, . . . from Anna K. Craig, . . ." the court held that she was referring to the beneficial share in the trust. Therefore the intention to exercise the power is implied.\(^12\)

The common law rule that a general devise, bequest or residuary clause will not constitute an exercise of a power of appointment has been changed by statute in England,\(^14\) the District of Columbia,\(^15\) and seventeen states.\(^16\) The rule under

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9. See: 3 Powell, Real Property, ¶ 397 (1951); 5 American Law of Property, § 23.40a; Restatement, Property, § 343(1) (1951).
10. Weiss v. St. Louis Union Trust Co., 142 S.W.2d 1105, 1106 (St. L. App. 1940); Papin v. Piednoir, 205 Mo. 521, 104 S.W. 63 (1907); Standley v. Allen, 163 S.W.2d 1012, 1014 (Mo. 1942).
14. Wills Act, 1837, 7 Will 4 and 1 Vict., ch 26 § 27.
these statutes is that a general residuary clause, devise or bequest will exercise all general powers of appointment owned by the decedent. Massachusetts reaches the same result by a judicially imposed presumption that the power is exercised.\textsuperscript{17}

These statutes and the Massachusetts presumption have created problems for will drafters and estate planners in all states. It has become a common estate planning technique to set up a “marital deduction trust” for a surviving widow with a power of appointment by will in the widow. This power of appointment is usually not intended to be exercised.\textsuperscript{18} So a surviving widow may draw her will thinking the children are well provided for by the trust and having no intention of exercising the power of appointment. She may make a residuary devise of what she thinks is a small sum to a friend or charity. If the law of one of the seventeen states or the District of Columbia applies the residuary clause will be an effective exercise of the power of appointment. As a result the taker’s in default, usually children, will take nothing by the will of the widow or by the trust. This problem is magnified by the fact that the will drafter cannot depend on the law of the donee’s domicile being applied to determine whether or not there has been an exercise of the power of appointment. Thus a will drafted in Missouri for a Missouri resident may be governed by the law of another state in determining whether or not a power has been exercised. And if the other state is one which has statutes of the type mentioned disastrous consequences can result. Under the conflict of laws rule, the applicable law is generally considered to be that of the trust situs in cases of personality\textsuperscript{19} and the law of the situs of the real property in cases of realty.\textsuperscript{20} If the power is created by inter vivos instrument, the law of the jurisdiction governing the creating instrument is said to govern.\textsuperscript{21} Even if a power of appointment is exercised under one of these statutes there will be the problem of whether or not there is marketable title. In the case of real estate, one taking by virtue of the exercise of a power of appointment where there has been no specific reference to the power would probably not have marketable title. In the case of securities there might be a problem satisfying transfer agents where there has been no specific reference to the power of appointment.

Of course the simple answer to the problem is for the will drafter to determine exactly what powers of appointment the testator possesses, decide whether or not he wants to exercise those powers and specifically state that he wants the power exercised or that he does not want the power exercised. But the will drafter-


\textsuperscript{18} See: Casner, Estate Planning-Powers of Appointment 64 HARV. L. REV. 185 (1950).

\textsuperscript{19} See: Durand and Herterich, Conflict of Laws and The Exercise of Powers of Appointment, 42 CORNELL L.Q. 186 (1957); 5 AMERICAN LAW OF PROPERTY § 23.2 (Casner ed. 1952); Casner, Estate Planning-Powers of Appointment 64 HARV. L. REV. 185, 208 (1950).

\textsuperscript{20} RESTATEMENT, CONFLICTS § 236 (1934).

\textsuperscript{21} Durand and Herterich, Conflict of Laws and Exercise of Power of Appointment, 42 CORNELL LAW QUARTERLY 185 (1957).
man may not discover all the powers the testator possesses. And this makes no provision for powers the testator may acquire after the execution of the will on which these statutes presumably would operate.

From the estate planner’s standpoint it seems that the problem could be avoided by requiring a specific reference to the power for a valid exercise of a power. But this presents problems also. Several states have statutes which say in effect that failure to satisfy formalities of execution other than those required by the statute will not nullify an exercise of a power. This specific reference provision may be considered such a “formality” and so there would be an exercise despite the requirement of specific reference. Also statutes which make a residuary clause an exercise of a power of appointment may nullify these specific reference clauses. This is because they may be construed to exercise the power even if specific reference is required. Of course if the will specifically states that it is not intended to exercise a power of appointment, the intention is clear, and no state could construe it as an exercise of the power of appointment.

To get marketable title into a recipient it would be essential to require specific reference to the power to exercise the power, and have such specific reference made in the instrument purporting to exercise the power.

At one time at least some authorities advocated the use of blind exercises of all powers in wills. In view of the problem with the marital deduction trust it would now seem advisable to refrain from the use of these “blanket” exercises and “blending” provisions.

Wisconsin had a statute which provided that a general devise of land operated to exercise all powers to devise land possessed by the testator. To solve the problems pointed out above Wisconsin repealed that statute and substituted one which is closer to the common law rule. This statute provides that where the donor requires a specific reference to exercise the power, the instrument purporting to exercise the power must contain a specific reference to the power or creating instrument and expressly manifest an intent to exercise the power. In the case of powers not requiring a specific reference, the statute provides:

... an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property

24. For a discussion of these requirements see: Rabin, Blind Exercises of Powers of Appointment, 51 CORNELL L.Q. 1, 14, (1965).
25. Id.
26. For the view that blanket exercises of powers of appointment are undesirable see: Casner, Estate Planning—Powers of Appointment, 64 HARV. L. REV. 185, 202 (1950). But for the view they are desirable see: Rabin, Blind Exercises of Powers of Appointment, 51 CORNELL L.Q. 1 (1965); 3 POWELL, REAL PROPERTY ¶ 396 (1952).
27. Wis. STAT. § 232.51 (1959). Repealed by; Wis. L. 1965c 52 § 5.
which the donee would have no power to transfer except by virtue of the power even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording in light of the circumstances surrounding its drafting and execution manifests an intent to exercise the power. If there is a general power exercisable by will with no gift in default in the creating instrument, a residuary clause or other general language in the donee’s will purporting to dispose of all of the donee’s estate or property operates to exercise the power in favor of the donee’s estate, but in all other cases such a clause or language does not in itself manifest an intent to exercise a power exercisable by will.

Under this statute a residuary clause will not exercise a power of appointment contained in the normal marital deduction trust since such a creating instrument will usually contain a gift in default and should require specific reference to the power. The Uniform Probate Code adopts, in substance, the common law view.29

The most recent New York statute provides:30

(a) Subject to paragraph (b), an effective exercise of a power of appointment does not require an express reference to such power. A power is effectively exercised if the donee manifests his intention to exercise it. Such a manifestation exists when the donee:

(1) Declares in substance that he is exercising all the powers he has;

(2) Sufficiently identifying the appointive property or any part thereof, executes an instrument purporting to dispose of such property or part;

(3) Makes a disposition which, when read with reference to the property he owned and the circumstances existing at the time of its making, manifests his understanding that he was disposing of the appointive property; or

(4) Leaves a will disposing of all of his property or all of his property of the kind covered by the power, unless the intention that the will is not to operate as an execution of the power appears expressly or by necessary implication.

(b) If the donor has expressly directed that no instrument shall be effective to exercise the power unless it contains a specific reference to the power, an instrument not containing such reference does not validly exercise the power.

Under this statute a power in a marital deduction trust which requires a specific reference cannot be exercised without such specific reference. But a power not requiring specific reference could apparently be exercised by a residuary clause disposing of all the donee’s property under the subsection (a)(4).

In conclusion, the best solution to the problem seems to be in the hands of the will draftsman. He should make every effort to determine what powers the

29. Uniform Probate Code (Third Working Draft, November 1967) § 2-608 provides: “A will, whether or not it contains a residuary clause, does not exercise a power of appointment held by the testator unless an intent to exercise the power is indicated by the will.”

testator has and the law that will apply to each. There should be an explicit provision that the will is intended to be an exercise of a particular power if the testator wishes to exercise that power. As to powers the testator does not wish to exercise, there should be an explicit provision that the will is not intended to be an exercise of those powers. The draftsman should not insert blanket provisions for the exercise of powers as by "blending clauses." The estate planner can alleviate the problem by advising a testator whose will will be drafted to urge donees of powers of appointment created by the will to revise their own wills so as to make specific reference to each power.

C. Patrick McLarney

THE FINALITY OF A PROBATE DEGREE OF DISTRIBUTION IN MISSOURI

McNeal v. Bonnel

A will devised land to the testator's son in trust for himself. A later paragraph named another person as trustee. The trust was to continue until the son attained thirty years of age and the trustee was to have "full, absolute, and complete discretion" with reference to the use of the corpus of the trust until the son reached thirty when the corpus was to be paid over to the son. If the son predeceased the testator or died before reaching thirty, the land was devised to the bodily heirs of the son, if any, and, if none, to the testator's nephew. The testator died in 1956, and the probate court made an order of distribution on June 3, 1957, directing that "the title thereto be . . . assigned, transferred and distributed to" the testator's son. Thereafter, before attaining the age of thirty, the son conveyed the land to Broyles who subsequently conveyed to the plaintiffs. After the son attained the age of thirty, he executed a general warranty deed purporting to convey the land to the defendants. Defendants admitted having knowledge of the prior conveyance to the plaintiffs. All three conveyances were by general warranty deed and were recorded within one day after their execution and delivery. The plaintiffs brought this action to determine title to the forty acres. On motion for summary judgment, the trial court found the plaintiffs to be the fee simple owners of the land, and the defendants appealed. One of the defendant's contentions on appeal was that the 1957 decree of distribution was void as being contrary to the clear provisions of the will. The Supreme Court of Missouri, agreeing with this contention, declared the decree to be void, but affirmed for the plaintiffs on other grounds.

As McNeal was ultimately decided, it was unnecessary for the court to comment, one way or the other, on the decree in question. As interpreted by the court, the will devised a contingent remainder to the testator's son. Contingent remainders being alienable in Missouri, the son's deed was effective to convey his

1. 412 S.W.2d 167 (Mo. 1967).
contingent remainder to the plaintiffs. The remainder vested and became possessory as the estate in fee simple absolute in the plaintiffs when the son reached the age of thirty. Consequently, the son’s later conveyance to the defendants’ grantor conveyed nothing because he had nothing. If the probate decree had been held to be valid, the result would have been the same. The probate decree gave the testator’s son a fee simple absolute from the moment of the testator’s death. The son’s recorded conveyance to the plaintiffs would, of course, prevail over his later conveyance to the defendants’ grantor.

In some fields of law the rules of the American states are relatively clear and uniform because English law could be and was received here without substantial change. This is not the case as to the rules governing determination of the successors to real property on the death of the owner. In England prior to 1858 some three hundred seventy ecclesiastical courts had exclusive jurisdiction over probate of wills disposing of personal property and appointment of administrators. They had limited jurisdiction over administration and distribution of personal property of decedents. The ecclesiastical courts were inferior tribunals and the qualifications of their judges were not always the highest. Because of their deficiencies, the High Court of Chancery assumed jurisdiction of the administration and distribution of the personal estates of decedents. The ecclesiastical courts had no jurisdiction whatever over real property. Heirs were determined and wills of real property were proved and construed in actions of ejectment in the superior courts of common law or by suits in the High Court of Chancery.

In 1858 the jurisdiction of the English ecclesiastical courts over wills and estates of decedents was transferred to a secular Court of Probate which was also given jurisdiction to admit wills of real property to probate. It had no other power over real property. In 1875 probate jurisdiction and the jurisdiction of the High Court of Chancery over administration and distribution of estates of decedents, including the construction of wills and the distribution of real property, were transferred to the High Court of Justice, which is the trial court of general jurisdiction. In 1897 English executors and administrators were given title to the real property of the decedent and charged with its administration and distribution.

Many American states have placed probate jurisdiction in inferior courts of special and limited jurisdiction. Prior to 1956 probate courts in Missouri were

2. Coke, Institutes *335-341; 2 Blackstone Commentaries *488-519; Sheppard, Grand Abridgment, Part IV, 98 (1675); Swinburne, Testaments, Part IV, p. 69 (1635). Floyer, Proctor’s Practice in the Ecclesiastical Courts 1-31 (1746).
4. Sheppard, Grand Abridgment, Part IV, p. 98 (1675); Swinburne, Testaments 122 (1635); Williams, Executors and Administrators 6.320-21 (3rd Am. Ed., 1849); Theobald, Wills 71, 75 (5th Ed., 1900).
5. 20 & 21 Vict., c. 77 (1857).
7. Land Transfer Act, 60 & 61 Vict., c. 65 (1897); Atkinson, Brief History of English Testamentary Jurisdiction, 8 Mo. L. Rev. 107, 125 (1943).
8. See Simes & Basye, Organization of the Probate Courts in America, 42 Mich. L. Rev. 965 (1944), which traces the traditional powers and status of
inferior tribunals with no authority over real property except (1) their decrees admitting or denying probate of a will were binding as to real as well as to personal property, and (2) they could order sale of real property to pay debts. They had no power to determine heirs, construe provisions of wills relating to real property, or determine the distribution of real property. Until 1945 their judges were not required to be lawyers. The Missouri Probate Code of 1955 attempted to expand the jurisdiction of probate courts over real property by empowering them to determine heirs, construe provisions of wills relating to real property, and enter conclusive decrees of final distribution which would make a final determination of the persons entitled to succeed to the real property of a decedent, whether by devise or by intestacy. The provisions of the Code as to decrees of final distribution make it clear that such a decree, rather than the will, was to be the title document establishing the passage of title from the decedent to the heir or devisee. This being so, the decree of distribution was the document to be included in the abstract of title; the will could be omitted and ignored because the decree, not the will, was to be the final and conclusive adjudication of the passage of title. This scheme was excellent—if it could be made to work. The enactment of the Missouri Probate Code in 1955 raised the question of whether a scheme of conclusive adjudication of real property titles by probate courts would work so long as those courts were inferior tribunals of limited jurisdiction.

The 1955 Probate Code was enacted against a background of traditional, and justified, low regard held by lawyers and judges for the probate courts. This stemmed from the fact that, due to the low remuneration and the low qualification requirements, many probate judges were men "unlearned in the law." Because of their lack of prestige, narrow jurisdictional boundaries were laid down probate courts from the ecclesiastical and common-law courts of England to the present day probate courts.

9. § 481.020, RSMo (1949). Two appraisals of the history and development of probate courts in Missouri and of the changes effected by the 1955 Probate Code have been written. They are Limbaugh, The Sources and Development of Probate Law, 1956 WASH. L.Q. 419, and Welch, Oliver, & Summers, Constitutionality of the Broadened Powers of the Probate Court Under the New Code, 23 Mo. L. Rev. 113 (1958). See also Summers' introduction to the new code in 25 V.A.M.S. v-xxi (1959) for the changes effected by the code.


11. The statute that directly bears on the case being noted is § 473.617(4), RSMo 1959. Its specific provisions that are applicable to the instant decision are as follows: "The decree of final distribution is a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the decree. It operates as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees." See also § 472.010(11), RSMo 1959, and § 472.020, RSMo 1959.


by appellate courts for the probate courts, and this cast a light of uncertainty upon
the finality of a probate decree.14 It was the purpose of the 1955 revision to
correct the uncertainty involved;15 but the present decision, among others,16 indicates
that the attempted correction has not been effective.

The Missouri Probate Code clearly states that a decree of final distribution
of a probate court operates as a final adjudication, subject only to the right of
appeal and the right to reopen the decree.17 In McNeal, there was no appeal
taken from the decree in question, nor had there been any attempt by interested
parties to reopen the decree. The supreme court declared the decree of distribu-
tion void, and it is this determination that is under inspection here. That the
statute gives to decrees of distribution the same degree of finality as any other
decree of Missouri courts cannot be disputed; and even in lieu of such a
statute, there are Missouri court decisions that declare "Such a judgment is as
impregnable to collateral attack as judgments of other courts of record."18 The
decree distributing the testator’s estate was collaterally attacked, and it therefore
becomes necessary to determine on what grounds judgments so attacked can be
declared void.

In Missouri, the bases for declaring a judgment void fall into only two catego-
ries: (1) lack of jurisdiction (over the person or the subject) in the court that
decided the judgment, or (2) fraud in the procuring of the judgment.19 There

14. "... the orders and decrees of probate courts were always subject to
scrutiny to verify that every matter essential to authorize the probate court to act
had been complied with. The result was to bring into question numerous orders
of probate courts unless every element of jurisdiction was satisfied." Basye, Are
Probate Courts in Missouri Undergoing a Retrogression?, 32 Mo. L. Rev. 175, 176
courts ... are limited, in their powers and jurisdiction, to such matters as are
expressly conferred on them by the statute, and such as are necessarily incident
to the duties imposed."

15. Limbaugh, The Sources and Development of Probate Law, 1956 WASH.
U.L.Q. 419; Welch, Oliver, and Summers, Constitutionality of the Broadened
Powers of the Probate Court Under the New Code, 23 Mo. L. Rev. 113 (1958);
Basye, Are Probate Courts in Missouri Undergoing a Retrogression?, 32 Mo. L.
Rev. 175 (1967). See also Summers’ introduction to the new code in 25 V.A.M.S.
v-xxi (1959). For a concise and accurate treatment of the foundations for and
purposes of each section of the 1955 Probate Code, see Summers, The Proposed

16. Clapper v. Chandler, 406 S.W.2d 114 (Spr. Mo. App. 1966), (holding
probate sale void for lack of notice of the sale to the heirs. § 473.013, RSMo 1959
expressly provides that notice for hearing on a petition for sale is not jurisdic-
tional; the court held it jurisdictional.) Stark v. Cole, 373 S.W.2d 473, 478 (K.C. Mo.
App. 1963), suggests that probate court judgments are peculiarly vulnerable to
attack because these courts are easily deceived and often negligent (Quoting from
Clyce v. Anderson, 49 Mo. 37 (1871)). For the best example and discussion of
how probate decrees are to be held under close scrutiny, see Morrow v. Weed,
4 Iowa 77, 124 (1856).

17. Note 11, supra.

18. Gorg v. Rutherford, 31 S.W.2d 585, 589 (St. L. Mo. App. 1930).

19. La Presto v. La Presto, 285 S.W.2d 568, 570 (Mo. 1955), (jurisdiction).
Smith v. Hauger, 150 Mo. 437, 444, 51 S.W. 1052, 1054 (1899), (fraud).
was no showing of either of the above requirements in *McNeal*, nor does the record indicate that either might have been present. Instead, the probate decree of distribution was declared void because it was erroneous. It is well settled law that an erroneous judgment is not subject to collateral attack, but stands as the ruling law until reversed on appeal; if not appealed from, the erroneous decision is final.20

The Supreme Court was probably correct in determining that the probate court's decree of distribution was erroneous. Although, considering the first paragraph alone, the devise to the son on trust for himself *would* give him an immediate fee simple, it is fairly apparent that this was cut down by the later language. Hence, in some sense, the error in the decree of distribution was apparent on its face. The court recognized this, and used this error as a basis for declaring the judgment void: "[D]efendants contend the decree of distribution void because in conflict with the will of the testator . . . . We agree . . . ." Thus the court has, in effect, taken jurisdiction from a court for the erroneous use of that jurisdiction.21

If this practice were followed to its logical extreme, courts of record would have jurisdiction over a subject only when they conducted their proceedings free from error, otherwise their judgments would be void.

Many Missouri precedents indicate that probate decrees should be given a greater degree of finality than that given the decree in question in *McNeal*.22 A great many other jurisdictions have also held that probate decrees are final adjudications.23 An examination of how one jurisdiction handled this problem is indica-

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For the position of most jurisdictions, Irving v. Rodriguez, 27 Ill. App. 2d 75, 79, 169 N.E.2d 145, 147 (1960), is indicative:

"Void judgments generally fall into two classifications, that is, judgments where there is want of jurisdiction of person or subject matter, and judgments procured through fraud."

20. "In so far as the application of the principles of res judicata are concerned, an erroneous judgment has the same effect as a correct one." Braker v. Cirese, 269 S.W.2d 62, 66 (Mo. en banc 1954). And more specifically: "[T]hey are faced with the final judgment of that court from which they did not see fit to appeal, and consequently the propriety of the distribution ordered by the probate court is no longer open to question." Gorg v. Rutherford, 31 S.W.2d 585, 589 (S. L. Mo. App. 1930). This case is even more significant because it reached this holding prior to the 1955 *Code* which requires such finality. See 49 C.J.S., *Judgments*, § 428 (1947), for a list of the numerous authorities supporting this rule.

21. That courts might have difficulty in this area was recognized in Kristanik v. Chevrolet Motors Co., 335 Mo. 60, 70, 70 S.W.2d 890, 894 (1934), which said: "The failure to distinguish between erroneous exercise of jurisdiction and the want of jurisdiction is a fruitful source of confusion and errancy of decision."

22. Gorg v. Rutherford, 31 S.W.2d 585 (St. L. Mo. App. 1930); White v. Hutton, 240 S.W.2d 193 (K.C. Mo. App. 1951); State ex inf. Kell v. Buchanan, 210 S.W.2d 359 (Mo. 1948); Williams v. Vaughan, 253 S.W.2d 111 (Mo. en banc 1952).

23. Estate of Peyton v. Commissioner, 323 F.2d 438 (8th Cir. 1963); Boshell v. Boshell, 118 So. 553 (Ala. 1928); Carrillo v. Taylor, 81 Ariz. 14, 299 P.2d 188 (1956); Pigott v. Donovan, 99 Atl. 1047 (Conn. 1917); State *ex rel* Price v. Alexander, 49 A.2d 420 (Del. 1946); Cone v. Benjamin, 27 So.2d 90 (Fla. 1946); Kam Chin Chun Ming v. Kam Hee Ho, 371 P.2d 379 (Hawaii 1962); Isabet v. Scott, 286 Ill. App. 24, 2 N.E.2d 754 (1936); Leeper v. Wilson, 201 N.E. 2d 500 (Ind. 1964); Keith v. Guthrie, 52 Pac. 435 (Kan. 1898); Quigley v. Quigley, 161
tive of the position taken by most other jurisdictions. The Michigan case of
Snyder v. Potter,24 was a suit in equity for a determination that a testamentary
trust of land was void because it violated a statutory rule against perpetuities. No
appeal had been taken from a probate court decree of distribution which assigned
the land to the testamentary trustee. The Michigan Supreme Court held that the
probate court decree of distribution was res judicata on the validity of the trust
under the statutory rule against perpetuities and that, therefore, the question
could not be litigated again in equity. The Michigan probate courts, like Mis-
souri's are separate from the courts of general jurisdiction.25 The above holding,
and others cited in that decision,26 show that Michigan has given probate decrees
the finality that was intended for them by statute.27 It should be noted that this
was done where the statute is not as definite as Missouri's in requiring that such
decrees be final.28 Further, it must again be emphasized that the Michigan probate
courts have the same status as Missouri's: separate from the courts of general
jurisdiction.

The language of the Supreme Court of Missouri in McNeal v. Bonnel indicates
that the 1955 Missouri Probate Code scheme of conclusive adjudication of real
property titles by probate courts has failed. It now seems evident that the appellate

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28. Compare the words of § 473.617(4), RSMo 1959, set forth in note 11,
is merely a general description of the probate court's jurisdiction from which the
Michigan Courts have given probate decrees their finality:
§ 27.3178(19) Jurisdiction; hearings; modification or setting aside of
orders; concurrent jurisdiction of circuit court; time for order.
5. And shall have and exercise all such other powers and jurisdiction
as are or may be conferred by law:
To that end he may upon the filing in said court of a petition therein,
within . . . months of the original hearing, or of the rendering or making
of any order, sentence or decree, as the case may be, and after due notice
to all parties interested, grant hearings, and may modify and set aside
orders, sentences and decrees rendered in such court: Provided, that the
jurisdiction conferred by this section shall not be construed to deprive
the circuit court in chancery in the proper county of concurrent jurisdiction
as originally exercised over the same matter. . .
courts will not enforce such statutory provisions so long as probate courts remain inferior tribunals of special and limited jurisdiction. This suggests that Missouri can have a modern, efficient probate system only if probate jurisdiction is transferred to the trial court of general jurisdiction. This was done in England in 1875 and has been done in a number of states including, only recently, Illinois.\(^{29}\) Once such a transfer is effected, the appellate courts are willing to accord adequate finality to decrees of distribution determining title to land. A good example of this is in California, where the Probate Courts have been joined with the courts of general jurisdiction. The California statute as to finality of probate decrees of distribution,\(^{30}\) enacted in 1931, is similar to Missouri's.\(^{31}\) In *Estate of Loring*,\(^ {32}\) a California district court erroneously distributed more than one-third of Loring's estate to charity, in violation of a statute declaring that no more than one third of an estate may be distributed to charity.\(^{33}\) After the decree of distribution became final, a proceeding seeking a new distribution was commenced. Justice Traynor, speaking for the court in denying appellant's contentions that such a judgment was voidable upon collateral attack, stated:

It is settled, however, that, once final, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error.\(^{34}\)

And, in *In re Buchhants' Estate*,\(^ {35}\) the court said: "[I]t is hornbook law that the decree of distribution, when it becomes final, is conclusive . . ." As witnessed by McNeal, the Missouri courts have not yet taken such a position.

It has been argued that a decree similar to the one in *McNeal* could be declared "void on its face."\(^ {36}\) This position would be derived from the holding in *Hughes v. Neeley*,\(^ {37}\) where a judgment purporting to terminate a contingent remainder was so declared void. The court stated that on the record, the lower court had no "authority, power, or jurisdiction"\(^ {38}\) to render such judgments. But once again, this is not the same as saying that a court with the "authority, power, and jurisdiction" to render such judgments may not do so erroneously. The probate court that decreed the distribution of the estate involved in the case

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30. Cal. Prob. Code § 1021: "Decree of distribution . . . Such order or decree, when it becomes final, is conclusive . . . ."
31. Note 11, supra.
32. 29 Cal. 2d 423, 175 P.2d 524 (1946). The decree in *Loring* was not only erroneous, but clearly against California public policy (Cal. Prob. Code § 41.). Still, it was held to be invulnerable to collateral attack.
37. 332 S.W.2d 1 (Mo. 1959).
38. Supra note 38, at 11.
under discussion certainly had the authority and jurisdiction to distribute that
estate, and such authority has not been challenged.

As a practical matter, it is doubtful that a decree distributing an estate to A
where the will devised it to B would not be declared "void on its face." But such
a holding would open up for the courts' determination the question of what degree
of error is necessary for a judgment to be void on its face. This could hardly be a
stabilizing factor for Missouri's probate law. The legislature has removed this area
from the courts' determination by stating that all decrees of distribution are final; and, inferentially, there can be no determination of "degree of error" when these
decrees are collaterally attacked.

The choice was between the injustices that might result from the above fact
situation, and giving the Missouri probate law the stability it needed; the legisla-
ture chose the latter. It is then up to the courts to give the statutes the interpreta-
tion intended for them by the lawmakers.

Decisions such as McNeal continue the traditional idea that probate courts
are to be held in low regard and are to have only limited jurisdiction. The
1955 Missouri Probate Code and various legal scholars have tried to change this
traditional approach in order to increase the effectiveness of the probate courts, but this decision indicates that they have met with little success. The result is
that probate decrees of distribution do not, as a practical matter, have the degree
of finality provided by the Missouri Probate Code, and decrees of distribution are
not yet final adjudications of the interests involved.

Thomas L. Patten

39. Note 37, supra.
40. § 473.617(4), RSMo (1959).
41. Note 14, supra.
42. Note 11, supra, also Basye, Are Probate Courts in Missouri Undergoing
a Retrogression?, 32 Mo. L. Rev. 175 (1967).
OPEN HOUSING—ATTEMPTED REVIVAL OF A RECONSTRUCTION CIVIL RIGHTS ACT TO END PRIVATE RACIAL DISCRIMINATION IN HOUSING

Jones v. Alfred H. Mayer Co.¹

Joseph Lee Jones, a Negro, and his wife were looking for a new home in June 1965. After reading an advertisement in the St. Louis Post Dispatch, they proceeded to Paddock Woods, a subdivision in north St. Louis County, Missouri, where they picked up a brochure describing the development and inspected several display homes. They decided that a certain style of house described was suitable to their needs and picked a lot from those available on which it could be built for $28,195. The defendant, through its sales agents "refused to consider the plaintiff's application to purchase a house and to enter into a contract for the sale of a house and lot, because Joseph Lee Jones is a Negro, and it is defendant's general policy not to sell said houses and lots to Negroes."²

Jones subsequently brought suit in the United States District Court for the Eastern District of Missouri, establishing jurisdiction under 28 U.S.C. § 1343(3) and (4)³ which allows plaintiffs to initiate civil rights actions in federal district courts regardless of diversity of citizenship or jurisdictional amount. The complaint prayed for $50 ordinary damages, $10,000 punitive damages, and an injunction compelling sale of a house and lot to plaintiff. There are numerous grounds under which plaintiff asserted his claims. Among them are alleged violations of: the Civil Rights Acts of 1866, 1870, and 1871 (these are presently codified in 42 U.S.C. sections 1982, 1981, and 1983); the Civil Rights Act of 1964;⁴ Executive Order No. 11065, entitled "Equal Opportunity in Housing;"⁵ the thirteenth and fourteenth amendments, and, the Constitution, article I section 8 (Enabling Clause) and article IV (Supremacy Clause). The district court dismissed the complaint for failure to state a cause of action.⁶

¹ 379 F.2d 33 (8th Cir. 1967). A writ of certiorari was granted by the U.S. Supreme Court on December 4, 1967. 36 U.S.L.WEEK 3221 (Dec. 5, 1967). The Johnson Administration had urged that the Court hear the case and the Justice Department has filed an amicus curiae brief on behalf of the Plaintiff. Graham, The New York Times, October 8, 1967, p. E7, col. 1.
⁴ The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.
⁵ The specific sections of the Act of which violation is alleged are §§ 201 to 207, codified as 42 U.S.C. §§ 2000a to 2000a-6.
Plaintiff appealed to the United States Court of Appeals for the Eighth Circuit which affirmed the district court and dismissed the complaint. This decision is the subject of this note.

On appeal, the Executive Order and the 1964 Civil Rights Act were not urged. After examining the other grounds alleged, the circuit court concluded that "the appeal, thus, pivots on § 1982." Section 1982 (which embodies the 1866 Civil Rights Act) guarantees to all citizens the same rights to "inherit, purchase, lease, sell, hold, and convey real and personal property." The circuit court went into considerable detail in reviewing the history of 42 U.S.C. section 1982, its companion section 1981 and 1983, and the thirteenth and fourteenth amendments, all of which are relevant to the determination of this case. Its conclusions

8. Jones was aided in this appeal by an amicus curiae brief filed by the National Committee Against Discrimination in Housing which urged reversal particularly under 42 U.S.C. § 1982.
9. Executive Order 11063 deals with prevention of discrimination in housing on all land connected with the federal government or receiving aid from the federal government. The defendant's subdivision was privately owned, received no federal aid, and was not financed by F.H.A. or V.A. secured mortgages. Hence this executive mandate is largely inapplicable.

The Civil Rights Act of 1964 prohibits discrimination or segregation in places of public accommodation (equal access). It was upheld under the power to regulate commerce in Heart of Atlanta Motel v. United States, 379 U.S. 294 (1964). Since Defendant's property is private, not public, accommodation and the effect of his discriminatory policies on interstate commerce is not readily apparent, the use of this act stands on very unsure footing.

Property rights of citizens.
All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property which is enjoyed by white citizens, and shall be subject to the same punishment, pains, penalties, taxes, licenses, and extraction of every kind and no other.
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 other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
12. The chronology of enactment of these statutes and amendment, ably presented by the court at 379 F.2d 33, at 37-38, is helpful to understand the interpretations of legislative history and meaning upon which several of the significant issues in this case turn.

The thirteenth amendment, abolishing slavery, became law on December 12, 1865. 13 Stat. 774 (1865).
The Civil Rights Act of 1866, was passed on April 9, 1866. It incorporated what are now §§ 1981 and 1982. 14 Stat. 27 (1866).
were that since the thirteenth amendment and the 1866 Act preceded the fourteenth amendment's formal introduction in Congress, the fourteenth amendment was directed toward situations not reached by the thirteenth amendment or the 1866 Act ("or at least only questionably covered by them"). Further, the 1870 and 1871 Acts were an implementation of the fourteenth amendment and the 1866 Act was re-enacted as part of the 1870 Act. The Court also noted that the fourteenth amendment's prohibitions are directed against "state action" by its very language and by court interpretation from 1879 to the present day.

From the legislative history (chronology) of section 1982 it is not readily apparent whether that statute rests on the thirteenth or the fourteenth amendment since it was passed after the thirteenth and prior to the fourteenth, but re-enacted under the fourteenth. The court concludes, relying on the weight of prior Supreme Court interpretations, that section 1982 rests on section 1 of the fourteenth amendment and therefore is directed against "state action." This conclusion is basic to the decision the court reaches in this case, which is that "state action" is the standard by which discrimination under section 1982 is measured, and that defendant's discriminatory acts did not constitute "state action" as that term has been defined to date; thus, the complaint must be dismissed. The Circuit Court, however, suggests three ways in which the Supreme Court might reach a different result: 1) remove the "state action" requirement by finding that section 1982 was derived from the thirteenth amendment; 2) broaden the concept of "state action;" or, 3) find, as suggested in U.S. v. Guest, that Congress has already acted through

The fourteenth amendment was passed by the Senate on June 8, 1966, two months after the 1866 Act, and became law on July 28, 1868. It guaranteed the privileges and immunities of citizens, due process, and equal protection of law against state infringement.

The Enforcement Act of 1870 has language similar to § 1981 and further provided in § 18 that the 1866 Act "is hereby re-enacted." 16 Stat. 144 (1870).

The Enforcement Act of 1871, the forerunner of § 1983, was titled "An Act to Enforce the Provisions of the Fourteenth Amendment" and provided civil liability and redress for certain deprivations of civil rights. 17 Stat. 13 (1871).

Civil Rights Acts of 1875, 1897, and 1964 followed. Portions of the 1875 Act were declared unconstitutional in the Civil Rights Cases, 109 U.S. 3 (1883).

14. Shelley v. Kraemer, 334 U.S. 1 (1948) at 20, furnishes a general definition of "state action." "State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertion of state power in all forms."
15. The language the court refers to is in § 1 of the Fourteenth Amendment.
section 1982 to reach private racial discrimination in housing. The propriety of these theories as well as the theory on which this court's decision is based shall be considered in the remainder of this note.

The argument that section 1982 is derived from the thirteenth amendment is appealing in light of the fact that section 1982 (1866 Act) passed through Congress shortly after the amendment and both dealt with the rights of Negro slaves (later citizens). However, this view is refuted in the cases. The 1866 Act, which embodied what is now section 1982, was re-enacted in the 1870 Act. "After [the fourteenth amendment's] adoption, the Civil Rights Act was re-enacted and upon the first section of that amendment it rests" was the opinion in *Virginia v. Rives* in 1879. A recent case explains that at the time of the 1870 re-enactment, there were serious doubts that the thirteenth amendment would support the 1866 Act and for that reason it was re-enacted under the fourteenth amendment to insure its validity. Also, the fourteenth amendment and the 1866 Act (section 1982) passed through the same session of Congress barely two months apart and were closely related in both their inception and objectives. To justify the enactment of section 1982 under the thirteenth amendment, one would have to take the position that discrimination in housing amounts to a badge of slavery since that amendment "simply abolished slavery" and "does not in other matters protect the individual rights of persons of the negro race." It is doubtful that discrimination in public housing should be so construed. Another explanation for the enactment of section 1982 is that its purpose was the abolition of slave codes as they applied to property contracts and the like. The inability to hold property had been concomitant to slavery, and was not determined by race, creed or color as the slave codes did not affect free Negroes. Under this view, even if it is said that the thirteenth amendment supports section 1982, no new right to buy property was granted, as the purpose of that statute was only to give newly freed slaves the freedom other citizens already had. It is also significant that the fourteenth amendment was argued in Congress as being the constitutional means by which section 1982 might be upheld. It appears, therefore, that an argument for the abolition of the "state ac-

18. The court then went on to say: It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expounding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law. *Jones v. Alfred H. Mayer Co.*, supra note 1, at 45.

19. 100 U.S. at 333.


21. Civil Rights Cases, 109 U.S. 3 (1883) at 23. Congress did not assume under the authority given by the Thirteenth Amendment to adjust what might be called the social rights of men in the community. Supra at 22-23.


23. *Avins, The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 So. Cal. L. Rev. 274 (1967). In view of this theory, the article continues, the word "right" at the beginning of § 1982 should be read to mean "capacity."


25. The Justice Department, in an amicus curiae brief to the Supreme Court, describes inequality in housing purchases as a remaining "vestige of slavery."
tion" requirement on section 1982 by virtue of its derivation from the thirteenth, rather than the fourteenth amendment, will fail in the face of such strong authority to the contrary.26 Also, the consistent application of the "state action" requirement to section 1982, discussed below, weighs heavily in favor of derivation from the fourteenth amendment.

The concept of "state action"27 pervades the whole area of fourteenth amendment rights and is especially important in the determination of this case. U.S. v. Cruikshank28 was first to announce that section 1 of the fourteenth amendment applied only to infringement of rights by the states and was followed shortly thereafter in other Supreme Court decisions.29 In 1917, Buchanan v. Warley30 said that the purpose of section 1982 was to entitle a Negro to acquire property without state legislation discriminating against him. Shelley v. Kraemer31 in 1948, relying heavily on Buchanan, held that among the rights protected against "state action" by the fourteenth amendment "are the rights to acquire, enjoy, own and dispose of property" and that the Missouri Supreme Court's enforcement of restrictive covenants constituted "state action" against those rights.32 However, this argument, however, is not a focal point of this brief. See Graham, op. cit. supra note 1.

26. Only two cases can be found in favor of thirteenth amendment derivation. United States v. Harris, 106 U.S. 629 (1882), dicta at p. 640. This view was rejected in the Civil Rights Cases, supra note 21. The other is United States v. Morrison, 125 F. 322 (E.D. Ark. 1903). Frantz, Congressional Power to Enforce the Fourteenth Amendment, 73 Yale L.J. 1353 (1964), expresses some doubt as to the controlling effect of the older cases as the Civil Rights Cases on interpretations of Congressional intent with respect to § 1982.

27. For a recent discussion of "what is state action," see Sherwood, Constitutional Law—Private Persons Succeeding City as Trustee of Park Under Racially Discriminating Devises Held Subject to Fourteenth Amendment, 32 Mo. L. Rev. 147 (1967). Another good discussion of "state action" and its development is St. Antoine, Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private Racial Discrimination," 59 Mich. L. Rev. 993 (1961). See also, Lewis, The Meaning of State Action, 60 Col. L. Rev. 1083 (1960). The Circuit Court in Jones also provides useful examples of what has been held to be "state action" at 379 F.2d at 40-41.

28. 92 U.S. 542 (1876).

29. United States v. Harris, 106 U.S. 629 (1883). Here the court struck down portions of a conspiracy statute (17 Stat. 13, 14) which dealt with private action, holding that the fourteenth amendment authorized only prohibitions against "state action," in the Civil Rights Cases, 109 U.S. 542 (1883). The court followed Harris in stating that § 5 of the fourteenth amendment was limited to legislation against "state action" only. This interpretation of the grant of legislative power in § 5 is specifically rejected in the concurring opinion of Justices Brennan, Warren and Douglas and impliedly rejected in the concurring opinion of Justices Clark, Black and Fortas in United States v. Guest, supra note 17.


31. 334 U.S. 1, 10 (1948). See Annot. on this case, 3 A.L.R.2d 441, 466 (1949).

32. 355 Mo. 814, 198 S.W.2d 679 (1946). This decision was reversed on resubmission in accordance with the U.S. Supreme Court decision, supra note 31, at 358 Mo. 364, 214 S.W.2d 525 (1948).
the *Shelley* court went on to say that voluntary adherence to the terms of a racially restrictive covenant is permissible as this does not in any way involve the state in the discrimination. *Hurd v. Hodge*, a companion case of *Shelley*, decided the same day on facts similar to *Shelley*, definitely made "state action" a requirement for violation under section 1982. As this case has not been overruled, the court in the *Jones* case found it controlling as it "remains good law," but noted the absence of its citation in several recent Supreme Court decisions.*Shelley* was soon followed in other cases where violations of section 1982 was a key issue. Several recent cases indicate that the Supreme Court has by no means abandoned its use of the "state action" theory. In *Monroe v. Pape*, they applied this limitation to section 1983, companion of section 1982. Similarly, in *Bell v. Maryland*, it was found that the right to be free of discriminatory treatment in places of public accommodation was a right guaranteed against "state action." Douglas, concurring, cited *Shelley* and reiterated his concurring opinions in both *Katzenbach v. McClung* and *Lombard v. Louisiana*. In 1966, Justice Stewart in *U.S. v. Guest* clearly indicated the Court's most recent position citing the dissent in *U.S. v. Williams* where Justice Douglas said: "[t]he Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals." Justice Stewart concluded that "[i]t remains the court's view today." Therefore, it is highly doubtful that today any argument could persuade the Supreme Court to abandon the doctrine of "state action"; to do so would require that a multitude of decisions be overruled and that the Court completely contra-

33. 334 U.S. 24 (1948). Chief Justice Vinson wrote the opinions in both *Shelley* and *Hurd* as the questions of law and fact were quite similar. Violation of § 1982 was not urged in *Shelley*, but was in *Hurd*. Therefore, the Court's construction of that statute was announced only in the latter case.


35. *Barrows v. Jackson*, 346 U.S. 249 (1953) held in an action for damages by a co-covenantor for violation of a racially discriminating covenant that to award damages would be "state action" and dismissed the complaint.


37. 378 U.S. 226 (1964). In this case the trespass convictions of participants of a sit-in in a Baltimore restaurant were vacated. Conviction by the state was discriminatory "state action."


41. 341 U.S. 70, 92 (1951).

dict itself in several recent opinions. To a large extent, this is what led the Circuit Court to employ this doctrine as the basis for their decision in the instant case.

While the preceding indicates that "state action" is written somewhat indelibly in Supreme Court opinions up to the present time, the scope of its definition and application are by no means settled. What constitutes "state action" has expanded greatly; the trend in the past few years is particularly important. The Shelley definition and the finding in Screws v. U.S. that even unauthorized activity that is ostensibly carried on by power of the state amounts to "state action" significantly broadened the scope of application in the 1940's. Further expansion in the 1960's forms the basis for plaintiff's argument that since defendant's subdivision contemplates a suburban community of over 1000 people, enforcement of policies as to its habitation and operation constitute a governmental function. The complaint also alleges sufficient state and municipal involvement to constitute "state action" because of the state licensing of defendant corporation and the protection afforded them by "various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property," metropolitan sewer service, and other services. That is, "the state plays an important part in the success of a private housing development" and also that such subdivisions are typically governed by a board of trustees who would in effect be practicing discrimination of a governmental nature with state permission. The approach taken by Justice Douglas concurring in Garner v. Louisiana and again concurring in Lombard v. Louisiana, both of which arose out of lunch room sit-in demonstrations, lends credence to plaintiff's argument. He said in Garner:

A municipality granting a license to operate a business for the public represents the public interests of Negroes as well as other races who live

43. Hurd v. Hodge, 334 U.S. 24 (1948) gave the Circuit Court the most trouble as its unqualified attachment of "state action" to §1982 would have to be directly contradicted to remove that limitation in Jones. Reitman v. Mulkey, 387 U.S. 369 (1967) is one of the very recent cases where the Court continues to apply the "state action" concept. This case is discussed further in the text and at note 51 infra.

44. See note 27 supra for citation to authorities on the definition and scope of this term.

45. See note 15 supra for the Shelley definition of "state action."

46. 325 U.S. 91 (1945). This case extended state action to include the beating of a Negro by a police officer acting outside the scope of his authority.

47. Jones v. Alfred H. Mayer Co., 379 F.2d 33, 35, 44 (8th Cir. 1967). Marsh v. Alabama, 326 U.S. 501 (1946), gives considerable support to this argument. There, it was found that a company owned town performed a public function and, therefore, action by the town government was "state action."


49. 373 U.S. 267 (1963). Lombard is interesting in that no state laws or local ordinances were involved. Rather, segregation in restaurants was a matter of local custom announced by the major and enforced by the police. While the Court concluded that these acts in and of themselves were sufficient to be "state action," Justice Douglas went on to find that notwithstanding these acts, licensing of the restaurant by the municipality was state involvement to a significant extent to meet the requirement of "state action."
there. A license to establish a restaurant is a license to establish a public facility and necessarily imparts, in law, equality of use for all members of the public.50

This construction, should the court adopt it in the instant case, would most likely lead to a finding that the licensing of defendant by the state real estate board and as a corporation involves the state sufficiently for defendant’s discriminatory policy to qualify as “state action.” The interpretation found in Reitman v. Mulkey,51 a 1967 decision, from which the circuit court finally concluded that only Justice Douglas would decide that licensing equals “state action” in the instant case, may give us some insight into the court’s thinking on the matter.52 In Reitman the majority opinion concluded that there really is no one formula for determining what is “state action” (or significant involvement or state involvement to an unconstitutional degree), but this must be determined by looking at the facts in each case.53 Thus, the Court has left itself enough latitude to interpret the facts of Jones in any of several ways. The fact that defendant is a developer and that his policies have the effect of precluding Negroes from entering a whole community may well be the fact that in Jones will have enough weight to swing the balance of the Court.

U.S. v. Guest54 sums up the cumulative effects of a changing interpretation of the grant of power to legislate under section 5 of the fourteenth amendment. It is the principal authority for the third and most far-reaching of plaintiff’s arguments. Guest was a case of conspiracy under 18 U.S.C. section 24155 which a majority of

50. 368 U.S. at 184.
51. 387 U.S. 369 (1967). In Rietman the Court invalidated a California constitutional provision denying the state the right to prohibit any person from declining to sell, lease or rent his real property to such persons as he may see fit. This provision, it was said, would involve the state in racial discrimination to an unconstitutional degree. The dissenting opinion concluded that this is only state inaction and is not prohibited. Comment, 14 U.C.L.A. L Rev. 553 (1967) suggests that if “state inaction” in some situations is found violative of some constitutional guarantee, then the wrong involved would be failure of the state to act. Query: Would this mean there is a civil right to have a state enact laws on one’s behalf?
53. St. Antione, supra note 27, does suggest a new formula that may be developing, which is helpful. He says that private action may become state action when the state permits private persons to exercise power over matters of high public interest and thereby violate the Fourteenth Amendment.
54. 383 U.S. 745 (1966). The facts of this case involved a conspiracy to deprive Negroes of rights to freedom of interstate travel and use of state facilities by false reports of criminal acts. The primary opinion found that protection of the right to travel was a proper object of § 241. Supra at 760.
If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premise of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5000 or imprisoned not more than 10 years, or both.
the Court interpreted as making actionable conspiracies involving state officials to impair fourteenth and non-fourteenth amendment rights and purely private conspiracies to impair non-fourteenth amendment rights. More important to the instant case is the Guest view of the grant of legislative power under section 5 of the fourteenth amendment. Six of nine justices agreed that section 5 authorizes legislation over "state action" which impairs fourteenth and non-fourteenth amendment rights plus purely private conspiracies impairing fourteenth amendment rights. Justice Brennan joined by Justices Warren and Douglas, went farther in saying that section 5 is:

a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens.

While Guest does seem to grant Congress the power to deal legislatively with the actions of private individuals (on the assumption that if Congress can proscribe private conspiracies to interfere with civil rights it can proscribe private action by individuals to do the same), it does not change the interpretation of section 1 of the fourteenth amendment which still "speaks to the state or to those acting under the color of its authority." This position with respect to the Equal Protection

56. This construction of § 241 itself is not of primary importance to the instant case. What the court said is that "§ 241 by its clear words incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive as opposed to remedial implementation to any rights secured by that clause." United States v. Guest, supra note 54, at 754-755. While Justice Stewart in the primary opinion reserved the question, the six Justices named at note 58 infra went on to say that even though this statute (§ 241) does not do so, Congress could, by the power of the Fourteenth Amendment § 5, enact a conspiracy statute that would deal also with purely private conspiracies impairing Fourteenth Amendment rights. This finding in the Guest case was built upon the decision in United States v. Price, 383 U.S. 787 (1966) which rejected the interpretation that § 241 protects only non-fourteenth amendment federal rights found in United States v. Williams, 341 U.S. 70 (1950). Guest did involve a non-fourteenth amendment federal right, viz., the right of interstate travel.

57. Amend. 14 § 5 "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

58. These six justices are Brennan, Warren and Douglas, and Clark, Fortas and Black, who said:

There now can be no doubt that the specific language of § 5 [of the Fourteenth Amendment] empowers Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment Rights. United States v. Guest, supra note 54, at 762.

59. This rejects the interpretations of the Civil Rights Cases, supra note 21, that fourteenth amendment § 5 authorized Congressional legislation only against state laws and state acts.


Clause agrees in part with Collins v. Hardyman62 which reasoned that the guarantee of equal protection was good only as against the states, for only they can deprive a person of equal protection of the law.63 Therefore, Congress could only (and need only) protect federal (non-fourteenth amendment) rights against infringement by individuals. Guest agrees that without other federal legislation, the fourteenth amendment protects only against "state action" but differs from Collins in that it envisions section 5 as "implementing the Equal Protection Clause or any other clause of the Fourteenth Amendment."64 With this construction Congress can legislatively expand the protection of that clause to include infringements by private individuals of fourteenth amendment rights.

Section 5 of the fourteenth amendment empowers Congress to enact legislation against private infringement of fourteenth amendment rights; Congress has already acted through section 1982 to reach private discrimination in housing; consequently, defendant has violated section 1982 by discriminating against Joseph Lee Jones. This is the essence of plaintiff's contention. There are, in fact, several recent cases which have based civil rights legislation on section 5: Katzenbach v. Morgan65 based the Voting Rights Act of 196566 on it, calling the Act "appropriate legislation to enforce the Equal Protection Clause,"67 Monroe v. Pape68 based section 198369 on section 5; and, Justices Douglas and Goldberg preferred to base the Civil Rights Act of 196470 on section 5 rather than on the Commerce Clause in Heart of Atlanta Motel v. U.S.71 and in Katzenbach v. McClung.72 While this approach, and the above cases, might appear to provide clear grounds for reversal in Jones, there are some obstructions. The major stumbling block is the question of whether there is a right to purchase that is protected by the fourteenth amendment of which plaintiff was deprived. The Circuit Court in Jones asked this question and was unable to find that there was such a right that was violated.73

It cannot be denied that section 1982 creates a right to own or acquire real property free of discrimination under color of law. This is precisely what Hurd v. Hodge74 said in following Shelley v. Kraemer,75 "These were abilities [under law]..."
which he [the Negro] did not possess under slavery." This right, however, is not the same "right" that the plaintiff alleges was violated. He claims a "right" to purchase a particular piece of property when the owner places it on the market. This contention is contrary to several strong arguments.

First, if it is contended that this "right" was created impliedly by section 1982 (and is thereby under the fourteenth amendment), the holdings in *Hurd* and *Shelley*, which stand unmolested today, say that the right granted by section 1982 is against "state action" only and is not the same substantive right plaintiff claimed anyway. Second, if it is claimed that this "right" exists as a guarantee of the fourteenth amendment alone (to avoid the *Hurd* construction of section 1982) the "right" would still only be against "state action." Third, it has always been taken for granted that "the right to disposition of property is a fundamental attribute of ownership, and any hindrances of that right by the courts directly offends a fundamental property right." Fourth, forcing the sale of defendant's property could be construed as taking private property for private use in violation of the Due Process Clause in article I section 4 of the Constitution and in the fourteenth amendment section 1. In the face of this opposition the plaintiffs may modify their claim to read: [I]t is not contended that every person who offers a home for sale has no right to refuse to sell for discriminatory reasons, but the developer of a private subdivision is in a different category. This argument would seem more appropriate in claiming an infringement of rights by "state action," but a favorable decision by the Supreme Court on this basis would preserve some freedom of disposition, at least by the private homeowner.

On appeal, there are three ways by which the Supreme Court can reverse the holding in *Jones*. The first, by holding that section 1982 was enacted solely under the thirteenth amendment and, therefore, has no "state action" limitation would seem to be the least likely route as it would require the Court to directly overturn more authorities than by either of the two alternatives. Also, in its recent decisions, the Court has shown no trend in this direction. On the other hand, the second route to reversal would be more in line with recent Supreme Court inclinations to broaden the concept of "state action." Plaintiff's contention that a housing developer should be in a different category than a private homeowner presents a strong argument in light of the fact that defendant's discriminatory policies have the effect of excluding Negroes from an entire community. A decision on this basis would also strike something of a middle ground in this controversial area because the right of a private homeowner to choose his purchaser would thereby be preserved. The *Guest* theory, while analytically appealing, is also confronted with the necessity of rejecting prior authority and the question of whether the "right" plaintiff claims actually exists. Also, by reversing on the *Guest* theory the Court would be stepping forward to proscribe private actions on which recent Congressional legislation was defeated. Therefore the most satisfactory approach for reversal, if any, appears to be an expansion of the "state action" concept. The


most probable ground for affirming would be that while the power to legislate in this area exists, "its exercise is absent."\textsuperscript{78}

Looking toward the future, there is little doubt that the Supreme Court will approve whatever reasonable open housing legislation Congress should enact.\textsuperscript{79} Several state courts have already held valid state open housing laws.\textsuperscript{80} The Court in \textit{Katzenbach v. Morgan}\textsuperscript{81} and in \textit{Katzenbach v. McClung}\textsuperscript{82} indicated that the job of finding facts and appraising their significance is one for the legislature, not for the courts. This effectively allows Congress to define the substantive scope of the Equal Protection Clause. If Congress can establish a rational basis for its conclusions in a strong legislative record, the Court will probably inquire no further into its exercise of power under section 5 of the fourteenth amendment.\textsuperscript{83}

KENNETH H. SUELTHAUS

\textsuperscript{78} Jones v. Alfred H. Mayer Co., \textit{supra} note 47, at 45.

\textsuperscript{79} The Proposed Civil Rights Act of 1966, H.R. 1628, 89th Cong., 2nd Sess. 9-12 (1966) is an example. See also Memorandum on the Constitutionality of the Proposed Civil Rights Act of 1966, 112 Cong. Record 22104 (Sept. 19, 1966).


\textsuperscript{81} 384 U.S. 641 (1966). Justice Brennan gave Amend. 14 § 5 the broadest possible interpretation saying,

\begin{quote}
By including § 5, the draftsman sought to grant to Congress by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause. \textit{Supra} at 650.
\end{quote}

\textsuperscript{82} 379 U.S. 294 (1964).

\textsuperscript{83} See Comment, 14 U.C.L.A. L. Rev. 553 (1967) for a discussion of the Congressional powers and limitations implied in \textit{Guest}.  

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CONSTITUTIONAL LAW—MASS PROTESTS AND THE INJUNCTION—FREEDOM OF SPEECH AND ASSEMBLY

_Walker v. City of Birmingham_1

"Dr. King is Denied a Rehearing, Faces a 5 day Term for Contempt."2 This was how the New York Times informed its readers of the Supreme Court’s refusal to reconsider its decision of June 12, 1967, in which the Court affirmed the criminal contempt conviction of Dr. Martin Luther King and seven other Negro ministers for violating a temporary injunction issued by the Circuit Court of Jefferson County, Alabama.3 Thus, the noted case stands as the Supreme Court’s latest decision in the difficult and often controversial area of first amendment freedoms.

The case arose when the eight ministers, members of the Alabama Christian Movement for Human Rights, sought to express their concern over racial discrimination practices in Birmingham, Alabama, by holding protest demonstrations in that city on Good Friday and Easter Sunday, 1963. The city had a parade ordinance which made it unlawful to organize, hold or participate in any parade or public demonstration on the streets of the city unless a permit was obtained from the city commission.4 Attempts to get this permit were rebuffed.5 In spite of this, the petitioners proceeded with their plans for the march. On Wednesday, April 10th, two days before the proposed march, officials of Birmingham filed a bill for injunctive relief in the circuit court alleging that the activities of the petitioners endangered the lives, safety, peace, tranquility and general welfare of the city’s residents and that the remedy at law was inadequate.6 The circuit judge granted a temporary ex parte injunction barring the petitioners from participating in or encouraging mass street parades or mass processions without a permit as required by the city ordinance.7 The petitioners made no attempt to comply with the injunction or to get it modified or dissolved, but declared their intentions to defy it and hold the marches as scheduled.8 The marches were held, with some violence occurring, on Easter Sunday. Subsequently, the petitioners were convicted of criminal contempt for violating the injunction. The circuit judge refused to consider the petitioners’ constitutional attacks upon the injunction and the underlying ordinance, saying that the only issues before the court were whether it had jurisdiction to issue the temporary injunction and whether the petitioners had knowingly violated it.9 The Supreme Court of Alabama affirmed,10 and certiorari was granted.

5. _Id._ at 317.
7. For a copy of the injunction, see Walker v. Birmingham, _supra_ note 6, at 321.
9. _Id._ at 311-12.
In affirming the convictions, the majority opinion (written by Justice Stewart, with Justices Black, Clark, Harlan and White concurring) pointed out that the petitioners were not free to completely ignore the injunction. State and local governments have a legitimate concern in regulating the use of streets and public places.\(^{11}\) The petitioners were not entitled to treat the ordinance as a nullity which could not form the basis for any legal proceeding even though both it and the injunction were constitutionally suspect.\(^{12}\)

Alabama procedure provided that a person could not raise the question of a statute's unconstitutionality in an appeal from a conviction of contempt for violating an order or decree based on that statute.\(^{13}\) The constitutionality of a statute is something which must be judicially declared in an appropriate proceeding, it cannot be attacked collaterally. This approach had been adopted by the United States Supreme Court in *Howat v. State of Kansas*\(^{14}\) and has been followed by the federal courts.\(^{15}\) The premise behind this rule of law, that a civilized society must maintain respect for judicial process in order to insure the fair administration of justice and stability which only an orderly system of law can provide, was found to be of such continuing validity by the majority that they could not justify any departure from *Howat*.\(^{16}\)

The majority said that the petitioners could have protected their constitutional rights adequately through normal legal procedures. A motion to modify or dissolve the injunction could have been filed and the Court also noted, failing this, that Alabama procedure provided for expedited appellate review.\(^{17}\) Had the petitioners then met with frustration or delay of their constitutional claims, the Court hinted that it might have reached a different result.\(^{18}\)

14. 258 U.S. 181, 189-90 (1922), where the Court said: "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."
15. Kasper v. Brittain, 245 F.2d 92 (6th Cir. 1957), *cert. denied*, 355 U.S. 834 (1957). However, although *Howat* language is used, it is interesting to note that both the District Court and the Court of Appeals heard the appellants, constitutional claims and found them to be without merit.
17. *Id.* at 319. The Court also noted that an Alabama appellate court had found the Birmingham ordinance to be unconstitutional upon reviewing the conviction of one of these petitioners under it. Shuttlesworth v. City of Birmingham, 43 Ala. App. 68, 180 So.2d 114 (1965).
In three separate opinions, the dissenting justices strongly disagreed with the opinion of the Court.\(^\text{19}\) The dissenters thought the petitioners were free to ignore the injunction because the underlying ordinance was unconstitutional on its face: first, because it subjected first amendment rights to the complete discretion of local officials,\(^\text{20}\) and second, because the local officials were attempting to prohibit an unpopular cause under the guise of regulation in the interest of public safety.\(^\text{21}\) To claim that Birmingham officials had only the purest of motives in seeking this injunction would seem to be a little ridiculous. The attitude of Commissioner "Bull" Connor and others towards the civil rights movement is quite well known to all as Chief Justice Warren points out in his first footnote.\(^\text{22}\) For the Court to uphold these contempt convictions in the face of an obvious attempt by Alabama officials to stifle first amendment privileges seemed ludicrous to the dissenters.

Chief Justice Warren drew an analogy between this situation and the use of the temporary ex parte injunction in labor disputes. He noted how the labor injunction had been misused to cripple legitimate union activity to such an extent that Congress removed federal jurisdiction in the Norris-LaGuardia Act, and also pointed out that the dissatisfaction and resentment on the part of labor which the labor injunction had caused certainly did not increase respect for the courts and for judicial process.\(^\text{23}\) Warren felt that the majority was wrong in relying on \textit{Howat} because it had been clearly modified by subsequent decisions. In footnote nine,\(^\text{24}\) the majority is criticized for its analysis of \textit{In re Green}.\(^\text{25}\) To Warren, "if an in-


25. 369 U.S. 689 (1962). In this case, Green was convicted of contempt for violating a labor injunction issued by an Ohio court. He claimed that the dispute was subject to the jurisdiction of the National Labor Relations Board, and therefore the state court had no right to issue an ex parte order. In reversing the conviction, the Supreme Court stated that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption." \textit{Id.} at 692. The majority in \textit{Walker} construed this as meaning that there could be no contempt citation for violating an injunction without a hearing to determine whether the state court had jurisdiction over the matter. \textit{Walker v. Birmingham}, 388 U.S. 307, n.6 at 315 (1967). Therefore, \textit{Green} did not apply since the Alabama court had jurisdiction.

To this writer, the majority's approach is correct. \textit{In re Green} must be analyzed in conjunction with an earlier case, \textit{United States v. United Mine Workers, 330 U.S. 258, 289-96 (1947)}, where the Supreme Court held that disobedience of a temporary restraining order issued by a court whose claim to jurisdiction over the underlying proceeding is not frivolous may be punished as criminal contempt even though it is ultimately determined on appeal that such jurisdiction was lacking. Thus it was still possible for state courts to punish strikers even though federal legislation had given exclusive jurisdiction to the National Labor Relations Board.
junction can be challenged on the ground that it deals with a matter arguably subject to the jurisdiction of the National Labor Relations Board, then a fortiori it can be challenged on first amendment grounds.\(^{26}\) The Constitution's superiority should not be nullified by the simple process of incorporating an unconstitutional criminal statute into a judicial decree.\(^{27}\)

Justice Douglas adopted a different approach in his dissent. Since he considered the ordinance unconstitutional on its face, the injunction enforcing it was also unconstitutional.\(^{28}\) Douglas pointed out that state court action was held to be "state" action in Shelley v. Kraemer\(^{29}\) and, therefore, a court should be powerless to do what a state legislature lacks power to do. Since an unconstitutional statute may be defied, an unconstitutional injunction may also be flouted.\(^{30}\)

Justice Brennan agreed with the Court that states are entitled to adopt rules designed to require respect for their courts' orders, but felt that this interest must give way when it infringes on rights guaranteed by the Constitution. He noted the traditional concern the Court has had for first amendment privileges and the lengths to which it has gone in order to protect them.\(^{31}\) Brennan argued that the ex parte injunction is far more dangerous to first amendment freedoms than statutes. To say that the petitioners were required to seek modification or dissolution of the injunction before conducting their marches, as the Court did here, subjects them to broader prior restraints than any legislative action could have. This injunction not only attempted to restrain petitioners in the exercise of constitutional rights, but unlike a legislative restraint, it cannot be challenged in any subsequent proceeding for its violation.\(^{32}\) By the simple expediency of transforming an invalid ordinance into an ex parte judicial order, the states can now punish as "contempt" activity which they otherwise could not punish at all.\(^{33}\) Since the Constitution

It was this situation which the Court in Green attempted to correct by removing the power to punish until there had been a hearing and a determination that the state did indeed have jurisdiction. This was necessary in order to give effect to the intent of Congress that the National Labor Relations Board be given exclusive jurisdiction over certain labor matters.

However, the Constitution as interpreted by the Supreme Court has never pre-empted the states whenever First Amendment rights are involved. It is superior and therefore state decisions in derogation of these rights have been struck down by the Court, but state courts of general jurisdiction have always been free to pursue and decide constitutional questions. In re Green did not purport to change this.

27. Id. at 334.
29. 334 U.S. 1, 14-18 (1947).
In particular, Justice Brennan noted the development of the doctrine of the invalidity of legislative prior restraints on freedom of speech.
33. Id. at 349.
limits judicial power as well as legislative and executive power, Brennan argued
that convictions for contempt of court orders which invalidly restrict first amend-
ment freedoms must be condemned as unconstitutional. 34

It is clear that, until the retirement of Justice Clark, five justices were able
to agree that communication by conduct is not to be given the same protection as
communication by pure speech. In Adderly v. State of Florida, 35 Justice Black,
speaking for this majority, said that people do not have the constitutional right
to propagate protests or views whenever, however, and wherever they please. 36
The Court held there that civil rights demonstrators who picketed a jail house to
protest racial discrimination were not deprived of first amendment rights and
affirmed their convictions for violation of Florida’s trespass statute. 37 In the
noted case, the same majority clearly rejected the dissenters’ arguments that
mass picketing and protesting incorporate the first amendment freedoms to such
an extent that the ex parte injunction with its attendant contempt powers should
not be used against them without a hearing on the merits. Any inconvenience
suffered while abiding by the injunction until it can be modified or dissolved is sim-
ply the price protesters must pay for living in an organized society.

This decision cannot be read as a further adoption of Justice Black’s opinion
that the first and fourteenth amendments only take away all government power to
“restrict freedom of speech, press and assembly where people have a right to be for
such purposes” 38 and that the states are not constitutionally required to permit
picketing and patrolling on public property unless they discriminate in their regu-
lation or prohibition. 39 The Court did not say that picketing or patrolling could
be prohibited if done in a non-discriminatory fashion. It has merely issued a warn-
ing to those who would communicate their ideas, however laudable, by mass march-
ing and demonstration not to ignore state procedural remedies when faced with an
injunction.

The future status of this decision poses a problem. As the dissent pointed out,
the ex parte injunction could very easily be used to muzzle those whose views are
unpopular. 40 It is certain that the individual justices are not unaware of this po-
tential hazard. In addition, the present majority has been destroyed by the retire-

36. Id. at 47-48. It is worthy of mention at this point that Justice Black has
always been a strong champion of the first amendment privilege of freedom of
speech. See Black and Cohn, Justice Black and First Amendment “Absolutes”:
have no doubt about the general power of Louisiana to bar all picketing on its
streets and highways. Standing, patrolling or marching back and forth on streets
is conduct, not speech, and as conduct can be regulated or prohibited.” Instead,
the Court pointed out that the jail grounds had always been preserved for jail
uses and therefore the state had a right to prohibit the public from gathering there.
39. This was emphasized heavily by both the NAACP Legal Defense and
Educational Fund, Inc. and the AFL-CIO in their attempts to get a reconsideration.
ment of Justice Clark and the position of his successor, Thurgood Marshall, remains to be seen. One would expect Justice Marshall to be sympathetic to minority rights but the history of others who have been appointed to the Court cautions one against predicting that he would vote to overrule this decision. However, those who would use the injunction in an attempt to stifle conduct more akin to pure speech, e.g., passing out leaflets or small orderly picketing, would be wise not to rely on *Walker v. City of Birmingham*.

RICHAHD L. WIELER

PERFECTION OF LIENS ON MOTOR VEHICLES IN MISSOURI

In Re Jackson

Jackson purchased a new automobile from a dealer, paying part of the purchase price with cash and a trade-in, and executing a promissory note secured by a chattel mortgage security agreement on the automobile for the balance. The dealer sold the note and security agreement to a bank. On the date of purchase, the dealer prepared, and both the dealer and Jackson executed, an application for a Missouri certificate of ownership (title). This form has several copies and is used both as an application for title and as an application for registration. The bank sent the "lien perfection copy" and the required certificate of ownership fee to the Director of Revenue. The Director placed the "lien perfection copy" in a suspense file pending receipt of the remaining copies of the application and payment of the sales tax. Jackson was to send the other copies with payment of the tax. The other copies of the application, however, were never delivered, and no certificate of title was issued to Jackson. Apparently she simply attached

2. This form is now called an "Application for Missouri Title and/or License" and is designated as form "MMV-1-R3." The dealer in the principal case used the application form in use before the effective date of §§ 301.600-670, RSMo 1965 Supp., designated "MMV-1." Subsequently the Director of Revenue distributed a new form apparently designated "MMV-1-R1." On February 1, 1966, a second revised form, designated "MMV-1-R2," became effective. Thereafter the third revision was distributed.

The document representing title is referred to in the Missouri Statutes as a "certificate of ownership" though the document itself is entitled "certificate of title."

3. The old form, "MMV-1," consisted of four identical copies. Pending distribution of the new form, "MMV-1-R1," the Director of Revenue had agreed to accept the blue copy of the old form as the equivalent of the "lien perfection copy" of the new form. See In re Jackson, 268 F.Supp. 434, 442 (E.D. Mo. 1967).

4. The Director of Revenue did not require delivery of the manufacturer's certificate of origin, in addition to the application and fee, to perfect a lien on a new motor vehicle until February 1, 1966. See Department of Revenue, "Revised Procedure for Perfecting Motor Vehicle or Trailer Liens," January 24, 1966. Query the authority of the Director to require the manufacturer's certificate of origin now since it is not required by § 301.600, RSMo 1965 Supp.
her old license plate to her new automobile to avoid paying the sales tax on the new vehicle. Less than a year after the purchase a petition in bankruptcy was filed, and subsequently the trustee took possession of the automobile. The bank then filed a reclamation petition to recover the automobile. The referee in bankruptcy denied the petition on the grounds that the bank had failed to take all the steps necessary to perfect a security interest in a motor vehicle, but the district court reversed the referee and granted the petition.

Prior to July 1, 1965, a lien on a motor vehicle was perfected by local filing of the security agreement (usually a chattel mortgage). In some situations the additional requirement of notation of the lien on the certificate of title was necessary. The statutes controlling pre-Uniform Commercial Code (UCC) perfection were repealed because they were inconsistent with the UCC. Since Missouri has a motor vehicle certificate of title act, the filing provisions of the UCC as adopted in Missouri did not apply to motor vehicles and some provision had to be made for perfecting security interests in motor vehicles. Accordingly, new sections were added to the chapter on registration and licensing. These sections are the exclusive method for perfecting liens on motor vehicles. To perfect a lien there must be delivered to the Director of Revenue 1) the existing certificate of ownership (title), if any, 2) an “application” for a certificate of ownership, and 3) the required fee. The difficulty is in interpreting the word “application.” Does it require compliance with all prerequisites for obtaining a certificate of ownership and thus require submission of the original of the “Application for Missouri Title and/or License” with payment of the sales tax, or will submission

5. Apparently this is a common procedure for evading payment of the sales tax. See In re Jackson, 268 F. Supp. 434, 438 (E.D. Mo. 1967).

6. As to use of a reclamation petition see McPheeters, Bankruptcy—Reclamation and the Uniform Commercial Code, 33 Mo. L. Rev. — (1968).

7. §§ 428.100, 443.460-480 (All repealed, Mo. Laws 1963, at 637; Mo. Laws 1965, at 595). For material on the prior law see Mollenkamp, Unrecorded Chattel Mortgages—Effect of Amendment to the Recording Act, Section 443.460, RSMo 1959, 27 Mo. L. Rev. 146 (1962); McGhee, Chattel Mortgages—Automobiles—Notation on Certificate of Title, 16 Mo. L. Rev. 156 (1951); Wilson, Conflict of Laws—Recognition of a Foreign Chattel Mortgage, 16 Mo. L. Rev. 160 (1951); Note, 1951 Wash. U.L.Q. 539.

8. § 400.9-302, RSMo 1965 Supp. For the reasons behind this system see Gilmor, Security Interests in Personal Property 294 (1965).


11. With a new automobile there is no existing certificate of ownership. However, the Director of Revenue does require the manufacturer’s certificate of origin. See note 4 supra.

12. § 301.600.2, RSMo 1965 Supp.

13. Reply brief for Appellant, p. 2, Zuke v. Mercantile Trust Co. Nat’l Ass’n., No. 18,841 (8th Cir. 1967), explains that the position of the trustee in bankruptcy does not require that all prerequisites for issuance of a certificate of title be met, but that “application” means the original instead of a copy must be submitted. This position would apparently allow the financial institution to submit the original in place of or in addition to the “lien perfection copy” and thereby to perfect its liens. A decision to this effect would allow the court to avoid the real issue of whether all prerequisites to issuance of a certificate of ownership need be
of the information required by the statute on the "lien perfection copy" suffice?

The referee concluded that the word "application" was not ambiguous in the registration statute nor in the certificate of ownership statute and should be interpreted the same way in the lien perfection statute thus requiring completion of the prerequisites for a certificate of ownership. The trustee also contended

met before a lien can be perfected. If the court should decide that all prerequisites need not be met, the arrangement of submitting the original in place of or in addition to the "lien perfection copy" would undoubtedly be acceptable to the financial institutions.

14. Section 301.600.2, RSMo 1965 Supp. required the application to contain the name and address of the lienholder and the date of his security agreement. Presumably some identification of the vehicle is also required.

15. There is a collateral issue which the bank did not argue in the bankruptcy court. In re Jackson, Bankruptcy No. 66B-1029, E.D. Mo., Dec. 1, 1966, at 12. The bank's lien might be valid against the trustee in bankruptcy even though it is not perfected under §§ 301.600-.670, RSMo 1965 Supp. A lien not perfected under § 301.600-.670 is not valid against "subsequent transferees or lienholders... who took without knowledge of the lien..." § 301.600.1, RSMo 1965 Supp. The trustee is not a subsequent transferee. 4 COLLIER, BANKRUPTCY § 70.52 (14th ed. 1964). If the trustee is a "lienholder" within the meaning of § 301.600, he is without knowledge. Bankruptcy Act § 70c, 80 Stat. 269 (1966), 11 U.S.C. § 110(c) (1964), as amended 11 U.S.C. § 110(c) (Supp.II 1966). The word "lienholder" as used in several sections of § 301.600-.670 is limited to one who acquired a lien by agreement. The Missouri statute does not define "lienholder," however, sections 1(e) and 1(h) of the UNIFORM MOTOR VEHICLE CERTIFICATE OF TITLE AND ANTI-THEFT ACT, from which the Missouri statute was taken, define lienholder as one whose lien was acquired by agreement. 9B UNIFORM LAWS ANNOTATED 376 (1966). Thus if "lienholder" is so limited, the trustee in bankruptcy whose lien is a judicial lien under Bankruptcy Act § 70c, supra, cannot invalidate the bank's lien. The referees in In re O'Neal, Bankruptcy No. 65-B-1748, E.D. Mo., July 26, 1966, and In re Jackson, supra both decided that since the Missouri legislature did not define "lienholder," it did not intend to adopt the UNIFORM MOTOR VEHICLE CERTIFICATE OF TITLE AND ANTI-THEFT ACT definition, and therefore "lienholder" in § 301.600.1, RSMo 1965 Supp. means the same as "lienholder" in pre-1965 law which included holders of judicial liens. The district court in In re Jackson, 268 F.Supp. 434, 443 (E.D. Mo. 1967), expressly reserved the point for a case in which it is in issue and the bank did not contend the point on appeal. Brief for Appellee Zuke v. Mercantile Trust Co. Nat'l. Ass'n., No. 18,841 (8th Cir. 1967). An amicus curiae, however, did contend on appeal that the trustee does not have the power to attack the lien. Brief for General Bancshares as Amicus Curiae, Zuke v. Mercantile Trust Co. Nat'l. Ass'n., No. 18,841 (8th Cir. 1967).

16. § 301.020, RSMo 1959.
17. § 301.190, RSMo 1965 Supp.
18. In re Jackson, Bankruptcy No. 66B-1029, E.D. Mo., Dec. 1, 1966. See also In re O'Neal, Bankruptcy No. 65-B-1748, E.D. Mo., July 26, 1966. Gilmore apparently would agree with the referees. In discussing the UNIFORM MOTOR VEHICLE CERTIFICATE OF TITLE AND ANTI-THEFT ACT, § 20(b), from which § 301.600.2, RSMo 1965 Supp. was derived, he states:

"It can hardly be thought that § 20(b) was meant to give perfected status to a security interest on an incomplete application under which a certificate could not be issued, provided only that the items referred to in the subsection are present. The only reasonable construction of the provision is that perfection depends on filing of an application that is proper in all
that a copy cannot be an application. In reply the bank contended that there is a difference in the applications for certificate of ownership, for registration, and for lien perfection even though they are on the same forms; that in certain instances it is not necessary to apply for a certificate of ownership at all to perfect a lien; that the registration statute provides a delinquency fee for failing to register and this should be the only penalty; and that the repossession statute specifically excludes the lienholder from paying sales tax on repossessed automobiles thereby indicating a legislative intent to avoid burdening lienholders with enforcement of the sales tax.

Both the original and the revised instructions issued by the Director of Revenue concerning perfection of motor vehicle liens provided that the delivery of the "lien perfection copy" and compliance with the other requirements is sufficient to perfect the lien. Subsequently the Missouri Attorney General issued an opinion saying that all copies of the application form were necessary to perfect a lien, and then reversed himself in a revised opinion and held that only the "lien perfection copy" was necessary. In spite of this, the referee in an earlier bankruptcy case involving a used car (for which a certificate of title had been issued) suggested by dictum that all prerequisites for obtaining title were necessary for perfection; the referee in the noted case involving a new car (no certificate of title) actually held that all prerequisites for obtaining title, including submission of the original application form, were necessary for perfection.

respects and which must in any event contain the information about the security agreement specifically referred to.

He goes on to say, however, that the date of perfection is not affected by any administrative delay between the time of delivery of the application and the issuance of the certificate. 1 Gilmore, op. cit. supra note 8, at 567.


21. Brief for Appellee, supra note 20, at 27. E.g., where a motor vehicle subject to a perfected lien in another state is brought into Missouri. See § 301.600.3(4), RSMo 1965 Supp. See also In re Jackson, 268 F.Supp. 434, 442 (E.D. Mo. 1967).


27. In re O'Neal, Bankruptcy No. 65-B-1748, E.D. Mo., July 26, 1966; In re Jackson, Bankruptcy No. 66B-1029, E.D. Mo., Dec. 1, 1966. In the O'Neal case...
district court reversed the referee in the noted case and held that only the "lien perfection copy" was needed.  

Both sides cited rules of statutory construction in their favor, but these rules can be found to support almost any position. There is general agreement that the Director of Revenue does not have authority to dictate by his instructions what is necessary to perfect a lien. The Kansas City Court of Appeals said that while opinions of the Attorney General are entitled to great weight and should be followed by state officials, "unless and until a proper court rules otherwise, such opinions do not become the law of the land." Since these approaches are inconclusive, the consequences of each contention should be inspected.

If the trustee's contention is upheld, the lienholder becomes responsible for enforcing payment of the sales tax. The purchaser, not the lienholder, is responsible for the sales tax on motor vehicles. The certificate of ownership will not be issued until there is proof of payment of the sales tax. Thus if all prerequisites for a certificate of ownership must be met before a lien is perfected, the lienholder must insure that the sales tax is paid. Further, if the lienholder does not pay the sales tax himself from the proceeds of the loan, he may incur a delay while waiting for the purchaser to pay during which another person might become a lien creditor. Financial institutions are opposed to this interpretation because they will suffer current losses from unperfected liens and increased operating expenses in the future. But aside from their opposition, a system relying on lienholders to enforce payment of the sales tax is incomplete. Liens are not created with all sales of

the dealer failed to deliver the certificate of ownership (which existed because the case involved a used car) to the Director of Revenue as required by § 301.600.2, RSMo 1965 Supp. Accordingly the referee's discussion of what constitutes an "application" is dictum. The dealer had failed to submit the certificate of ownership because the Director had omitted from his instructions the requirement of delivery of the existing certificate of title. Department of Revenue, "Instructions to Perfect a Lien on Motor Vehicle," July 1, 1965. Apparently no petition for review of the referee's order was filed in the O'Neal case.

29. See e.g., In re Jackson, Bankruptcy No. 66B-1029, E.D. Mo., Dec. 1, 1966, at 7; In re Jackson, supra note 28, at 441; Brief for Appellant, p. 9, Zuke v. Mercantile Trust Co. Nat'l. Ass'n., No. 18,841 (8th Cir. 1967); Brief for Appellee, p. 12, Zuke v. Mercantile Trust Co. Nat'l. Ass'n., No. 18,841 (8th Cir. 1967).
32. § 144.070, RSMo 1965 Supp. There are comparable provisions for the use tax. See § 144.440, RSMo 1965 Supp.
33. §144.070, RSMo 1965 Supp.
34. "Lien creditor" is defined in § 400.9-301(3), RSMo 1965 Supp.
35. The number of lien perfection applications held in the suspense file by the Director of Revenue varies between 10,000 and 25,000. Since debtors who avoid paying the sales tax are probably less reliable credit risks than the average automobile owner, a higher percentage of defaults can be anticipated in connection with the 10,000 to 25,000 unperfected liens than with a similar number of random motor vehicle loans. Brief for Missouri Bankers Ass'n. as Amicus Curiae, p. 2, Zuke v. Mercantile Trust Co. Nat'l. Ass'n., No. 18,841 (8th Cir. 1967).
motor vehicles, for example cash sales and trades. A possible solution providing a comprehensive system of enforcement and avoiding the problem of forcing the purchaser to take the initiative is to require the seller (instead of the lienholder) to collect the sales tax as part of the purchase price.36

The bank in the noted case contended that the lien perfection statute established a system of notice filing similar to that under the UCC37 whereas the trustee contended that recording the lien on the certificate of title itself is the only means of perfection.38 The purpose of a filing system is to protect the innocent purchaser, subsequent lienholders, and subsequent creditors against "secret" liens. No additional protection is provided by requiring that all prerequisites for a certificate of ownership be met before a lien is perfected.39 Knowledge of the lien can be had when only the "lien perfection copy" is filed by making inquiry of the Director of Revenue. With a new vehicle, no certificate of ownership exists, nor will the Director of Revenue issue a certificate of ownership without recording the liens thereon.40 Since title cannot be transferred nor a second lien incurred without a certificate of ownership and since the lien can be discovered by inquiry,41 there is no way a purchaser, subsequent lienholder or subsequent creditor can be misled by perfection of the lien before title is issued.

To approach the problem from the standpoint of statutory construction or from the opinions of the Attorney General or Director of Revenue leads to an inconclusive result. The effects of the trustee's contentions are undesirable because they create a piecemeal system of sales tax enforcement and because they complicate the lien perfection system without providing any corresponding benefits. Conceding the lien perfection statute is ambiguous, the holding of the noted case is the better solution.

John Z. Williams

36. To have the seller collect the sales tax on motor vehicles would require a revision of § 144.070, RSMo 1965 Supp. and § 144.440, RSMo 1965 Supp. Apparently the legislature chose to collect from the purchaser instead of the seller because of the instability of many used car dealers after World War II. Brief for Appellee, p. 17, Zuke v. Mercantile Trust Co. Nat'l. Ass'n., No. 18,841 (8th Cir. 1967). Query whether this situation still exists.
40. § 301.190, RSMo 1965 Supp.
41. § 301.210, RSMo 1959; § 301.620, RSMo 1965 Supp. See also Taylor, Title to Used Automobiles in Missouri, 28 Mo. L. Rev. 121 (1963); Schiller, Insurance—Insurable Interest—Effect of Failing to Comply with Motor Vehicle Registration Act, 4 Mo. L. Rev. 212 (1939); Note, 1958 Wash. U.L.Q. 304. For a comparison of certificate of title acts see 1 GILMORE, op. cit. supra note 8, § 20; Townsend, The Case of the Mysterious Accessory, 16 LAW & CONTEMP. PROB. 197 (1951); Comments, 47 CALIF. L. Rev. 543 (1959), 70 YALE L.J. 995 (1961).
INTERNAL REVENUE—SECTION 119—MEANING OF "BUSINESS PREMISES OF THE EMPLOYER"

Commissioner v. Anderson

Charles N. Anderson, manager of a motel in Columbus, Ohio, lived with his family in a house which was owned by the motel corporation and provided for Anderson and his family without charge. The house was not located on the motel property, but was described as being "2 short blocks" away. Anderson was on twenty-four hour call, seven days a week. In his tax return for the years 1957 to 1960 he excluded the rental value of the house from his gross income. This was challenged by the Commissioner on the ground that the lodging had not been furnished "on the business premises of the employer" as required by section 119 of the Internal Revenue Code of 1954.

The Tax Court took a liberal approach in defining "business premises of the employer," and held that the exclusion was proper. The court reasoned that since the house was only "two short blocks" from the motel, it should be considered "on the business premises of the employer" for the purposes of section 119. The Sixth Circuit Court of Appeals reversed this decision and the United States Supreme Court denied certiorari.

The Sixth Circuit held that the "business premises of the employer" includes those places where the employee performs a significant portion of his duties and those premises where the employer conducts a significant portion of his business. In applying this test, the court found that Anderson did not perform significant duties at his place of lodging and that his employer did not conduct any of his business there. In a dissenting opinion Judge McAllister argued that the court's definition was not wholly supported by past case law and congressional intent, and that Anderson actually satisfied the test of the majority in that he performed significant duties at the house. He also felt that cases adopting a more liberal approach in defining "business premises of the employer" were correctly decided and should be followed.

Prior to the 1954 Code there was no statutory authorization for the exclusion of the value of meals and lodging from gross income. Such exclusion, which soon became popularly known as "the convenience of the employer rule," had its beginnings in 1919, when in O.D. 265 the Bureau ruled that the board and lodging of seamen were furnished for the convenience of the employer, and were therefore

1. 371 F.2d 59 (6th Cir. 1966); cert. denied 387 U.S. 906 (1967).
3. Ibid.
not includible in the gross income of the seamen. In 1920 the Regulations were amended to afford recognition to this rule,8 and it was thereafter adopted by the courts.9 As the law developed, two tests for exclusion emerged: (1) the meals and lodging could not be intended as compensation, and (2) they had to be furnished for the convenience of the employer. Although there was considerable disagreement concerning which of these was the primary test, at no time was there ever a requirement that meals and lodging be furnished on the business premises of the employer in order to be subject to exclusion.

Section 119, Int. Rev. Code of 1954 excludes from gross income the value of meals and lodging furnished to an employee under certain circumstances. Among the requirements for exclusion is the provision that the meals and lodging must be furnished “on the business premises of the employer.”10

Section 119 originated in the House of Representatives and, as first proposed, required that the meals or lodging be furnished “at the place of employment”11 rather than “on the business premises of the employer.” The latter phrasing was added by the Senate and eventually found its way into the Code. It was noted in the Conference Report on the bill that “the term ‘business premises of the employer’ is intended, in general, to have the same effect as the term ‘place of employment’ in the House Bill.”12 The Regulations also state that the term “business premises of the employer” means “... the place of employment of the employee.”13

Although the Supreme Court has not yet spoken on this subject, lower courts have, and several principles of construction have emerged. One tendency is to define the phrase in geographical terms. In Gordon S. Dole14 employees of a woolen mill were required to live in company-owned houses one mile from the mill. The Tax Court held that the rental value of these houses could not be excluded from gross income, and Judge Raum, in a concurring opinion, explained that this was because the houses were not on the “business premises of the employer.” He emphasized that Congress, in enacting section 119, used the word “on” and not a word such as “near” or “close by.” The First Circuit Court of Appeals affirmed this decision in a per curiam opinion, based solely on this concurring opinion of Judge Raum,15 which had specifically disapproved the approach employed by the Tax Court in Anderson.

Boykin v. Commissioner,16 from the Eighth Circuit, also seems to rest on the geographical approach. In that case a physician was employed by a hospital and was furnished lodging in a separate building on the hospital grounds; he performed

10. It is uncertain why Congress added this new requirement rather than merely codifying the prior law. The House and Senate Reports give no reasons and neither the courts nor the writers have supplied one.
15. Dole v. Commissioner, 351 F.2d 308 (1st Cir. 1965).
16. 260 F.2d 249 (8th Cir. 1958).
none of his duties at his place of lodging, but performed all duties at the hospital. The court, without discussion, concluded that the lodging was furnished on the business premises of the employer.

There are, however, cases which have adopted a more liberal approach in applying section 119. United States v. Barrett involved highway patrolmen who ate meals in restaurants near the highways which they patrolled. The Fifth Circuit allowed them to exclude the value of these meals from gross income. The court found that the business premises of their employer extended to all roads and highways in the state, and that restaurants adjacent to these highways were to be considered as "on the business premises of the employer" for the purpose of section 119. The Eighth Circuit reached a similar conclusion in United States v. Morelan.

The Court of Claims has held that the "business premises of the employer" include any place where the employee performs his duties. Therefore, the court decided that a home which the Junior Chamber of Commerce furnished its president was a part of the "business premises of the employer," since he held business meetings and did extensive business entertaining there. In reaching this decision, the Court of Claims cited the Tax Court decision in Anderson with approval.

The majority opinion in the present case seems to be an attempt to formulate a more precise definition of the term "business premises of the employer" than has existed in the past. The Sixth Circuit's definition is not as restrictive as the geographical approach and explicitly rejects the liberal approach. It is probably broad enough to encompass the cases which rest on both approaches, with the exception of Boykin. In Dole the employees performed no duties at their place of lodging and their employer conducted none of his business there. In Barnett, Morelan, and Junior Chamber of Commerce, the taxpayers did in fact perform some of their duties at the place where they ate or lodged, and if it can be said that they performed a "significant" portion of their duties there, then the test of the court is met. In Boykin, the employee performed none of his duties at his place of lodging, and the employer conducted none of his business there.

The main difficulty with the Anderson approach, however, is that it will be difficult to apply. It will not be an easy task for a court to decide what is a "significant" portion of one's duties or business. Even in the present case the majority and the dissent could not agree on whether by being on twenty-four hour call and receiving complaints and entertaining motel guests at his home Anderson was performing a "significant" portion of his duties there; and if the Sixth Circuit definition had been applied in either Barnett, Morelan, or Junior Chamber of Commerce, a similar divergence of opinion would have been likely. Although the court indicates that the determination of what is a "significant" portion of duties or business is a question of law, the opinion is not entirely clear on this point. Thus, the

17. 321 F. 2d 911 (5th Cir. 1963).
18. 356 F. 2d 199 (8th Cir. 1966).
opinion does not really solve the problem of interpretation presented by section 119; it merely offers a third approach which is no better than the two rejected, and perhaps not as good. For this reason the case probably will, and should, have little effect outside the Sixth Circuit.

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