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Recent Cases

SUBSTANTIATION REQUIREMENTS FOR TRAVEL, ENTERTAINMENT, AND GIFT EXPENSES

William F. Sanford

During 1968 taxpayer Sanford maintained a “diary” in which he recorded his business entertainment expenses, mostly luncheons and dinners, as an outside salesman. Sanford’s “diary” was a desk calendar, upon which he entered the amount of individual expenditures (generally in excess of $25), the date, the restaurant, and persons entertained. However, the taxpayer either failed to obtain or did not retain supporting receipts or other documentary evidence. Since these expenses were not reimbursed by his employer, the taxpayer claimed a deduction from gross income in the amount of $5,067.17. The Commissioner disallowed all expenditures of $25 or more because the taxpayer failed to substantiate his expenses as required by section 274 (d) of the Internal Revenue Code of 1954 and the accompanying regulations. The tax court sustained the Commissioner’s disallowance, holding that on these facts, a “diary”, standing alone, does not meet the “adequate records” or “sufficient evidence” requirement of section 274 (d), and that the regulations supporting the Commissioner’s position are valid.

Under the Cohan rule, which prevailed prior to the enactment of section 274 (d), widespread abuses developed in the use of expense accounts, especially those related to entertainment expenses. Under the Cohan rule, if the taxpayer could establish the making of the expenditure but could not establish the amount, a court was required to approximate the amount and allow the deduction. These lax requirements encouraged taxpayers to report excessive amounts in expenses so that an approximation would at least be equal to, if not greater than, the amount actually expended. Congress sought to put an end to this abuse by amending the code to require better records of expenses for travel, entertainment, and gifts.

The Revenue Act of 1962 added section 274 to the Internal Revenue Code of 1954 and imposed a number of limitations on the allowance of these types of deductions. The most controversial of these limitations is

1. 50 T.C. 823 (1968).
3. This “rule” derives its name from the case of Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930).
5. Ibid.
7. It is important to note that the taxpayer must still satisfy the “ordinary and necessary” requirement of a business expense under § 274. Section 274 acts as a disallowance section in that it disallows an expense otherwise deductible under another section of the code. Robert H. Alter, 50 T.C. 833 (1968).
section 274(d)\textsuperscript{8} which clearly overrules the Cohan rule with respect to travel, entertainment, and gift expenses.\textsuperscript{9} In order for the taxpayer to deduct entertainment expenses, he must substantiate, by adequate records or sufficient evidence, specific elements of the expenditure.\textsuperscript{10} These elements are: (1) cost, (2) time and place of the expense, (3) business purpose of the expense, and (4) business relationship with the person entertained.\textsuperscript{11} The substantiation requirements for travel, entertainment facilities, and gifts are similar. The importance of establishing each element was emphasized in Henry E. Earle.\textsuperscript{12} In that decision the taxpayer retained bills and receipts but failed to keep his own records as to the business purpose of the expenditures. The tax court held that a failure to substantiate all the elements as required by section 274(d), in spite of the documentary evidence showing actual expenditure, was fatal to the deduction.\textsuperscript{13}

Although the statute is clear as to what the taxpayer is to substantiate, it does not specify how the taxpayer is to substantiate.\textsuperscript{14} However, the regulations set down definite rules for substantiation and clearly state what is meant by "adequate records" and "sufficient evidence".\textsuperscript{15} In order to meet the adequate records requirement for an expense, the taxpayer must record each element in a "diary", account book, or similar record.\textsuperscript{16} Further, if the expense is $25 or more or if it is for lodging away from home, then in addition to the personal record, the taxpayer must furnish documentary evidence such as receipts or paid bills.

In keeping a proper diary, account book, etc., it is necessary that entries be made contemporaneously with the expenditure or as near in time as possible.\textsuperscript{17} The Treasury recognizes that contemporaneous entries into a record book have a much higher degree of credibility than entries made subsequent to the expenditure.\textsuperscript{18} In Sanford the taxpayer's "diary" showed an entertainment expense incurred in Chicago, while an expense voucher turned in to Sanford's employer showed that the taxpayer was in New York at the same time. The court said it was taking the view most charitable to the taxpayer when it noted that the discrepancy might be accounted for by the taxpayer's inaccurate recall resulting from the fact that he normally made entries in his diary "some days" after the expenses were actually

\textsuperscript{8} Emmanuel and Lipoff, Travel and Entertainment: The New World of Section 274, 18 Tax L. Rev. 487, 516 (1963).
\textsuperscript{10} Int. Rev. Code of 1954, § 274(d).
\textsuperscript{11} Ibid.
\textsuperscript{13} Id. at 152.
\textsuperscript{14} Emmanuel and Lipoff, Travel and Entertainment: The New World of Section 274, 18 Tax L. Rev. 487, 516 (1963).
\textsuperscript{15} Treas. Reg. § 1.274-5(c)(2)(i) (1962). Express authority was given by Congress to the Secretary to prescribe regulations. See Int. Rev. Code of 1954, § 274(b).
\textsuperscript{18} Treas. Reg. § 1.274-5(c)(1) (1962).
incurred. Nevertheless, the “dairy” in Sanford was accepted by the Commissioner as sufficient. The taxpayer lost in Sanford because he failed to meet the second requirement of substantiation by documentary evidence in the form of receipts or paid bills. These, in combination with the taxpayer’s own records, must establish each element of the expenditure in order to satisfy the adequate records requirement of the statute. The taxpayer’s records alone, being self-serving in nature, will no longer be sufficient as a basis for claiming a deduction.

It is important to note that the statute provides an alternative to the adequate records requirement. In place of the documentary evidence necessary for adequate records, the taxpayer may satisfy the substantiation requirement by producing sufficient evidence to corroborate his own detailed contemporaneous record relating to the elements of an expenditure. The corroborative evidence necessary to satisfy the “sufficient evidence” requirement has a variable meaning depending on what element of the expenditure is to be established. Direct evidence, such as oral testimony or a written statement by persons entertained, is sufficient corroboration to establish cost, time, place, or date of the expenditure. However, circumstantial evidence is all that is necessary to corroborate the business purpose and business relationship elements of an expenditure. Absent the special circumstances set forth in the regulations, a taxpayer who fails to fulfill the “adequate records” or “sufficient evidence” requirement will have the expenditure he claims as a deduction disallowed in full.

Prior to Sanford it was widely believed that a well-kept personal record

20. By the last sentence of § 274(d), Congress explicitly authorized the Treasury to set a minimum amount below which the taxpayer need not corroborate his own records. In accordance with this authority, the Treasury has set this figure at $25. It is therefore important to the taxpayer to know how the $25 minimum is figured for deduction purposes. Generally, each separate payment is considered an expenditure in the $25 minimum. However, repetitive payments incurred as part of a single event will be considered as an expenditure. For example, the total cost, rather than the cost of each round of drinks at a cocktail lounge, is used to figure the $25 minimum. See Treas. Reg. § 1.274-5(c)(6)(i)(a)&(b) (1962).
28. Treas. Reg. § 1.274-5(c)(4),(5). The “special circumstances” found in these regulations are: (1) the inherent nature of the expenditure making it impossible for the taxpayer to obtain documentary evidence; (2) loss of records through no fault of the taxpayer.
would be sufficient to substantiate expenses, in spite of the regulations.\textsuperscript{30} Now, however, the strict approach to substantiation of travel, entertainment, and gift expenses that Congress intended in section 274 (d)\textsuperscript{31} and that is exemplified in the Treasury Regulations\textsuperscript{32} has clearly been adopted by the tax court in the \textit{Sanford} decision. Thus, it is clear that the substantiation provisions of section 274 (d) require documentary or other sufficient evidence in addition to the taxpayer's personal record if he claims travel, entertainment, and gift expenses as deductions.\textsuperscript{33}

\textbf{REPLEVIN—DEFENSE OF TITLE IN A THIRD PERSON}

\textit{First National Bank of Clayton v. Trimco Metal Products Co.}\textsuperscript{1}

A replevin action was instituted by First National Bank of Clayton against Trimco Metal Products Co. in circuit court. Trimco had executed a promissory note to the bank which was secured by a chattel mortgage on certain equipment with right of possession upon default. Trimco defaulted in payment and the bank asserted its claim to the mortgaged equipment. Trimco denied that it was the owner of the equipment and averred that the bank had no right to possession because title to the property was in a third person and the bank had knowledge of this fact when the note and mortgage were executed. On appeal, the Missouri Supreme Court, in holding for plaintiff, stated that even though plaintiff did not have legal title, it would not be precluded from recovering from a defendant with an inferior claim, if it could show a special property or interest in the equipment. The execution of the chattel mortgage and note by Trimco created such an interest, and gave plaintiff a right in the equipment superior to that of Trimco. The court added, however, that this decision in no way impaired the third person's rights against either the bank or Trimco.

To understand fully the propriety of the plea of title in a stranger or the \textit{jus tertii} defense asserted by defendant Trimco, it is necessary to consider its use and scope at common law. At common law the doctrine of \textit{jus tertii} was not considered a valid defense to most forms of action. For example, title in a third person has never been a defense in a suit for tres-

\begin{verbatim}
30. Sanford's lawyer advised him that documentary evidence was not needed to support his "diary". The court indicates the lawyer's advice was based on the conclusion that the regulations were invalid. \textit{Id.} at 830.
32. Treas. Reg. § 1.274-5 (c). The court stated its position toward the regulations in this manner: "Far from being contrary to the will of Congress, we think the regulations under consideration reflect a faithful observance of the Congressional intent." \textit{William F. Sanford}, 50 T.C. 823, 832 (1968).

1. \textit{429 S.W.2d} 276 (Mo. 1968).
\end{verbatim}
pass to either personal\(^2\) or real\(^3\) property. If \(D\) trespasses on land which is in \(P\)'s possession, \(D\) cannot defeat the action by showing that \(T\) owns the land and that \(T\) could have compelled \(P\) to vacate. However, when \(D\) has not merely trespassed but has also deprived \(P\) of possession, there is a split of authority as to the validity of the *jus tertii* defense in a subsequent action in ejectment.\(^4\) In *trover* the defense of title in a third person is not valid in most jurisdictions\(^6\) whether plaintiff gained possession under a void transfer\(^7\) or acquired possession wrongfully.\(^8\) In an action of *detinue,*\(^9\) where plaintiff has had prior possession, the defendant must connect himself with the outstanding title in order to assert the *jus tertii* defense.\(^10\) In trespass on the case,\(^11\) the *jus tertii* defense has not been valid since the 1902 case of *The Winkfield.*\(^12\) In *The Winkfield* a bailee was permitted to recover full damages from a third party tortfeasor notwithstanding title in the bailor. Thus, with the possible exception of ejectment, none of the


\(^3\) Hughes v. Graves, 39 Vt. 359 (1867).

\(^4\) Adams v. Orange Realty Sales, Inc., 194 Fla. 175, 183 So. 621 (1938); Bertha v. Smith, 26 Tenn. App. 619, 175 S.W.2d 41 (1943), held that a defendant in possession under color of title or right may prevail by showing title in a third person, notwithstanding that the third person is not a party to the action, nor connected with defendant. In Urschel v. Davis, 125 Kan. 169, 263 P. 1074 (1928) the defense of title in a third person was not permitted in an ejectment action.

However, even in those jurisdictions which permit the *jus tertii* defense to defeat an ejectment action, three exceptions are recognized. In these cases the defendant will have to connect himself with the outstanding title in order to defeat plaintiff's action: a. where defendant has entered into possession under plaintiff. Hall v. Dallas Joint-Stock Land Bank of Dallas, 95 S.W.2d 200 (Tex. Civ. App. 1936), reh. denied; b. where both parties claim title from a common source. Stockton v. Murray, 183 Tenn. App. 371, 157 S.W.2d 859 (1941); c. where defendant is a mere trespasser. Randolph v. Hinck, 288 Ill. 99, 123 N.E. 273 (1919); Walsh v. Tipton, 183 Tenn. 28, 190 S.W.2d 294 (1945).

\(^5\) *Trover* is defined as: "A remedy to recover the value of personal chattels wrongfully converted by another to his own use." Black's Law Dictionary 1679 (4th ed. 1951).

\(^6\) Buschow Lumber Co. v. Hines, 206 Mo. App. 681, 229 S.W. 451 (K.C. Ct. App. 1921); Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S.W. 445 (1903). The minority view is set out in Barwick v. Barwick, 33 N.C. 80 (1850), which held that title in a third person is a valid defense to trover when the plaintiff only has had prior possession.

\(^7\) Bustin v. Craven, 57 N.M. 724, 263 P.2d 392 (1953).

\(^8\) Anderson v. Gouldberg, 51 Minn. 294, 53 N.W. 656 (1892). But see Turley v. Tucker, 6 Mo. 583 (1840), which held that a trespasser or wrongdoer could not maintain trover against another trespasser or wrongdoer.

\(^9\) Detinue is defined as: "A form of action which lies for the recovery, *in specie,* of personal chattels from one who acquired possession of them lawfully, but retains it without right, together with damages for the detention." Black's Law Dictionary 537 (4th ed. 1951).

\(^10\) Sims v. Boynton, 32 Ala. 353 (1858).

\(^11\) Trespass on the case is defined as: "The form of action, at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force, or which is the indirect or secondary consequence of defendant's act." Black's Law Dictionary 1675 (4th ed. 1951).

\(^12\) [1902] All E. R. 346.
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common law writs discussed above have permitted the defense of title in a third person.

One action at common law, that of replevin, could be defeated by a showing of title in a third person. The reason replevin differed from the other writs in this respect, is due to its origin and historical development. Replevin was introduced at the end of the 12th Century as a special remedy for an unlawful distress, where trespass would not lie because the distrainor (person who took the goods) neither claimed nor acquired the necessary interest in them, but conceded that the title remained in the distrainee (person from whom the goods were taken). For example, a landlord who claimed rent in arrears, would take some cattle of the tenant in order to satisfy the debt due him. In order to determine the lawfulness of the taking the tenant would apply for a writ of replevin. At trial, the only issue was whether there was a debt owing from the plaintiff to the defendant. If there was a debt the plaintiff could keep the cattle. If not, the tenant could have his cattle returned to him. If the defendant asserted title to the property in himself or a third person, the writ was defeated and the tenant would have to bring trespass. This was due to the fact that if defendant claimed title in himself or another, the taking amounted to disseisin and not simply a distress. Hence, replevin was the wrong remedy.

The action of replevin, in effect, was a determination of whether a debt was owing from the plaintiff to the defendant. This was the sole issue to be litigated. Because of the limited scope of replevin, the defense of title in a third person was permitted. As replevin developed in England, however, it was expanded until it was used to recover the possession of goods whenever there was any wrongful taking. It was no longer limited to the issue of whether a debt existed. Yet, when there was not a wrongful taking, but simply a wrongful detention, replevin was still unavailable. In such a situation, detinue was the proper remedy. The scope of replevin was expanded even further in the United States to include not only a wrongful taking but also a wrongful detention. In other words, the separate common law actions of replevin and detinue were combined into one action. In 1849, the writs of replevin and detinue were abolished by

13. A distress is defined as: "The taking a personal chattel out of the possession of a wrongdoer into the custody of the party injured, to procure a satisfaction for a wrong committed; as for non payment of rent . . . ." BLACK'S LAW DICTIONARY 561 (4th ed. 1951).
14. III W. HOLDSWORTH, HISTORY OF ENGLISH LAW, 284 (3d ed. rewritten 1927) [hereinafter cited as III HOLDSWORTH].
15. A classic English case demonstrating the defense is Wildman v. North, 83 Eng. Rep. 465 (K.B. 1674), also reported as Wildman v. Norton, 86 Eng. Rep. 167 (K. B. 1674). In the second report, the case is stated as containing a plea by the defendant of property in himself. In the first report the plea is of property in a third person. Apparently no distinction was drawn between these two pleas.
16. III HOLDSWORTH 284.
19. T. PLUCKNETT, supra note 18, at 369.
statute in Missouri, but the substantive law covering these two actions was incorporated into a "Claim and Delivery Statute."\(^2\)

Owing to the expansion of the action of replevin, the reason which originally justified the defense of title in a third party, i.e., to determine whether plaintiff's title would take the case outside the scope of replevin and place it within the scope of trespass, no longer exists. Replevin is no longer concerned solely with the debt owing from the plaintiff to the defendant, but it depends, as in the case of trespass, upon the relative possessory rights of the parties. The party who can prove a superior possessory interest in the property should be allowed to prevail. Otherwise, a wrongdoing defendant, who cannot justify his acts upon his own right, would be able to secure immunity because the plaintiff's claim, though better than his own, may be inferior to some third party's. This reasoning is followed by most courts in this country.\(^2\) Yet, some courts persist in following the anachronistic doctrine of permitting title in a third person to be a valid defense.\(^2\) These courts hold that regardless of the possessory rights between the parties, the defendant may defeat the replevin by proving that some third party has a right to possession superior either to himself or to the plaintiff.

The early Missouri cases which considered the \textit{jus tertii} defense in a replevin action seemed to adopt the arbitrary approach of the early common law. In \textit{Jackson v. City of Columbia},\(^2\) the city seized a carload of whiskey from Jackson, a bailee of the owner. In a replevin action by Jackson against the city for return of the whiskey, the city was permitted to defend by showing that title to the whiskey was in a third person.\(^2\) In the earlier case of \textit{Baker v. Campbell},\(^2\) a replevin action for timber wrongfully cut

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21. The first statutes covering claim and delivery of personal property after the abolition of the old forms of action were Mo. Laws 1849, at 82, §§ 1-9.
22. See Annot., 25 A. & E. Cas. 20 (1912).
23. See, e.g., Boyd v. White Motor Credit Co., 208 So.2d 757 (Miss. 1968); Marlin v. Merrill, 25 Tenn. App. 328, 156 S.W.2d 814 (1941); State ex rel. Hayashi v. Ronald, 134 Wash. 152, 235 P. 21 (1925); Hitch v. Riggin, 26 Del. 84, 80 A. 975 (1911); Fuller v. Brownell, 48 Neb. 145, 67 N.W. 6 (1896).

Allowing the defense of title in a third person also still seems to be the law in England. Presgrave v. Saunders, 92 Eng. Rep. 156 (1703); Clarke v. Davies, 129 Eng. Rep. 29 (1816). The English court, in Butcher v. Porter, 91 Eng. Rep. 87 (K.B. 1692), indicated its disapproval of the defense. The court held that title in a third person was a valid defense; however, an editorial note following the case stated:

Though this case appears to be established law, it does not seem founded on very accurate reasoning. For the plaintiff, being in possession of the goods at the time of the caption by the defendant, may be considered as having a right against all persons but the actual owner; and it has not much semblance of justice that A should seize upon goods which are in the possession of B and justify that seizure by a title in a perfect stranger.

25. It should be pointed out that Jackson was in illegal possession of the whiskey in the city of Columbia, and the courts are not apt to aid a person in violating the law. Although the proper result was reached, the court should not have used the doctrine of \textit{jus tertii} to justify its decision.
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was defeated by showing that the title and right to possession were not in the plaintiff, but in his wife. This defense was allowed even though plaintiff was in possession of the premises at the time of the cutting.27

The Missouri cases gradually departed from the early common law approach, and today the rule, as demonstrated in Trimco, is that the defense of title in a third person will not defeat an action in replevin.28 The first indication of a departure from the former rule was in Campbell v. Brown,29 a case decided ten years prior to Jackson. In Brown, the plaintiff occupied a newly formed island in the Mississippi River between Missouri and Tennessee which had not been included in any federal or state survey. Plaintiff cultivated it and erected several buildings. The defendant tortiously removed a barge-load of sand from the island, whereupon the plaintiff sued in replevin for its return or the value thereof. The court held for plaintiff, basing its decision on the plaintiff's prior possession of the island. Although this case did not involve the defense of title in a third person, it did establish precedent for the proposition that mere prior possession is sufficient to sustain an action in replevin, thereby permitting title to be in someone other than the plaintiff. Here, the court simply looked at the relative rights of the plaintiff and defendant. The Brown decision, incidentally, was never mentioned in Jackson.31

Rankin v. Wyatt,32 a 1934 case, cited as the controlling authority in Trimco, established the rule in Missouri that a replevin action cannot be defeated by setting up title in a third person. The Rankin Court held that one rightfully in possession of an automobile, but without title because of failure to obtain an assignment of the title certificate as required by statute, could maintain replevin against a trespasser. In this connection, the court stated:

The fact that a third person may have some interest in the property will not preclude replevin by one having the right to possession as against the defendant sued. As the right of a defendant to retain the property descends the scale of relative rights of

27. In Campbell, there seems to have been little justification for allowing the defense, since the proper result was not reached as it had been in Jackson. See note 26, supra.

A number of other Missouri cases reiterate the same doctrine: American Metal Co. v. Daugherty, 204 Mo. 71, 102 S.W. 538 (1907); Draper v. Farris, 56 Mo. App. 417 (St. L. Ct. App. 1894); Stone v. McNealy, 59 Mo. App. 396 (K.C. Ct. App. 1894); Gartside v. Nixon, 45 Mo. 138 (1868); Gray v. Parker, 38 Mo. 160 (1866); Broadwater v. Darne, 10 Mo. 277 (1847). However, these cases which held that bare possession is not sufficient to support an action in replevin did not directly involve the defense of title in a third person. See generally Annot., 150 A.L.R. 163, 193 (1944).

28. Where a chattel is owned by several persons, the owner of an undivided interest cannot maintain replevin for the chattel without joining the other owners as plaintiffs. Thus, the defendant in such a suit could use the jus tertii defense if the other owners were not joined. See 17 Mo. L. Rev. 107, 109 (1952).


30. Ibid.


32. 335 Mo. 628, 73 S.W.2d 764 (1934). Accord, Pearl v. Interstate Sec. Co., 357 Mo. 160, 206 S.W.2d 975 (1947).
possession to the vanishing point of a wrongful detention by a trespasser, the interest sufficient to sustain plaintiff's action in replevin diminishes. 33

In conclusion, it is submitted that those jurisdictions which have not done so, should set aside the *jus tertii* defense as an anachronism that is no longer useful, and follow the approach demonstrated by *Rankin* and *Trimco* which does not permit a defendant to defeat a replevin action by setting up title in a third person. The reason which once justified the *jus tertii* defense in replevin no longer exists, and there is no reason why replevin should be treated differently than common law trespass, trover, or detinue. The courts should focus on the relative rights of the parties to the litigation and not upon the rights of a third party stranger.

IRWIN E. BLOND

VICARIOUS LIABILITY OF PHYSICIANS FOR NEGLIGENT TREATMENT BY OTHER PHYSICIANS

*Crump v. Piper*¹

Plaintiff Crump had a history of back trouble, having had one laminectomy at the L4-L5 interspace in 1957, and another such operation in 1959. Still suffering from persistent severe pains in his lower back due, in part, to only partial recovery from the first two operations, Crump consulted Dr. Pucci, a neurosurgeon specializing in the excision of spinal discs, one of the defendants. Plaintiff, in discussing his condition with Dr. Pucci, suggested that if another operation was necessary he thought a fusion of the vertebrae should be done. Dr. Pucci then suggested that Dr. Piper, an orthopedic surgeon specializing in the fusion of vertebrae and co-defendant herein, be called in for consultation in connection with a fusion of the L4 and L5 vertebrae. Dr. Piper was brought into the case and the two doctors agreed, after consultation, that another laminectomy and also a stabilization of the affected area by a fusion of the L4 and L5 vertebrae was required. Plaintiff was advised of this and agreed to the surgery.

The operation was performed in the following manner. Dr. Pucci opened plaintiff's back and proceeded with the laminectomy facet of the operation, removing the offending disc fragment next to the L4 nerve root. When this part of the operation was finished, Dr. Piper took over and proceeded to practice his specialty by effecting a fusion of the L4 and L5 vertebrae. Dr. Piper was Dr. Pucci's assistant during the first (laminectomy) part of the operation performed by Dr. Pucci and Dr. Piper was assisted by Dr. Pucci in the second part of the operation when the vertebrae were fused. However, Dr. Pucci left the operating room to attend to other business

33. *Rankin v. Wyatt*, 335 Mo. 628, 634, 73 S.W.2d 764, 767 (1934).

1. 425 S.W.2d 924 (Mo. 1968).
prior to the time that the wound was closed by Dr. Piper. Cottonoid sponges were not used in the laminectomy portion of the operation performed by Dr. Pucci, but such sponges were used in the fusion portion of the operation performed by Dr. Piper. One of these sponges remained inside plaintiff's back when Dr. Piper closed up the wound.

Plaintiff brought suit against Dr. Pucci and Dr. Piper for $250,000 for damages resulting from failure to remove the cottonoid sponge. Following a jury verdict and a judgment in favor of both defendants, the trial court entered an order granting plaintiff a new trial on the grounds that the verdict was against the weight of the evidence. Defendants appealed and the Missouri Supreme Court affirmed the trial court's order. The specific act of negligence charged was the leaving of the cottonoid sponge in the plaintiff's body. Assuming without deciding that there is sufficient evidence to warrant a finding of primary negligence on the part of Dr. Piper, the discussion in this article will focus solely on the treatment of the case by the supreme court when it found Dr. Pucci vicariously liable for the negligent omissions of Dr. Piper.

The court rejected the contentions of the defendants that they were each independent contractors, each engaged for a specific part of the operation, and that each was responsible for his own negligence in that part of the operation performed by him and no more. The court relied heavily on American Law Reports Annotated, Second Series and American Jurisprudence as the foundation for its decision in the Crump case. These two sources are not completely instructive in solving the problems in Crump, however. Therefore, it is necessary to review the underlying cases which are used to support the statements found therein in an effort to see which, if any, of the promulgated "maxims" apply to the Crump situation.

There are three Missouri decisions on medical malpractice which are helpful in shedding light on the Missouri attitude toward situations analogous to the one in the noted case. In Gross v. Robinson, the court was presented with a situation in which a patient with a fractured rib went to D-1 for X-rays in preparation for a lawsuit. D-1 made several unsuccessful attempts to obtain adequate X-rays when finally, in the presence of the patient, D-1 called D-2 over the telephone, explained the situation and requested D-2 to come over and take the pictures with D-1's machine. D-2 came over, but he too was unsuccessful as were subsequent attempts by D-1. In a suit by the patient against D-1 for being overexposed to the X-ray treat-

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ments, the court talked of the liability of D-1 for D-2's acts. Although finding D-1 primarily negligent on the grounds that continued exposures with knowledge of what D-2 had done amounted to an adoption of D-2's conduct, the court had this to say by way of dictum:

It seems that the relation of master and servant, or principal and agent does not exist between two physician [sic] where one has been sent to treat the patient of the other with the consent of the patient. In such instance the rule of respondeat superior does not apply.

The idea running through these cases is that the rule does not apply to a physician or other professional man who, when employed, acts upon his own initiative and without direction from others.6

Telanus v. Simpson6 was regarded by the court in the Crump case as clearly inapplicable due to the fact that the case involved liability of two doctors who were partners. It is nevertheless significant because it represents an adoption by Missouri of the view that where two doctors are employed on the same case involving an operation, the two of them may agree to divide the services to be performed during the operation according to their best judgment and yet retain their status as independent contractors, each responsible for his own negligence and no more.7

Baird v. National Health Foundation8 was regarded by the court as authoritative in its disposition of the Crump case. In Baird, a hospital had a contract by which it would give people medical services if they were members of the defendant National Health Foundation. Plaintiff was a member of the Foundation and, upon being taken ill, took advantage of the contract which entitled her to employ one of the three defendant doctors as a medical director who alone could furnish her medical services. The defendant director (D-1) was authorized to and did employ two other physicians to assist him (D-2 and D-3). Each of the doctors had the same office and phone number as the Foundation and each was paid by the Foundation. D-1 examined and treated plaintiff when she first came to the Foundation complaining of an illness. She got worse and asked D-1 to make a house call, but D-2 went instead and prescribed a different medicine for her without having examined her first. Plaintiff again got worse and this time D-3 made the house call, examined her and prescribed treatment. Plaintiff ultimately sued the three doctors and the Foundation for negligently failing to discover her condition. The court found the three doctors liable for their neglect of duty to care for the welfare of their patient stressing the facts that they were all employed by the same Foundation for the purpose of treating plaintiff, that they were all associated in the same office and that each had knowledge of what the others had done and was doing. The court found

6. 321 Mo. 724, 12 S.W.2d 920 (1928).
7. Accord, Morey v. Thybo, 199 Fed. 760 (7th Cir. 1912).
that each doctor was negligent, independent of the other and that they were acting concurrently with the result that all were jointly and severally liable for whatever damage plaintiff suffered. The case was apparently cited in the Crump opinion for the proposition that when two or more doctors act concurrently and for a joint purpose that each is liable for the negligent acts and omissions of the other. It is the opinion of this writer, however, that this is an overly broad application of that case and that Baird merely represents the application of the “adoption” doctrine found in Gross v. Robinson, supra.

Missouri has adopted the prevalent attitude that, in most situations, a physician is to be treated as an independent contractor because the nature of his profession is to exercise his best skill and judgment in diagnosing and treating diseases and injuries without being subject to the control of others. As an extension of this rule, it has been held that when one physician refers a patient to another competent physician, the referring physician is not liable for the negligence of the referred physician, absent a partnership, agency, or a master-servant relationship. It is widely recognized by the courts that where there is a medical partnership each physician-member is liable for the negligence of his fellow physician-members.

Liability based on a finding of agency or of a master-servant relationship, however, has generated much confusion. In Gross v. Robinson, for instance, the court said that a physician is not to be regarded as an agent or servant in the usual sense because his profession demands that he be free from the control of those who pay his fees. Yet, in Baird v. National Foundation, the court in its holding that the Foundation was chargeable with the negligent treatment of the plaintiff by the defendant physicians, focused on the facts that the defendant doctors were employed and paid by the defendant Foundation and that they all shared the same office and phone numbers. There was no suggestion, however, that the Foundation exercised control over defendant doctors, nor that the Foundation was negligent in employing them. The liability of the Foundation was based solely on the fact of employment. It thus appears that Missouri will focus on who signs the paycheck in situations involving vicarious liability of an entity (the Foundation) for the negligence of a physician, whereas the focus will be on

11. Stephens v. Williams, 226 Ala. 534, 147 So. 608 (1933); Simmons v. Northern Pac. Ry. Co., 94 Mont. 355, 22 P.2d 609 (1933); Wemsett v. Mount, 134 Ore. 305, 292 P. 93 (1930); See also § 358.130 RSMo 1959. See Graddy v. New York Medical College, 243 N.Y.S. 2d 940 (1963), where two physicians who shared the same office, secretary, professional equipment and office supplies had an agreement whereby each agreed to service the other’s patients in his absence for a shared fee. Held, no partnership and therefore no vicarious liability.
control where a master servant relationship between two physicians is sought as the basis for finding vicarious liability.  

With respect to situations involving an attempt to hold one physician liable for the negligence of another, the general rule is that each are independent contractors, each answerable for his own negligence or the negligence of the other which he observed or, in the exercise of reasonable diligence, should have observed. A careful reading of this statement, however, would disclose that one is only liable for his own negligence. For, if one physician observes another physician being negligent and yet does nothing, then he can be said to have adopted the other's conduct through his own negligence in failing to object. Implicit in the statement is a recognition of a duty on the part of the one physician to object to the negligent acts or omissions of another physician which he observed or, in the exercise of reasonable diligence, should have observed, followed by a breach of that duty. Thus, the question is really one of primary negligence and not of vicarious responsibility, a distinction which many overlook. This becomes all the more apparent when we look to the—"or, in the exercise of reasonable diligence, should have observed"—aspect of the above rule. In the cases which discuss this rule, it is often pointed out that the one physician is not liable for the negligence of the second physician when the negligent act was not done in the presence of the first physician. This indicates that a physician's duty to object to negligence which he should have observed does not exist if he is absent, and inferentially, that this duty does not require him to be present. To be sure, a physician can be held liable for negligently abandoning his patient, but this too presupposes an initial duty on the part of the physician to be present and a breach of that duty. Again, breach of the duty to be present would be primary negligence and not a situation involving vicarious responsibility.

Several courts, in cases involving participation of more than one physician in connection with the patient's case, focus on the contractual relationship between the patient and each of the doctors. An example is *Wiley v. Wharton*, involving a situation in which the plaintiff patient engaged a Dr. Wharton to operate on her, and Dr. Wharton in turn engaged


a Dr. Michaels to administer the anaesthetic. Dr. Michaels, in the absence of
Dr. Wharton, prepared the patient for the operation by administering the
anaesthetic and while doing so negligently broke a needle, leaving it im-
bedded in the patient's spine. In holding that Dr. Wharton was not re-
ponsible for Dr. Michael's negligence, the court said:

Dr. Wharton and the plaintiff entered originally into a consensual contract. At the time, the parties understood that Dr. Wharton was not to administer the anaesthetic but was to perform the abdominal operation, Dr. Wharton suggested that Dr. Michaels be engaged. No objection was interposed by the plaintiff. The plaintiff accepted the services of Dr. Michaels, and although Dr. Wharton actually engaged Dr. Michaels, nevertheless there was created between the plaintiff and Dr. Michaels a separate con-
tract by implication. Under these circumstances each doctor was engaged to perform his separate and distinct work, independent of the other.21

Thus we have the idea that where two physicians are involved in the case, it does not matter how the second physician came into the case, whether by being contracted by the patient independent of the first physician or whether he is brought in by the second physician. What does matter is that the patient understands that each physician is to perform separate and distinct work, and that the patient consents to this arrangement.22 Moreover, consent may either be expressed or implied by the circumstances.23 As a by-product of this approach, there are holdings that when a physician merely arranges for an operation by another physician and lends casual assistance at the operation, he is not jointly liable for the negligence of the operating physician absent some relationship of partnership or employment.24

The law becomes very confused, however, when one encounters state-
ments in the cases to the effect that there is joint liability when negligently inflicted damage results from an operation which is actually performed by two doctors or when two doctors act in concert.25 Here the dividing line between two doctors acting independently and two doctors acting jointly or in concert seems to depend on whether the direction and control of the operations are in one man.26 If so, there will be no joint or concerted per-

formance of the operation. The mere fact that a physician assisted in the operation is not enough to render him jointly liable.

_Crump v. Piper_ is the first case which has applied the above principles to the modern practice of specialization in various areas of surgical treatments. As mentioned previously, this case involves the performance of two operations: a laminectomy and a fusion of vertebrae, each part being performed by a specialist in the appropriate field, both specialties being performed separately but being combined into one operation. The court was not without guidance, however, for there are decisions which at least indicate that where one physician calls in a specialist, he is not liable for the latter's negligence even if he assists the specialist, at least in the absence of concerted action. Nevertheless, the _Crump_ court said:

[It] reasonably may be inferred from the evidence that defendants were employed jointly not independently, to treat plaintiff jointly for the relief of his condition, according to their best judgment. They diagnosed his condition together and reached the same conclusion. They both recommended a laminectomy and fusion of vertebrae in one operation. Although each, in serving with the other, performed that part of the surgery for which his talents particularly qualified him. . . .

We hold that under the facts of this case the two defendants were not independent contractors. . . .

Moreover, the fact that Dr. Pucci had left the operating room and was not present when the negligent omission of Dr. Piper occurred did not relieve Dr. Pucci of vicarious liability.

What, then, is the current status of the Missouri law on medical malpractice based on the concept of vicarious liability? The court did not hold that Dr. Pucci was under a duty to remain in the operating room until Dr. Piper had finished the fusion, nor did it adopt the outlook in those cases that hold that whoever participates in an operation and is present when sponges are put into a patient's body has a duty to see that they are removed. Dr. Pucci was not held primarily negligent but vicariously responsible. Nor does the court seem to recognize those cases which hold that one

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28. Robinson v. Crotwell, 175 Ala. 194, 57 So. 23 (1911); Nelson v. Sandell, 202 Iowa 109, 209 N.W. 440 (1926); Morey v. Thybo, 199 Fed. 760 (7th Cir. 1912); Brown v. Bennett, 157 Mich. 654, 122 N.W. 305 (1909). _But see_, Conrad v. Lakewood General Hospital, 67 Wash. 2d 934, 410 P.2d 785 (1966), where the court found joint liability. The theory was that whoever participates in an operation has the duty to make certain that all instruments be removed from the patient's body. Both doctors breached that duty and so both were negligent. Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941), held that whoever assists in actually placing a sponge in the patient's body during an operation is charged with the duty to remove it. Failure to remove sponges renders all the assisting doctors liable for negligence.
31. 425 S.W.2d 924, 928 (Mo. 1968).
doctor is not vicariously liable for the negligent acts or omissions of another done in his absence. This seems to put physicians like Dr. Pucci in the position of being insurers; for while they have no duty to remain until the other specialist, then in control of and performing the operation, is finished, nevertheless they are vicariously responsible for negligence done in their absence. This is indeed an odd situation.

Most troublesome in the Crump decision, however, are the court’s findings that Doctor Piper and Pucci were “jointly employed” and that they treated the patient “jointly”. This finding of “joint employment” seems to disregard those cases which have applied the “independently employed” concept. Here, Dr. Pucci was engaged first and Dr. Piper was brought into the case upon Dr. Pucci’s suggestion, which was consented to by plaintiff. Dr. Pucci was to perform one service, a laminectomy, and Dr. Piper was to perform another service, the fusion. Not only was this division of service known by and consented to by the plaintiff, but that is the very reason for the bringing of Dr. Piper into the case in the first place. At this point it should be remembered that it was the plaintiff himself who suggested that if another operation was necessary then he thought a fusion should be performed. It is here that the court’s crucial finding that the two doctors were employed jointly, not independently, completely disregards not only the distinctions between the two concepts but established precedent as well. The court based its finding that the two doctors acted jointly, not independently, on the fact that they acted in concert to accomplish a common goal—the correction of the defect in plaintiff’s back. It would be more proper, however, to say that they acted “concurrently” and not “in concert” for by the very facts of the case each was a specialist and each assisted in that part of the operation performed by the other. Each was in control of that part of the operation which he performed while the other assisted, and at no time did they both act jointly in performing the operation. By the very facts of the case, when Dr. Pucci finished performing the laminectomy, “Dr. Piper took over for a fusion...” Missouri therefore seems to equate independently employed and concurrently acting with being jointly employed and jointly acting. Clearly, prior cases would not support such a confusion of heretofore carefully developed concepts.

It seems that the Missouri Supreme Court has, sub silentio, not only rejected the attitudes expressed in Gross v. Robinson and Telanus v. Simpson, but has overapplied the Baird case. As a result, it has separated itself not only from its own prior indications of policy, but also from the precedents developed in many other states. The resultant Missouri test for

32. See notes 20-24 supra and related text.
33. 425 S.W.2d 924, 926 (Mo. 1968) (emphasis supplied).
35. See notes 4 to 6 supra and related text.
36. See note 8 supra and related text.
joint employment-joint activity as opposed to independently employed and acting concurrently seems to be that if two physicians act together towards a common goal—i.e., the correction of a defect or disease of the patient—they are vicariously responsible regardless of the fact that they do not participate together with respect to the same aspect of that defect or disease. Emphasis has shifted so that the focus is now on this broadly defined goal. It takes little effort for one to imagine many situations both in the area of the physician and surgeon and in the area of independent contractors in general in which an application of this test would produce unsatisfactory results.

J. William Campbell

MUNICIPAL LAW—CONSTITUTIONAL HOME RULE CITIES—STATUTE IMPOSING DUTY ON MAYOR TO APPOINT FIREMEN'S ARBITRATION BOARD IS UNCONSTITUTIONAL

State ex rel. Burke v. Cervantes¹

A dispute arose concerning wages and conditions of employment between members of the Fire Department of St. Louis and Mayor Cervantes. The firemen requested that the Mayor select an arbitration board to resolve the dispute pursuant to the Firemen's Arbitration Board Act, enacted in 1963.² This statute provides that members of a paid fire department may request the chief executive of any city, town or other governmental unit to appoint an arbitration board to hear their disputes and make recommendations. The Mayor refused to select an arbitration board and the firemen brought a class action in mandamus to compel him to do so. The trial court granted mandamus and the Mayor appealed. The Supreme Court of Missouri reversed, holding that the statute is unconstitutional and void as applied to constitutional charter cities under article VI, section 22 of the Missouri Constitution of 1945, which provides:

No law shall be enacted creating or fixing the powers, duties, or compensation of any municipal office or employment, for a city framing or adopting its own charter under this or any previous constitution. . . .

In support of their position, the firemen cited the majority rule that legislation concerning municipal fire departments is a matter of state-wide concern and that general statutes on the subject apply to home rule municipalities.³ The court recognized this to be the rule, but found that the

¹. 423 S.W.2d 791 (Mo. 1968).
rule applied only to municipal-state conflicts, and not to constitutional-statutory conflicts. It was noted that state statutes may supersede charter provisions, but may not supersede the Missouri Constitution nor impose duties and obligations forbidden by the constitution. The court reasoned that the Firemen's Arbitration Board Act fixed a mandatory duty on the Mayor to appoint an arbitration board and concluded that the imposition of such a duty directly violated article VI, section 22 by "fixing the powers and duties" of the office of Mayor of St. Louis.

In the absence of state constitutional provision, municipalities have no inherent right of self-government and are merely convenient agencies for exercising such governmental powers of the state as may be entrusted to them. Missouri was the first state which attempted to change this situation by constitutional provision. The 1875 Constitution conferred upon certain municipalities the authority to govern their own affairs by a home rule charter, "consistent with and subject to the constitution and laws of the state. . . ."

Although there is some uncertainty as to the scope of power which home rule cities derive from this constitutional grant, the Missouri Supreme Court decided early that the provision did not prevent the General Assembly from creating and fixing the powers of municipal officers and employees. In State ex rel. Hawes v. Mason, the 1899 St. Louis Police Act was considered in a mandamus proceeding. The Police Act prescribed the number of St. Louis policemen, their qualifications, and salaries, and the method of removing them from the force. In upholding the Act's constitutionality, the Missouri Supreme Court stated, "The fact that St. Louis is organized under a constitutional freeholders' charter does not affect the question . . . [of whether the city] has the right to substitute its own police system for that of the state." Mason firmly established the proposition that

5. Id. at 794.
8. Mo. CONSt. art IX, § 16 (1875) provided:
   Any city having a population of more than one hundred thousand inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the State. . . .
   Mo. Consr. art. VI, § 19 does not modify this basic grant, except to lower the population requirement to 10,000.
10. 153 Mo. 23, 54 S.W. 524 (En Banc 1899).
11. Id. at 58, 54 S.W. at 534.
the General Assembly retains the power to create city offices despite the constitution's home rule grant.\footnote{12}

The practical inconvenience the Mason doctrine caused home rule cities can best be illustrated by example. Kansas City's charter provided for a city Commissioner of Licenses to be appointed under the city merit system with a stipulated salary to be provided by city ordinance. A 1901 state statute, on the other hand, provided for the general election of a License Collector in cities having a population of more than 300,000.\footnote{13} The statute prescribed the powers, duties, and compensation of the office. When enacted only St. Louis had a population of 300,000. By 1920 Kansas City also had a 300,000 population and thereafter the city was forced to appoint the winner of the License Collector general election to the position of city Commissioner of Licenses. To complicate matters further, Kansas City ordinances provided for a smaller salary than the salary prescribed by state statute.\footnote{14}

Litigation eventually arose concerning the legality of the statutory office of License Collector as against the charter office of License Commissioner. In Coleman v. Kansas City\footnote{15} the Missouri Supreme Court routinely noted that "[t]hroughout the state's existence the General Assembly has enacted statutes regulating cities, creating city offices and prescribing duties thereof."\footnote{16} The supreme court concluded that the statutory office of License Collector was the legal office, the statutes being superior to the city charter.

The Coleman case was decided on July 3, 1944 while the Constitutional Convention of Missouri of 1943-44 was in session. Immediately after the decision the entire matter of the statutory creation and control of municipal offices in charter cities was presented to the Constitutional Convention.\footnote{17} On July 25, 1944, Delegate Allen, at the request of the City Council and Mayor of Kansas City, after reciting the history of the Coleman case,\footnote{18} proposed what was to become article VI, section 22 of the 1945 Constitution of Missouri. Delegate Allen's proposal was that "[n]o municipal office shall be created by the General Assembly . . . [for constitutional home rule cities] nor shall the General Assembly fix the powers, duties, or compen-
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The debates of the Constitutional Convention indicate that the creation and control of municipal offices by the General Assembly had long been a vexatious problem, especially to the two largest charter cities of the state, Kansas City and St. Louis. The debates clearly indicate that the framers intended the constitutional language to be unequivocal, mandatory, and all inclusive.

The application of article VI, section 22 to various state laws has been attempted only in a limited number of cases. In fact, *Cervantes* is the first case in which the provision has been construed so as to have a substantial impact on state legislation relating to municipal employees and officials. Dicta in prior cases had, however, indicated that the court, when confronted with a statute within the scope of article VI, section 22, would construe the provision as giving home rule cities and their various officers and employees a broad measure of freedom from state legislative control.

In *Preisler v. Hayden*, the Missouri Supreme Court held that the license collector of St. Louis was a county officer and therefore not covered by article VI, section 22. However, the court also stated:

There can be no doubt that Section 22 of Article VI, 1945 Constitution, applied to all offices in cities of the constitutional class created under Section 19, Article VI, 1945 Constitution, because the only offices they can have are municipal offices.

The more recent case of *Joplin v. Industrial Commission of Missouri* involved the application of Missouri's Prevailing Wage Act to contractors performing public work for municipalities. The supreme court again referred to article VI, section 22 by way of dictum when it said that "to construe the [Prevailing Wage] Act as applicable to direct employees of public bodies would make it unconstitutional as to all cities adopting their own charters. . . ."

The *Preisler* and *Joplin* cases laid the groundwork for the *Cervantes* decision, but left another question unanswered. Why did not charter cities, especially Kansas City and St. Louis, attempt to take full advantages of article VI, section 22 prior to *Cervantes*?

In *State v. Gunn*, the St. Louis Board of Police Commissioners brought

19. *Id.* at 4524, 4526.
20. Delegate Hennings of St. Louis stated that the offices of city collector and city treasurer were subject to statutory regulation, but that the city assessor was subject only to St. Louis' charter. *Id.* at 4527.
21. Delegate Allen stated:

> Now there is only one way that we can settle this thing apparently, and that is to say plainly what we mean in this Constitution. *Id.* at 4527.

22. *Joplin v. Industrial Commission of Missouri*, 329 S.W.2d 687 (Mo. En Banc 1959); *Preisler v. Hayden*, 309 S.W.2d 645 (Mo. 1958); *Stemmler v. Einstein*, 297 S.W.2d 467 (Mo. En Banc 1956).
23. 309 S.W.2d 645 (Mo. 1958).
24. *Id.* at 647.
25. 329 S.W.2d 687 (Mo. En Banc 1959).
28. 326 S.W.2d 314 (Mo. En Banc 1959).

http://scholarship.law.missouri.edu/mlr/vol35/iss1/10
a mandamus proceeding to compel the city and its officers to appropriate an additional sum of money under the St. Louis Police Act. The Missouri Supreme Court upheld the validity of the statute. In State ex rel. Spink v. Kemp the Missouri Supreme Court decided that under the Kansas City Police Act the city's fiscal affairs were subject to such legislative control as is necessary for the proper advancement of matters of general state concern. The interesting aspect of the cases was that the cities did not argue that the state police statutes were laws "creating or fixing the powers, duties, or compensation of any municipal office or employment . . ." and therefore contrary to the prohibition of article VI, section 22. In fact, in the Gunn case the city conceded both that State ex rel. Hawes v. Mason established that the creation and maintenance of a police department was a state function, and that Mason had retained its validity and authority after the 1945 Constitution was ratified. This is equivalent to conceding that Missouri common law supersedes the Missouri Constitution.

The non-use of article VI, section 22 by home rule cities probably derives from its uniqueness, political considerations (i.e. reluctance to rock the boat, to antagonize firemen's unions, etc.), and the belief of the cities that the state-local distinction would be applied to section 22. Although over one-half of the states have followed Missouri's lead and by constitutional provision have granted home rule in varying forms to their municipalities, apparently only the Missouri Constitution prohibits the legislature from interfering with the municipal offices of home rule cities. The lack of

30. 365 Mo. 368, 283 S.W.2d 502 (En Banc 1955).
32. 153 Mo. 23, 54 S.W. 524 (En Banc 1899).
33. 365 Mo. 368, 283 S.W.2d 314, 320 (Mo. En Banc 1959).
34. See Debates of the Missouri Constitutional Convention of 1943-44 at 4525-26:

They started with the police departments and they said, "Well, a policeman is a state officer. Although it is true you had a right under the Constitution to have home rule, we will see that the General Assembly has control over that because they are state officers . . ." Now there is only one way that we can settle this thing apparently, and that is to say plainly what we mean in this Constitution.

35. ALASKA Const. art. X, § 9; ARIZ. Const. art. XIII, § 2; CAL. Const. art. XI, § 8; COLO. Const. art. XX, §§ 1-6; CONN. Const. art. X, § 1; FLA. Const. art. VIII, § 11; GA. Const. art. XV, ch. 2-35; HAWAII Const. art. VII, § 2; KAN. Const. art. XII, § 5; LA. Const. art. XIV, § 40; MASS. Const. art. II, § 6; MD. Const. art. XI-E, § 3; MICH. Const. art. VII, § 21; MINN. Const. art. XI, § 3; NEB. Const. art. XI, § 2; NEV. Const. art. VIII, § 8; N. M. Const. art. X, § 4; N.Y. Const. art. IX, §§ 1, 2; OHIO Const. art. XVIII, § 7; OKLA. Const. art. XVIII, § 3(a); ORE. Const. art. XI, § 2; PA. Const. art. XV § 1; R.I. Const. amend. XXVIII, § 2; S.D. Const. art. X, §§ 4, 5; TENN. Const. art. XI, § 9; TEX. Const. art. XI, § 5; UTAH Const. art. XI, § 5; WASH. Const. art. XI, § 10; W. VA. Const. art. VI, § 39(a); WISC. Const. art. XI, § 3.

36. COLO. Const. art. XX, § 6(a) grants Colorado home rule cities power to legislate provide, regulate, conduct and control:

The creation and terms of municipal officers, agencies and employment; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents, and employees.

There is, however, no constitutional prohibition against the legislature superseding
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precedent from other jurisdictions has in all likelihood contributed to the cities' limited use of section 22, but undoubtedly the largest single reason has been the belief that the Mason case prevented section 22 from being applied to city offices of state-wide concern. In Cervantes, however, the court applied section 22 while recognizing expressly that a majority of the cases from other jurisdictions hold that legislation concerning municipal fire departments is a matter of state-wide concern. Thus, Cervantes can be read as indicating that the distinction between state-wide and local concern does not govern the applicability of section 22.

The Cervantes decision takes a long step forward in recognizing that article VI, section 22 allows home rule cities the freedom to deal with their employees without the General Assembly prescribing special procedures or boards and giving special privileges to particular groups of local employees. The new status of this constitutional principle should result in the responsibility for the efficient administration of municipal offices being placed where it properly belongs: directly in the hands of the local community. After Cervantes, it is doubtful that article VI, section 22 will continue to suffer from non-use. The precedent which was lacking is now available to home rule cities, and they should not long ignore it.

J. DOUGLAS CASSITY

CONFLICT OF LAWS—MISSOURI TAKES A NEW APPROACH TO AN OLD PROBLEM

Kennedy v. Dixon

Lillian Kennedy brought suit against the administrator of the estate of Mary Towey to recover damages for personal injuries she allegedly received as a result of the deceased's negligent driving. The accident occurred in Indiana while the parties were on a vacation trip which took them through that state. Mrs. Kennedy lived in the same apartment building in St. Louis as Mrs. Towey and her husband, and had accompanied the Towey's on the trip as a guest. Plaintiff's suit was in three counts, the first of which alleged that the law of Missouri, which does not have a guest statute, should be applied rather than the law of Indiana which has such a statute. This count of the petition was dismissed by the trial court following Missouri precedent in applying the law of the place of the tort to determine all but procedural questions, which are determined by forum law. In a well-reasoned and documented opinion by Judge Finch, the Missouri Supreme

the home rule cities as to their employees. In People v. McNichols, 91 Colo. 141, 13 P.2d 266 (1932) the Colorado Supreme Court held that the statutory creation of city registrar was of state-wide concern, therefore rendering art. XX, § 6 (a) inapplicable.

37. State ex rel. Burke v. Cervantes, 423 S.W.2d 791, 793 (Mo. 1968).

1. 439 S.W.2d 173 (Mo. En Banc 1969).
Court reversed the trial court and decided that Missouri should join the present trend of decisions which rejects the *lex loci delicti* rule of conflict of laws and adopts the more flexible "most significant relationship" approach of the *Restatement Second.*

Had the *Kennedy* case been decided a few years earlier, there would have been no question as to its result; the law of Indiana, the place where the accident occurred, would have been applied to all substantive issues in the case. Until recently, the *lex loci delicti* was mechanically applied in most jurisdictions for no other reason than the weight of precedent supporting it. Missouri, until *Kennedy*, was no exception. For example, in *Robinson v. Gaines*, the Missouri Supreme Court held that the law of the place of the tort should determine whether one spouse should be permitted to sue the other for negligence. Further, as late as 1967, the Kansas City Court of Appeals, in the case of *Neihardt v. Knipmeyer*, decided that the law of the place of the tort, rather than the parties' domicile, should determine whether a guest can sue his host for the latter's negligence. It is obvious that *Kennedy* implicitly overrules the *Neihardt* case and makes the *Robinson* case very doubtful authority for the proposition that the *lex loci delicti* will be applied to determine the interspousal immunity issue.

The *Restatement Second* of Conflict of Laws adopted by the *Kennedy* case sets forth the most significant relationship approach as follows:

1. The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

2. Contacts to be taken into account in applying the principle of § 6 to determine the law applicable to an issue include:
   - The place where the injury occurred,
   - The place of the defendant's domicile,
   - The place where the transactions in connection with the tort occurred,
   - The place where the plaintiff resided at the time of the occurrence,
   - The place where the plaintiff resided at the time of the transaction in connection with the tort,
   - The place where the plaintiff usually abode at the time of the occurrence,
   - The place where the plaintiff was employed at the time of the occurrence,
   - The place where the plaintiff was employed at the time of the transaction in connection with the tort,
   - The place where the plaintiff resided at the time of the transaction in connection with the tort,
   - The place where the defendant resided at the time of the occurrence,
   - The place where the defendant was employed at the time of the occurrence,
   - The place where the defendant was employed at the time of the transaction in connection with the tort,
   - The place where the defendant resided at the time of the transaction in connection with the tort.

3. 15A C.J.S. *Conflict of Laws* § 12 (2) (1967). This section cites hundreds of cases which have applied the law of the place of the tort to substantive issues.
4. 331 S.W.2d 653 (Mo. 1960).
5. 420 S.W.2d 27 (K.C. Mo. App. 1967).
6. This assumption stems from the fact that the two issues are quite analogous to one another. Courts frequently cite guest statute cases for authority in intrafamilial immunity cases, and vice versa. Because of this close analogy both will be considered together in this note.
7. Section 6, to which reference is made, lists seven relevant factors which the scholars have deemed to be important considerations in a choice of law problem. These seven factors are as follows:
   - The needs of the interstate and international systems;
   - The relevant policies of the forum;
   - The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
   - The protection of justified expectations;
   - The basic policies underlying the particular field of law;
   - Certainty, predictability and uniformity of result; and
   - Ease in the determination and application of the law to be applied.

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(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.8

The soundness of the Missouri decision can be demonstrated by indicating the problems that would have been raised had the court decided to adhere to precedent and applied the *lex loci delicti* rule. The result would have been the application of Indiana law and the Indiana guest statute. However, it is doubtful whether this would have produced a desirable result. Missouri, which has no guest statute, has an established policy which dictates that a host who negligently injures a guest should bear the consequences of that act. This policy should be especially strong when, as in *Kennedy*, the host and guest were both Missouri residents, the car was garaged and most likely insured in Missouri, the parties departed from and planned to return to Missouri, and Missouri was the forum. Indiana's only connection with the events in question was its concern in seeing that drivers within its boundaries drive in a careful manner. In other words, Indiana has no other interest than determining whether the defendant did in fact drive negligently. It is apparent that Indiana has no concern in having its guest statute applied under the facts presented in *Kennedy*. The effect of applying Indiana law would be to say that foreign law determines whether one Missouri resident can sue another Missouri resident in a Missouri court. Such a result on its face is difficult to defend.

It has been argued, however, that the occasional unfortunate decision resulting from the application of the rule of *lex loci delicti* is outweighed by the relative ease of applying the rule and the fact that it provides uniformity of result no matter where a suit is brought. Judge Storkman, dissenting in *Kennedy*, considered these factors of sufficient importance to justify retention of the old rule.9 A number of other courts have likewise taken this position in refusing to overrule the *loci delicti* rule.10 However, some question might be raised as to the validity of this contention. It is not infrequent to find courts giving lip service to the *loci delicti* rule, and at the same time refusing to apply that state's law because its application would violate some public policy of the forum state.11 Indeed, Judge Donnelly in his concurring opinion takes precisely this approach in the *Kennedy* case.12 Moreover, the courts have frequently resorted to such escape devises as char-

9. 439 S.W.2d at 186-87.
11. See, e.g., Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935), where forum law was applied after it was determined that the *locus delicti* (Alabama), which permitted suits between spouses, affronted the public policy of West Virginia.
12. 439 S.W.2d at 186.
acterization in order to avoid reaching an unjust or absurd result dictated by a strict application of the *lex loci delicti*. For example, since it is a well-settled rule that the forum applies its own procedural rules, courts frequently characterize seemingly substantive issues as matters of procedure. Similarly, there are a number of cases where courts have called what appeared to be a tort issue one of contract. Conflicts authorities generally agree that the use of escape devices such as these substantially undermine the alleged certainty and uniformity resulting from application of the place of wrong rule. Thus, the concurring and dissenting opinions were based upon a dubious assumption.

Having determined that the decision is sound, it becomes necessary to explain how the rule operates. It will be noted that in *Kennedy*, Indiana had two contacts, or relationships, with the guest statute issue: the place where the injury occurred and the place of tortious conduct. Missouri likewise had two contacts: one as the domicile of the parties and the other as the place where the relationship of the parties was centered. This raises the problem as to what a court should do when the contacts are quantitatively equal. It is here that a complete understanding of the rule becomes critical. As one writer has aptly stated, there is the "grave danger [that] the Restatement Second will be interpreted to direct the counting of physical contacts with the parties and with the transaction and the awarding of the palm to the state with the 'most' contacts." To the contrary, the Restatement does not authorize a quantitative counting, but it requires an evaluation of the contacts "according to their relative importance." Recognizing this proposition, the court in *Kennedy* noted that "Indiana's only real interest was in requiring that Missouri residents comply with its standards of care for operation of motor vehicles on its highways." The court further noted that this interest would not be advanced by applying the Indiana guest statute. On the other hand, since the parties are domiciled in Missouri, this state has a real interest in seeing that one of its citizens who is negligently injured recovers for his injuries. Accordingly, Missouri, with its qualitative superiority of contacts, should apply its own law.

It is important to note, however, that this holding need not dictate the result in all cases. As stated in the comments to section 169 of the Restatement Second, "where the parties' relationship to the state of their domicile is considerably less close than is their relationship to some other

13. For example, in Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), it was decided that the survival of a cause of action is not substantive, but a matter of procedure relating to the administration of estates. Missouri cases where the substantive-procedural distinction has been made include: Russel v. Kotsch, 336 S.W.2d 405 (Mo. 1960); Robinson v. Gaines, 331 S.W.2d 653 (Mo. 1960); Hall Motor Freight v. Montgomery, 357 Mo. 1188, 212 S.W.2d 748 (1948); and Scott v. Jones, 334 S.W.2d 742 (K.C. Mo. App. 1960). See generally, Note, Choice of Laws—New Missouri Approach, 32 Mo. L. Rev. 392 (1967).


17. 499 S.W.2d at 184-85.
state," then the domiciliary law should not be applied.\(^{18}\) While section 169 refers to intrafamilial torts, the same rationale would be equally applicable to the closely related guest statute situations. The importance of such flexibility\(^ {19}\) is emphasized by recalling the cases where courts found it necessary to resort to various escape devices under the *lex loci delicti* rule,\(^ {20}\) and by referring to those decisions in which the court failed to utilize these devices and reached absurd results under a literal application of *lex loci delicti*.\(^ {21}\)

Once the determination and evaluation of the various relationships is complete, the question remains as to what happens if, after such evaluation, it is not clearly established which state has the most significant relationship. In anticipation of this eventuality, the court in *Kennedy* states that "the trial court should continue . . . to apply the substantive law of the place of the tort."\(^ {22}\) The court went on to warn, however, that this should not be used as a "means of abdicating the obligation of determining the state which has the most significant relationship."\(^ {23}\)

Finally, it is important to note that the majority opinion was concurred in by only three judges, as two judges dissented, one concurred in the result, and one abstained.\(^ {24}\) The implication this holds for the future of Missouri conflicts law is not clear. It is hoped, however, that the court will not retreat from its decision in *Kennedy*. To the contrary, it would be desirable for the court to expand the "most significant relationship" approach to other areas besides that of tort, such as contracts. This decision can most aptly be described as consistent with a trend of progressive decisions and law review commentaries which emphasize the fact that a single, mechanical rule frequently fails to yield desirable results.\(^ {25}\) While it is true


19. The fact that the rule is flexible, however, has not gone without criticism. See Ehrenzweig, The "Most Significant Relationship" in the Conflicts Law of Tort—Law and Reason Versus the Restatement Second, 28 Law & Contemporary Prob. 700 (1963).

20. See notes 11 and 13 supra.

21. For example, in Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App. 1953), it was held that whether there was negligence in a plane crash which occurred in Mexico after the plane had strayed off course in a flight between New Mexico and Texas, should be determined by the law of Mexico. However, the Texas court then dismissed the suit because it was "without jurisdiction" to administer Mexican law. In the interspousal immunity situation, Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931), which was the original case applying *lex loci delicti* to this issue, presents an equally absurd result. The effect of *Buckeye* was to hold that Illinois law dictated whether a man and wife residing in Wisconsin could bring a tort action against the other in a Wisconsin court. This is very similar to the result which would have been reached in *Kennedy* had the court adhered to precedent and applied the *lex loci delicti* rule.

22. 439 S.W.2d at 185.

23. Ibid.

24. The majority consisted of Judges Finch and Seiler, and Chief Judge Holman. Judge Storkman dissented; Judge Donnelly concurred in the result; and Judge Morgan did not participate as he was not a member of the court when the cause was submitted.

that the court is entering into relatively unchartered territory, this is no reason for continued adherence to a bad rule. It is strongly urged that future decisions expand on this most progressive and significant decision.

Kerry D. Douglas

FIDUCIARY FIDELITY IN MISSOURI—AN OMINOUS ESCALATION

Estate of Luyties v. Scudder

The will of one Luyties nominated one Scudder as co-executor of the Luyties estate. Luyties also devised one third of the residuary estate to Scudder, giving him three options: he could either take the one third, take a certain amount of Luyties’ stock at its fair market value, or take all of the shares of stock which Mr. Luyties owned which constituted the controlling interest in a corporation Scudder managed. Scudder chose to exercise the third option.

Prior to appraising the estate for Federal estate tax purposes the co-executors hired an accountant who later reported that the assets had a per share value of $17.60. The co-executors liquidated the stock at $24.71 per share. A year later Scudder and co-executor Mercantile Trust Company reported on the estate tax returns that the stock had a value of $6.00 per share. This figure was accepted by the government. Scudder recanted, however, and through his attorney informed the Internal Revenue Service of the audit and the liquidation value. The government re-opened the estate tax and increased the value of the stock shown on the return. As a result the estate paid $28,031 more in estate taxes, while Scudder’s capital gains taxes were $27,817 less than they would have been under the first valuation.

Mercantile and the beneficiaries brought an action to remove Scudder as co-executor and to recover damages for breach of fiduciary duty. The


1. 432 S.W.2d 210 (Mo. 1968).
2. Id. at 212.
3. Ibid.
4. Id. at 213.
RECENT CASES

This case has several interesting aspects, two of which will be discussed in this casenote. The first is the apparent extension of the duty of loyalty owed by a fiduciary, and the second is the peculiar attitude evinced by the court toward taxation in general. A third aspect which will only be mentioned in this note involves an earlier statement by the Missouri Supreme Court that an executor represents "not only the heirs or legatees, but also the law and creditors." He is a fiduciary for persons interested in the estate and is, therefore, a trustee must be impartial toward the various beneficiaries of his trust. It is possible that the Luyties case requires an executor to be partial to the legatees as against the creditors of the estate, but a thorough development of this question is beyond the scope of this note.

An executor is given the duty of settling the affairs of a decedent's estate, and to do this, he must pay and adjust claims. If an adjustment is "imprudent" he may be held personally liable for it. The degree of care required of an executor is stated variously as "that which prudent men exercise in the direction and management of their own affairs," "due prudence," or "ordinary care". While the executor acts for the estate, the estate is generally not liable for torts committed by the executor even if committed while administering the estate. But the estate may be liable for benefits derived from the tortious actions. It is possible for the testator, if he so desires, to limit the liability of his executor to instances of "willful malfeasance".

An executor is also a trustee who must give an "undivided loyalty" to the beneficiaries of the estate at all times. Executors are held to a standard of "utmost good faith" and "strictest accountability." As fiduciaries they may not deal with estate property in such a way as to "gain any advantage directly or indirectly" or "derive a personal benefit" for themselves. In Texas executors are specifically forbidden to purchase estate property by

5. Id. at 216.
18. Strates v. Dimitosis, 110 F.2d 374, 376 (5th Cir. 1940).
The same rule is in fact "a general rule of equity jurisprudence" in other jurisdictions. Furthermore, executors have an "obligation to take into possession and disclose all estate property and all information to those interested in the estate as to estate matters . . . ."

In the *Luyties* case, co-executor Scudder had a personal interest in a high stock valuation because of his capital gains taxes. This conflicted with the estate's interest in using a low valuation for estate tax purposes. It is a general rule that a mere conflict of interest "is not to be deemed a disqualification for appointment" as executor. However, such a conflict of interest, combined with hostility between the executor and the beneficiaries, has been considered sufficient cause for removal. Some states set out statutory grounds for removal which, if exclusive, allow the courts no discretion to disqualify on other grounds. Since the Missouri statute allows the executor to be removed if he is "unsuitable", Missouri courts have discretion as to the grounds for removal. Thus, it has been held that if an administrator refuses to resign at the "development of a real and substantial controversy" the court may revoke his letters "for unsuitability to exercise the trust."

A factor which tends to influence courts which are faced with questions about an executor's qualifications is the fact that he may have been appointed by the testator, as Scudder was in *Luyties*. Generally, "a court has no discretion respecting the issuance of letters testamentary to persons nominated in the will of a decedent, unless the nominees are expressly disqualified or discretion is created by statute." As indicated, Missouri courts have such discretion, but it is interesting that the above rule was stated by the Missouri Supreme Court in a case which described the testator's right to appoint an executor as "an important right" respected by Mis-

21. Strates v. Dimitosis, 110 F.2d 374, 376 (5th Cir. 1940).
23. *In re* Blodgett's Estate, 93 Utah 1, 16, 70 P.2d 742, 749 (1937). As noted in the case, this does not mean the executor must "advise . . . in matters affecting a conflict of interest between themselves."
25. *In re* Rafferty's Estate, 377 Pa. 304, 306, 105 A.2d 147, 148 (1954). Here the conflict involved ownership of proceeds from a disability fund and life insurance policies which the administrator claimed as his own while the heirs claimed they belonged to the estate.
28. State v. Thym, 282 S.W.2d 178, 187 (St. L. Mo. App. 1955). One instance of the type of controversy justifying refusal of an application for letters involved a would-be executor who had claims against the estate, and also a devisee under a will being contested by heirs. State *ex rel.* Evans v. Stahlhuth, 183 S.W.2d 384, 390 (St. L. Mo. App. 1944).
The Will named Mercantile Executor, and decedent's wife as co-executors but expressly provided that should decedent's wife predecease him (as she did) appellant Scudder was to be appointed as co-executor in her place and stead, and directed that no bond be required of the executors.
souri courts as a matter of policy.\textsuperscript{31} In Illinois it was said that the law only required that an appointee be "legally competent."\textsuperscript{32} Elsewhere courts have stated that a testator’s "solemn selection is not lightly to be disregarded."\textsuperscript{33} The reason for such deference lies in the "testator's knowledge of a possible conflict of interest."\textsuperscript{36} Furthermore, the argument can be made that "the testator intended that the executor exercise dual functions and impliedly consented to any self-dealing that might be inherent in the situation."\textsuperscript{30} Such arguments are quite relevant when we consider that in the \textit{Luyties} case Scudder was appointed by the deceased in the same instrument which granted him the option that created the conflict of interest.

The fiduciary duties of an executor have been made more demanding by the \textit{Luyties} case. This strictness derives primarily from the fact the court attached so little importance to those duties of an executor which are not for the benefit of the estate alone. More precisely, the court seemed to minimize the importance of the executor's duty to pay estate taxes. In his application for letters, an executor promises to pay the estate debts "as far as the assets extend and the law directs."\textsuperscript{37} Among claims against an estate the estate taxes rank second only to funeral expenses,\textsuperscript{38} and generally an executor is "personally liable for succession taxes."\textsuperscript{39} This rule is supported by a Federal statute\textsuperscript{40} and is beyond dispute in Federal case law.\textsuperscript{41} Therefore, an executor may not default in payment of taxes and thereafter purchase a tax title.\textsuperscript{42} And, if the government imposes a penalty for late filing of returns, the executor himself pays the penalty.\textsuperscript{43} In addition to such pressures there remains the possibility that the government may bring criminal charges. The Internal Revenue Code allows prosecution of any person who "willfully aids or assists in, or advises the preparation . . . of a return . . . which is fraudulent or is false as to any material matter."\textsuperscript{44} In the \textit{Luyties} case the co-executors reported a value of $6.00 per share, though

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\item \textsuperscript{31} State \textit{ex rel.} North St. Louis Trust Co. v. Stahlhuth, 362 Mo. 67, 72-73, 239 S.W.2d 515, 518 (1951).
\item \textsuperscript{32} Clark v. Patterson, 214 Ill. 533, 542, 73 N.E. 806, 809 (1905).
\item \textsuperscript{33} In \textit{re} Leland's Will, 219 N.Y. 398, 393, 114 N.E. 854, 856 (1916).
\item \textsuperscript{34} Reed v. Ringsby, 156 Neb. 35, 40, 54 N.W.2d 318, 322 (1952).
\item \textsuperscript{35} In \textit{re} Foss' Will, 282 App. Div. 509, 512, 125 N.Y.S.2d 103, 108-09 (1953).
\item \textsuperscript{36} Note, 47 VA. L. REV. 1105, 1113 (1961).
\item \textsuperscript{37} § 473.017, RSMo 1959:
\begin{itemize}
\item An application for letters testamentary or of administration shall be verified by applicant and shall state: . . . (9) That if letters are issued, the applicant will make a perfect inventory of the estate, pay the debts and legacies, if any, as far as the assets extend and the law directs . . .
\end{itemize}
\item \textsuperscript{38} § 473.397, RSMo 1959:
\begin{itemize}
\item All claims against the estate of a decedent other than for expenses of administration shall be divided into the following classes: (1) Funeral expenses; (2) Debts, including taxes, to the United States. . . .
\end{itemize}
\item Annot., 128 A.L.R. 123 (1940).
\item United States v. Cruikshank, 48 F.2d 352, 354 (S.D.N.Y. 1931).
\item In \textit{re} Alexander's Estate, 360 S.W.2d 92, 93 (Mo. 1962); Sanford v. Sanford's Adm'r, 262 S.W.2d 827, 828 (Ky. App. 1955).
\item INT. REV. CODE OF 1954, § 7206.
\end{itemize}
the audit indicated a value of over $17.00 and the stock was actually liqui-
dated at over $24.00 per share. While there had been no threats of legal
action, it seems that if Scudder had been motivated by a desire to abide by
the law he should not have been held guilty of a breach of duty to the estate.
Executors have a duty to "resist taxes which they consider unwarranted,"48
but that situation was not present in Luyties.

Scudder was caught between loyalty to the estate beneficiaries and
honesty to the government. The court's resolution of this conflict is the
most significant aspect of the case. The New York case of In re Carmody's
Estate47 is very much in point here. There the executor had failed to sell
some worthless stock belonging to the estate and the residuary legatees
sought to surcharge the executor's account for the par value of the stock.
The New York court recognized that if it granted the surcharge it would be
equivalent to requiring an executor to defraud the public for the estate's
benefit. Therefore the court refused to grant the surcharge. Although the
court acknowledged the executor's duty of loyalty, it continued by stating
that "'[t]his standard of conduct, however, does not absolve a representa-
tive from observing ordinary business ethics in his dealings with the pub-
lic . . . ."48 Since Scudder, too, was subject to similarly conflicting duties,
the Luyties case must be viewed as an indication that loyalty to the estate
requires an executor to set aside or, at least, subordinate his public
duties. While it was apparent in the Luyties case that Scudder's motives were es-
tially selfish, the New York court in Carmody said, "The motive that
acted the executor in this case is immaterial. It is the act itself in this
and other estates that becomes important."49

Another interesting feature of Luyties is that the court, by fining
Scudder the amount by which his taxes were lowered, showed an intriguing
attitude regarding taxes. A tax is "an enforced contribution for public pur-
poses . . . in no way dependent upon the will or express consent of the
person taxed."50 It is "not a voluntary payment or donation"51 and not "de-
rived from an agreement."52 The Missouri court decided Luyties, however,
on the premise that Scudder himself caused the taxes to be levied. In addition,
the fine which the court assessed indicates that the court believed
Scudder profited from the tax alteration. This contradicts the principle that
"the mere diminution of loss is not gain, profit, or income."53 Concededly,

45. 482 S.W.2d 210, 212 (Mo. 1968).
46. In re Manville's Will, 102 N.Y.S.2d 530, 533 (Surr. Ct. 1950), aff'd 105
 N.Y.S.2d 979 (1951).
47. In re Carmody's Estate, 134 Misc. 11, 13, 235 N.Y.S. 78 (1929).
48. Id. at 79-80.
49. Id. at 80.
50. State v. Kromarek, 78 N.D. 769, 52 N.W.2d 713, 715 (1952), cert. denied,
 343 U.S. 968 (1952).
52. People ex rel. Nassau Electric R. Co. v. Grout, 119 App. Div. 130, 131, 103
  N.Y.S. 975, 975 (1907); Lane County v. State of Oregon, 74 U.S. (7 Wall.) 71, 80
  (1868).
53. Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 175 (1926). In this case the
taxpayer borrowed over 8 million marks from a German bank to finance construc-
tion contracts. Because of the devaluation of the mark, their dollar equivalent
dropped by 684 thousand dollars. Although the whole amount of the loan had been
a low tax assessment is preferable to a high one; but, if taxes are "an enforced contribution" depending on impersonal facts such as the value of stock, can it be said that Scudder realized a benefit or gain?

*Luyties* illustrates the harsh possibilities inherent in exercising the duties of an executor. While the specific problem of tax valuation which arose here is peculiarly national in character, the *Luyties* case makes it more complicated in Missouri. There is the threat, however subtle, that honesty is no longer the best policy, and may in fact be legally dangerous if you are an executor filing a tax return for an estate. This seems an unfortunate and unnecessary extension of the duty of fiduciary fidelity.

IRVEN L. FRIEDHOFF

**TRADE REGULATION: EXCHANGES OF PRICE INFORMATION WHICH LEAD TO PRICE STABILIZATION**

—A VIOLATION OF THE SHERMAN ACT

*United States v. Container Corporation of America*

The defendants in this civil anti-trust action were eighteen of the fifty-one producers of corrugated containers located in the Southeastern United States. During the time period covered by the complaint, January 1, 1955 to October 14, 1963, the defendants engaged in occasional exchanges of price information. Each defendant, when requested to do so by a co-defendant, supplied to that co-defendant either the price charged in the last sale to a customer or the current price quotation to that customer. While the exact nature of the price information varied, it was always sufficient to allow the co-defendant to compute the exact price he would have to meet in order to obtain the customer's business. The exchanges were voluntary, and each defendant generally supplied the requested information on the assumption that he would receive similar information if and when he requested it.

During the period covered by the complaint, the number of producers of corrugated containers located in the Southeastern United States expanded from thirty, with forty-nine plants, to fifty-one, with ninety-eight plants, lost by the taxpayer, the government attempted to tax the difference of 684 thousand dollars. The Supreme Court disallowed the taxation.

54. This problem could not arise in England, where the taxes are all paid by the executor before he received his letters. See Customs and Inland Revenue Act of 1881, 44 & 45 Vict., c. 12, §§ 27 & 30. See generally Fratcher, *Fiduciary Administration*, 40 N.Y.U.L. Rev. 12, 43 (1965).

and total production expanded from slightly over nine billion square feet to just under sixteen billion square feet. Defendants' sales accounted for ninety percent of the total production in the Southeastern United States. Due to the ready availability of raw materials and production machinery, and the small amount of capital investment required ($50,000 to $75,000), market entry was easy and excess capacity existed throughout the entire eight year period covered by the complaint. Costs of production within the industry varied from plant to plant. Within each plant the average unit cost of production decreased as the effective utilization of plant capacity increased. Short run market demand was inelastic, and the general price trend of corrugated containers was downward, although prices generally remained within a narrow range.

In this action, brought in federal district court, the United States, alleging that the exchanges of price information constituted a conspiracy to fix prices in violation of the Sherman Act, sought an injunction prohibiting all future exchanges. The district court, after making extensive findings of fact, ruled: (1) the evidence supported neither the inference that an agreement to exchange price information existed nor the inference that such an agreement existed for the purposes of maintaining identical prices to the same customer or minimizing price reductions offered to that customer, and (2) the exchanges of information did not have the effect of reducing, minimizing, or eliminating price competition. Based on these conclusions, the district court refused to grant the injunctive relief sought and dismissed the case. On appeal, the United States Supreme Court reversed, with three judges dissenting.

The majority opinion, delivered by Justice Douglas, distinguished the instant case from other price information exchange decisions on the grounds that here: (1) the defendants did not agree to adhere to a price schedule, (2) the exchanged price information included information as to individual

3. Elasticity is a measure of how much the amount purchased (demand for a product) changes in response to a change in price. The formula for computing the elasticity of demand is: elasticity = percentage change in quantity / percentage change in price. Inelastic demand exists when the percentage change in quantity is less than the percentage change in price. When demand is inelastic a decrease in price results in a decrease in total revenue providing the demand curve remains unchanged. Demand is represented graphically by plotting price on the vertical axis and quantity on the horizontal axis. Demand may move from one point to another on the resulting demand curve, or the curve itself may change its shape to either the right or left. A change in the demand curve indicates a change in total demand. See G. L. Bach, Economics, An Introduction to Analysis and Policy 280-284 (6th ed. 1968).


5. Section 1 of the Sherman Act reads as follows:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . . 15 U.S.C. § 1 (1964).


sales to particular customers, and (3) no legal justification existed for the exchanges. The opinion concluded summarily that the supplying of price information by a defendant upon the expectation, usually fulfilled, that he would be furnished reciprocal information upon his request was sufficient "concerted action" to establish a "combination" or "conspiracy" as required by the Sherman Act. After discussing the voluntary nature of the "agreement" to exchange price information and describing the corrugated container market, the majority concluded that the "result of this reciprocal exchange of prices was to stabilize prices at a downward level" and that this was a violation of the Sherman Act. This conclusion is unique in that it is not a factual finding supported by evidence but rather is a theoretical probability inferred from an economic analysis of the corrugated container industry.

Both Justice Fortas, concurring, and the dissenters, Justices Marshall, Harlan, and Stewart, call attention to the use of theoretical probability rather than factual evidence. Fortas states that "theoretical probability... is not enough" unless one is to consider the mere exchange of price information to be a per se violation of the Sherman Act. Fortas finds sufficient evidence in the record to support a finding of price fixing. The dissenters not only reject the majority's inference of a lessening of competition, but also find that the record fails to support a finding that either price fixing or stabilization had occurred.

Reduced to its essential elements, the majority ruling is that any agreement to exchange price information which results in a lessening of price competition violates the Sherman Act. This rule itself is not an undue extension of prior anti-trust law. Existing cases not only make outright price fixing a per se Sherman Act violation but also ban exchanges of price information for the purpose of limiting competition. However, the means used to establish the required competitive harm, namely, theoretical economic analysis and reasoning, is a significant departure from prior practice. If this economic analysis approach is used in future cases, the Sherman Act may be made applicable to a far broader range of information gathering practices than it presently covers.

The theoretical economic analysis upon which the majority based its opinion consisted of constructing a model representing the corrugated container industry, determining that the exchanges of price information would lessen price competition within the model, and then inferring that such exchanges would also lessen price competition in the corrugated container industry. This model, as described by Justice Douglas, has characteristics

of both monopolistic competition and oligopoly.\textsuperscript{17} The key features of the model are an inelastic demand and price competition. Demand is inelastic because buyers only place orders for their immediate needs. The fungible nature of corrugated containers rules out any other type of competition except price. When demand for a product is inelastic the total revenue from the sale of that product decreases as the price level falls. Therefore, the total revenue available to all sellers increases as prices rise and decreases as prices fall. Consequentially, it is advantageous to sellers if prices remain stable rather than fall. Since prices did in fact remain fairly stable despite the existence of some excess capacity and continued entry into the industry by new firms, Justice Douglas infers that the exchanges of price information led to a lessening of price competition.

A critical assumption in this analysis is that because defendants already had ninety percent of the market, they could not increase their total revenue by obtaining a larger share of the market. While this is true when all eighteen defendants are considered as a group, the assumption may not be valid when each defendant is considered separately. It is possible that a single firm, by cutting its prices, could increase its share of the existing market sufficiently to increase its total revenue. In other words, since the industry's demand curve is the average or composite of all the individual producers' demand curves, the industry's demand curve will not be identical to each firm's demand curve. Therefore, the course of action most beneficial to an individual firm may easily be the opposite of that most beneficial to the industry. The decision does not provide sufficient information to determine if this was actually the situation in the instant case.

In addition, the majority's analysis model does not consider the effect of the long term increase in demand. Sales expanded from approximately nine billion to sixteen billion units during an eight year period. This long run increase in demand could have easily offset any loss of revenue experienced by the defendants when they reduced prices. If such were the case, actual total revenue would be increasing despite a falling price level. Thus, it is open to question whether the model used by the majority accurately reflected the true market conditions within the industry.

Finally, in light of the district court's findings that the exchanges of price information did not harm competition in that the "industry was and is highly competitive, and each defendant engaged in and was faced with price competition..."\textsuperscript{18} it would seem that considerable support can be marshalled for the argument that the analysis model constructed by

\begin{itemize}
\item \textsuperscript{17} Monopolistic competition exists where there are many sellers of slightly differentiated products, but not enough sellers to make the industry's market perfectly competitive. Oligopoly exists where there are so few competing producers that each producer, in making his production and marketing decisions, must consider the production and marketing choices made by other firms in the industry. See G. L. Bach, Economics, An Introduction to Analysis and Policy 337 (6th ed. 1968). The corrugated container industry has a fungible product and a large number of producer-sellers but is dominated by a relatively few of the producer-sellers. The six largest firms in the industry account for approximately sixty percent of the total sales.
\item \textsuperscript{18} United States v. Container Corp. of America, 273 F. Supp. 18, 24 (M.D.N.C. 1967) finding of fact 16.
\end{itemize}
Justice Douglas did not accurately represent actual conditions in the industry. If this is true, the conclusions drawn from an analysis of that model are invalid and should not serve as the basis for finding that a violation of the Sherman Act had occurred.

The decision also concludes summarily that the described exchanges of price information were "concerted action . . . sufficient to establish the combination or conspiracy, which is the initial ingredient of the Sherman Act." Yet, the district court expressly concluded that no evidence was found to support the existence of either an agreement to exchange price information or an agreement to exchange price information for the purpose of fixing prices. While the Supreme Court factually distinguished Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., it should be noted that the Paramount decision stated that the concept of "conscious parallelism" has not yet entirely read "conspiracy" out of the Sherman Act. If some element of conspiracy is still required by the Sherman Act, it is difficult to understand how the Supreme Court could conclude that a combination or conspiracy existed in view of the district court's finding that each defendant decided independently and on a request basis whether to supply the desired price information.

The district court further found that for a seller to compete effectively he needed to know the price alternatives available to a buyer, and that the buyer usually supplied such information to the seller. However, on occasion, buyers were found to have furnished sellers with incomplete, inaccurate, or misleading information. Thus, the need arose for sellers to exchange price information for the purpose of determining the accuracy of information supplied by a buyer. The Supreme Court in Cement Manufacturers Protective Ass'n v. United States upheld the exchange of price information when its purpose was to protect the sellers from being fraudulently induced to forgo their legal rights; namely, shipping more cement than required for a job and thereby receiving a lower price for the cement shipped. In view of the district court's findings it would seem that a strong argument can be made that the instant case and Cement Manufacturers Protective Ass'n v. United States are factually analogous to the extent that in both cases price information was exchanged for the purpose of determining the accuracy of information supplied by buyer and avoiding sales when that information proved to be false.

The modern commercial world functions more smoothly and efficiently when its members have full knowledge of market and business

22. Id. at 541. "Conscious parallelism" occurs when two or more firms knowingly pursue the same or similar courses of action. See Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950).
24. Id. at 25, finding of fact 19 (a), (b).
25. Id. at 28, finding of fact 30.
conditions. The establishment of systems for the dissemination of such information would therefore be desirable and should be encouraged. However, the possession of such knowledge by business entities normally leads to a lessening of price competition in any type of industry other than one in which pure competition exists, and the protection of competition is a cornerstone of American anti-trust policy. In prior decisions the conflict between an efficiently functioning market and the protection of competition was resolved by holding that a lessening of competition resulting from the acquisition of additional knowledge of business conditions was not an unreasonable restraint of trade. In holding that any agreement to exchange price information which results in a lessening of price competition is a violation of the Sherman Act, the instant decision gives the preservation of price competition precedence over the development of more efficiently functioning markets.

The majority opinion suffers from several additional deficiencies. The most troubling is its failure to set out fully the theoretical reasoning used to reach the conclusion that the exchanging of price information by defendants had a detrimental effect on competition. Without additional data, an analysis of the court's reasoning is most difficult. The opinion is also confusing in that the court appears to say that any exchange of price information is per se a violation of the Sherman Act. However, by holding that both an exchange of price information and a lessening of price competition are necessary for a violation of the Sherman Act, the court rejects such a per se rule. Finally, the decision concludes that the agreement to exchange price information, though more casual, is analogous to the one in American Column & Lumber Co. v. United States. Such a conclusion requires a considerable stretching of the facts. Unlike Container Corp., the sellers in American Column followed a price schedule and made periodic reports of their sales, shipments, and inventories to a trade association. In return they received reports of participating sellers' sales, shipments, and inventories. Also, all the sellers in American Column met periodically to discuss market conditions.

In summary, the holding of Container Corp. that an agreement for the exchange of price information which results in a lessening of price competition is a violation of the Sherman Act is not a significant departure from prior anti-trust law. However, the use of theoretical economic analysis rather

27. Pure competition exists where there are many sellers, each acting independently, each so small relative to the market that one seller has no effect on the market, each selling an identical product, and each with the freedom to enter or exit the industry as it desires. Perfect knowledge of relevant market conditions, especially price, is found in pure competition industries. Imperfect knowledge is found in industries of a type other than pure competition. See G. L. Bach, Economics, An Introduction to Analysis and Policy 322 (6th ed. 1968).

28. See Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-83 (1925), where the court states:

The natural effect of the acquisition of the wider and more scientific knowledge of business conditions, on the minds of those engaged in commerce, and the consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect lawful.

than factual findings is a significant departure from prior practice and is most troubling. If this economic analysis approach is used in future cases, actual proof of a lessening of price competition would not be required to establish a Sherman Act violation. Additionally, if the conclusions drawn from analysis of an economic model are to be valid, the analysis model must not vary from the actual conditions found within the industry. The construction of such a model is most difficult and in some cases impossible. Since an economic model which will indicate that price competition has been lessened\textsuperscript{30} may be constructed for any type of industry other than one in which pure competition exists, the practical effect of the decision may be that any exchange of price information will constitute a violation of the Sherman Act for all but pure competition industries. In view of valid business needs for market and price information, this writer would view such an application of the decision as most unfortunate.

Donald Heck

\textsuperscript{30} In a pure competition industry the number of individual producers is so large and each producer's share of the market so small that no single producer can affect the price level. However, in any other type of industry, individual producers normally have some control over the price level. The amount of control varies with the number and size of producers in the industry. Generally, as the producers grow fewer in number and larger in size, there is an increase in the degree of control they can individually exercise over the price level. In any industry other than pure competition, some degree of imperfect knowledge exists. As the degree of imperfect knowledge is reduced (individual producers learn of the available price and production alternatives), the individual firm tends to follow the alternative most beneficial to itself. In terms of price competition, if a firm learns that it is selling above the prevailing price level it reduces its price to avoid losing sales. Conversely, if a firm learns that it is selling below the prevailing price level it either raises its price or, over a period of time, causes the prevailing price level to fall. (Note that when the industry is a type other than pure competition, each firm has some control over the price level.) Therefore, uniformity of prices will increase as the individual firms increase their knowledge of market conditions. Thus, any increase in knowledge of the market will tend to reduce price competition in any industry of a type other than pure competition. Any economic model constructed for such an industry will reflect this lessening of competition. \textit{See} R. H. Leftwich, \textit{The Price System and Resource Allocation} 169-279 (rev. ed. 1960) and E. H. Chamberlin, \textit{The Theory of Monopolistic Competition}, A. Re-orientation of the Theory of Value 30-53 (5th ed. 1946).
THE TAXING POWER OF MISSOURI HOME RULE MUNICIPALITIES

Grant v. Kansas City

The plaintiff, a resident taxpayer of Kansas City, sought to enjoin the city from holding a special election to approve a charter amendment authorizing an additional one-half of one per cent increase in the city's existing earnings tax. In 1963, the city had enacted an earnings tax pursuant to express statutory authority. The Circuit Court of Jackson County entered judgment for the plaintiff on the grounds that section 92.230, RSMo set an upper limit of one-half of one percent on the city's earning tax and thus the city's ordinance which called for the special election was invalid. The Missouri Supreme Court affirmed.

The court on appeal was presented with two issues. The first was whether the ordinance and the statute were in conflict and, if so, which one would be given effect. This question arises in suits to determine the validity of a municipal ordinance enacted under a home rule charter because of the Missouri Constitutional requirement that the city charter be "consistent with and subject to the constitution and laws of the state." The Missouri Supreme Court has not construed the language as narrowly as a literal reading might require. The court has said that the enactments of the home rule cities must be "consistent with and subject to the Constitution and laws of the state" only as they relate to matters not of purely local or corporate concern. It has always been held in Missouri that the taxing power is not a matter of purely local or corporate concern.

The second issue, was whether the city, by virtue of being a home rule municipality, had the power to provide for the enactment of the earnings tax by charter amendment if there was no resulting conflict with a state statute. The court unanimously held that the ordinance was in conflict with section 92.230, RSMo, but Chief Justice Holman, writing for a majority of the court, left open the question of whether a constitutional charter city "would have the authority to amend its charter to provide for an earnings tax in the absence of an applicable conflicting state statute on the sub-

1. 431 S.W.2d 89 (Mo. En Banc 1968).
2. Kansas City Charter art. XX, § 487.
5. Kansas City, Mo., Committee Substitute for Ordinance 35205, April 19, 1969.
6. Mo. Const, art. VI, § 19 provides:
Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state.
8. State ex rel. Carpenter v. St. Louis, 318 Mo. 870, 2 S.W.2d 713 (En Banc 1928); Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S.W. 943 (En Banc 1897).
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Justice Seiler concurred in the result but said that "if it were not for section 92.230 antedating the proposed amendment, I would have no hesitancy in holding that Kansas City could increase the earnings tax by amending its charter so to provide." Justice Eager, who also concurred, could not decide whether the city would have the power to increase the tax in absence of a conflicting state statute.

Justice Eager is not alone in being uncertain as to what the law is in Missouri concerning the powers of a home rule municipality. This confusion has largely resulted from the Missouri courts' failure to distinguish between the situation in which a city ordinance conflicts with an express statutory or constitutional provision and the situation in which there is no such conflict with the city's initiative. Very few Missouri cases have recognized this distinction. However, these two problems are distinct.

It is one thing to argue that there should be no limit on municipal power in the absence of an express prohibition; it is quite another thing to argue that some municipal enactments should prevail over conflicting statutes.

The result in Grant v. Kansas City is not surprising, since prior decisions of the Missouri Supreme Court have held that state statutes prevail over conflicting municipal ordinances which deal with taxation. On the other hand, there is equally persuasive authority for the proposition that municipal taxes enacted without legislative authorization are valid when there is no conflicting state statute.

The Missouri Constitution places the power to tax in the General Assembly. However, the grant of the taxing power is not exclusive. Cities, when they adopt a home rule charter, have all the powers necessary for a

10. 431 S.W.2d at 94.
11. Ibid.
12. Ibid.
13. Schmandt, supra note 7, at 388.
15. The fact that the Grant case recognizes the distinction is an indication that some of the confusion in future cases will be less apparent.
17. State ex rel. Carpenter v. St. Louis, 318 Mo. 870, 2 S.W.2d 713 (En Banc 1928); Ex parte Tarling, 241 S.W. 929 (Mo. En Banc 1922).
18. Mo. Const. art X, § 1 provides:
The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.
§ 82.020, RSMo 1954 provides:
Any city in this state which now has or which may hereafter have a population of more than ten thousand inhabitants according to the last preceding federal decennial census may frame and adopt or amend a charter for its own government by complying with the provisions of sections 19 and 20 of Article VI of the constitution of this state, or any amendments thereof.
complete system of local self-government. It can thus be implied that there is some grant of the taxing power, because this power is necessary for the city to carry on its functions as a self-governing body. Without some grant of the taxing power in the grant of a home rule charter, the municipality could not exercise its taxing power unless specifically authorized to do so by the General Assembly.

The early cases in Missouri had little difficulty sustaining the taxing power of home rule municipalities. The Missouri Supreme Court in St. Louis v. Sternberg said the city had the taxing power, since it must be presumed that the framers of the constitution had in their minds the fact that it was wholly impossible to conduct a city government in a city like St. Louis without the power of taxation being vested in those charged with conducting such government.

The court further stated in American Union Express Co. v. St. Joseph that by reason of the direct grants of power contained in the constitution, the city may adopt any method of taxation for local purposes that the legislature of the state could have adopted and delegated by statute. These early decisions involved no conflicting statutory provisions.

If the extensive taxing power in these early cases had been recognized as power of home rule cities to tax in the absence of a conflicting statutory or constitutional provision, their taxing power would not be as uncertain as it is today. However, when the courts were faced with a conflicting state statute, they developed certain conceptual tests to determine whether the ordinance or the statute would prevail. The courts then tried to apply

21. Ex parte Asotsky, 319 Mo. 810, 5 S.W.2d 22 (En Banc 1928); St. Louis v. McCann, 157 Mo. 301, 57 S.W. 1016 (1900); St. Louis v. Bowler, 94 Mo. 630, 7 S.W. 484 (1888); St. Louis v. Sternberg, 69 Mo. 289 (1879); American Union Express Co. v. St. Joseph, 66 Mo. 675 (1877). "Municipal enactments were struck down or overridden during this period, but this occurred in cases in which there were (1) conflicts with statutes, (2) the ordinance was held to violate due process, or (3) the municipal charter did not authorize the enactment of the ordinance." Westbrook, supra note 16, at 52.
22. 69 Mo. 289, 298-99 (1879).
23. 66 Mo. 675, 680-81 (1877). See also St. Louis v. McCann, 157 Mo. 301, 57 S.W. 1016 (1900).
24. The statute would prevail when the activity was: (1) governmental, Coleman v. Kansas City, 359 Mo. 150, 182 S.W.2d 74 (En Banc 1944); Kansas City v. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S.W.2d 195 (1935); State ex rel. Garner v. Missouri & Kansas Telephone Co., 189 Mo. 83, 88 S.W. 41 (En Banc 1905); (2) of statewide concern, School District of Kansas City v. Kansas City, 382 S.W.2d 688 (Mo. En Banc 1964); (3) of general concern, State ex rel. Zoological Board v. St. Louis, 318 Mo. 910, 1 S.W.2d 1021 (En Banc 1928); (4) high governmental interest, Turner v. Kansas City, 354 Mo. 857, 191 S.W.2d 612 (1945); (5) paramountly concerning state interests, Joplin v. Industrial Comm'n of Missouri, 329 S.W.2d 687 (Mo. En Banc 1959).

It has been suggested that the decision of the courts, when they are faced with a state-local conflict, is usually based on the judgment of the courts as to whether the public interest requires that the ultimate decision be determined by the state rather than the city. Westbrook, supra note 16, at 62-63.
these tests in all situations, whether or not there was a conflicting state enactment. The application of such conceptual tests to situations involving no express statutory conflict would necessarily make the taxing power operative only through the authority of the state legislature. As a result, doubts arose as to the municipality’s taxing power.

Two Missouri cases, although criticized as detrimental to the autonomy of home rule cities in the taxing area, appear to authorize taxing power solely under the cities’ home rule charters. Kansas City v. Frogge invalidated a Kansas City use tax on all property purchases for use in the city upon which the state tax had not been paid. The court held that although this subject had not been covered by the state sales tax, in order for the city to impose the tax, it must either be authorized by the state legislature or by the people of the city in the charter. The court did not hold that the city had no power to enact the tax but only that the tax had not been provided for in the charter. In Carter Carburetor Corp. v. St. Louis the court held that the city’s charter was not specific enough to allow the city to impose an earnings tax. As in Frogge, the court did not preclude the city’s power to impose an earnings tax but held only that the charter did not authorize such a tax.

These two cases do not take away a city’s power to levy taxes without enabling legislation from the General Assembly. Although these cases did restrict the taxing power of the city from that found in the early Missouri decisions, the city may still exercise the power when authorized either by the legislature or the people through specific provisions in the city’s charter. This is considerably more power than would be allowed under a literal application of those conceptual tests mentioned above.

Cities in Missouri are now faced with the problem of which method to use in exercising the taxing power. Should the city seek enabling legislation or should it seek authorization from the people of the city by amending the city charter? The Grant case indicates what may happen when the city seeks to act in an area covered by an enabling statute. The statute may place a restriction on the exercise of the power granted. If this is the case, the city cannot modify the restriction imposed by the legislature by amending the charter since this would not be “consistent with the laws of the state.” Where no legislative restriction exists, the recent cases have generally sustained the taxing power if the tax is specifically authorized

26. 352 Mo. 233, 176 S.W.2d 496 (1943).
27. Id. at 239, 176 S.W.2d at 501.
28. 356 Mo. 646, 203 S.W.2d 438 (En Banc 1947).
29. Id. at 660, 203 S.W.2d at 445.
30. State ex rel. People’s Motorbus Co. v. Blaine, 382 Mo. 582, 58 S.W.2d 975 (1932); Automobile Gasoline Co. v. St. Louis, 326 Mo. 485, 32 S.W.2d 281 (1930).
31. The earnings tax has been upheld when it was enacted pursuant to specific authorization from the General Assembly. Barhost v. St. Louis, 423 S.W.2d 843 (Mo. En Banc 1967); Arnold v. Berra, 366 S.W.2d 321 (Mo. En Banc 1963); Walters v. St. Louis, 259 S.W.2d 377 (Mo. En Banc 1953).
by the charter of the city.\textsuperscript{33} In \textit{Giers Improvement Corp. v. Investment Service}, the court said:

Plaintiffs-appellants are correct in urging that the power to tax is a governmental function inherent in the State ... exercised by the legislature subject to constitutional limitations. But there are matters governmental in character, including taxation, over which a city may exercise authority delegated to it. ... A city, the people of which have framed and adopted a charter under direct constitutional authority, may exercise such powers of local self-government, including taxation, as the people of the city have delegated to it by charter subject to constitutional limitation.\textsuperscript{34}

In spite of the case authority supporting the power of home rule cities to levy taxes that are specifically authorized in the charter, Missouri home rule cities in recent years have consistently sought enabling legislation for taxation from the legislature. It appears that they have been deterred from relying on their home rule powers by the dicta and confusion in court opinions dealing with conflicts between state statutes and local enactments. Since the legislature often places rather strict limits on the taxing power granted by statute, home rule cities could obtain long range benefits if they would base taxes on their home rule powers rather than legislative authorization. Although the existing uncertainty in the law might result in litigation if cities now choose this basis for local taxation, the time and expense involved in litigating the issue of the taxing power of home rule municipalities would clearly be justified by successful elimination of their dependence on the legislature in this vital area of municipal concern.

\textbf{William L. Hubbard}

\textsuperscript{33} General Installation Co. v. University City, 379 S.W.2d 601 (Mo. En Banc 1964); Giers Improvement Corp. v. Investment Service, 235 S.W.2d 355 (Mo. 1950).

\textsuperscript{34} Giers Improvement Corp. v. Investment Service, \textit{supra} note 33, at 358.
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JUVENILE SOCIAL RECORDS AND CRIMINAL DISCOVERY

State ex rel. Arbeiter v. Reagan¹

On December 3, 1963, a 15 year old boy named Arbeiter was arrested by the St. Louis police. During police interrogation he admitted entering an apartment and stabbing its occupant. Later that evening he was transferred to the custody of the juvenile authorities. On December 30, the juvenile court relinquished jurisdiction and certified Arbeiter for trial under the general criminal law. Arbeiter was indicted for first degree murder, tried, convicted, and sentenced to life imprisonment. On appeal, the Missouri Supreme Court reversed and remanded the case for a new trial,² holding that the admission into evidence of statements made during Arbeiter's initial detention and interrogation by the police violated certain provisions of the juvenile code.³

On January 6, 1967, in preparation for Arbeiter's new trial, the circuit attorney filed a motion for a subpoena duces tecum to inspect the records of the juvenile court concerning Arbeiter.⁴ The State sought admissions Arbeiter had made while in the custody of juvenile authorities. The subpoena was issued over objections by the defense. The defense was successful in obtaining a preliminary writ of prohibition to quash the subpoena. After an appropriate hearing the supreme court quashed the preliminary writ of prohibition and held that when the juvenile court certified Arbeiter for trial, it relinquished to the criminal court the power to order the inspection of juvenile files by persons having a legitimate interest therein.⁵ The court also held that such inspection could be ordered by the issuance of a subpoena duces tecum.⁶

The juvenile courts are courts of special jurisdiction. Early reformers were appalled by the fact that children could be subjected to adult procedures and penalties and that they could be given long prison sentences to

1. 427 S.W.2d 371 (Mo. En Banc 1968), rehearing denied May 13, 1968.
2. State v. Arbeiter, 408 S.W.2d 26 (Mo. 1966).
3. § 211.061 (1), RSMo 1959, provides: "When a child is taken into custody . . . the child . . . shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him." (emphasis supplied.)
4. Mo. R. Crim. P. 25.19 states:
   A subpoena duces tecum may be issued by the court or the clerk thereof, upon application of either party, commanding the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be illegal, unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.
6. Id. at 374.
be served with hardened criminals. This reflected the feeling that the child was essentially good, and, if cared for and guided by the state he could be rehabilitated. Accordingly, juvenile proceedings were set up, not to determine the guilt or innocence of the child, but to determine whether the child was delinquent. The proceedings were not adversary in nature, the hearing was not a criminal one, and criminal procedures were not applicable. The child was to be "treated" and "rehabilitated" through institutionalization which was to be clinical rather than punitive in nature. Furthermore, constitutional safeguards did not apply because the state was acting as parens patriae for the child. The theory of parens patriae was further buttressed by the principle that the child had a right, not to liberty, but to custody. If the parents failed to provide that custody, the state could intervene and care for the child.

In a series of recent cases the federal courts have shifted to the view that constitutional safeguards, particularly the right to due process and a privilege against self-incrimination, are applicable to juvenile court proceedings. In 1961, a federal court of appeals stated that juvenile procedures are governed by "fundamental fairness" and that admissions made in juvenile hearings were to be kept out of adult courts in order to preserve the effective workings of the juvenile courts. In 1964, the same court stated that evidence obtained from juvenile proceedings may be admissible in criminal proceedings if used properly and that a juvenile's attorney should be allowed to inspect the youth's juvenile social file. In 1965, the

11. Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959); State v. Tolias, 326 S.W.2d 329, 333 (Mo. 1959); State ex rel. Matacia v. Buckner, 300 Mo. 359, 365, 295 S.W. 179, 180 (En Banc 1923); In re C., 314 S.W.2d 756, 760 (Spr. Mo. App. 1958). In Pee v. United States, supra at 561-62, the court cites authority from every state that proceedings in juvenile courts are not criminal cases.
14. State v. Heath, 353 Mo. 1147, 1150, 181 S.W.2d 517, 519 (1944); Ex parte Naccarat, 328 Mo. 722, 726, 41 S.W.2d 176, 178 (En Banc 1931); Minor Children of F.B. v. Caruthers, 323 S.W.2d 397, 400 (St. L. Mo. App. 1959); But see § 211.211, RSMo 1959 which affords the right of counsel to a child before his commitment to the State Board Training School.
Supreme Court stated that the juvenile court must give a juvenile the right to a hearing before transferring his case to an adult court.\textsuperscript{21} Finally, in 1967, the Supreme Court decided that a juvenile had the right to due process, including proper notice for hearings, right to counsel, and a privilege against self-incrimination, and that the juvenile courts were unable to commit a child in the absence of sworn testimony.\textsuperscript{22}

In analyzing the problem of whether to allow inspection of a juvenile's social file initial inquiry must be made into the Missouri Juvenile Code, which states:

The proceedings of the juvenile court shall be entered in a book kept for that purpose and known as the juvenile records. These records as well as all information obtained and social records prepared in the discharge of official duty for the court shall be open to persons having a legitimate interest therein.\textsuperscript{23}

Under the wording of this statute the circuit attorney can, if he has a "legitimate interest," inspect the juvenile court's records either before or after the time of the juvenile's transfer to adult court.\textsuperscript{24} The question of whether to release the juvenile's records is one of policy for the individual judge to decide. The purpose of the transfer of a juvenile to adult criminal courts is to protect the public where rehabilitation is impossible.\textsuperscript{25} Presumably, this public protection would be increased by a disclosure of the juvenile's past files.\textsuperscript{26} On the other hand, to allow a disclosure of juvenile files, as did the \textit{Arbeiter} court, could negate the purpose of the juvenile courts by destroying the confidentiality of the proceedings as well as the juvenile's trust in them.\textsuperscript{27}

By permitting the inspection of \textit{Arbeiter's} juvenile records the court has struck a crippling blow to the confidentiality of juvenile court proceedings in Missouri. Allowing a juvenile's records to be inspected by anyone with a "legitimate interest therein" means that, although it seems safe to assume the press would not have such "legitimate interest," the records could possibly be opened up to prospective employers, insurance investigators, and the like.\textsuperscript{28} Even if the prosecutor alone were allowed to inspect the records, the confidentiality surrounding juvenile procedures would be destroyed to such an extent that a juvenile's lawyer would advise him to remain silent in order to avoid the possibility of damaging disclosures becoming available to the prosecutor should the case be shifted to the adult courts. By destroying the confidentiality surrounding juvenile proceedings the court seems to have shifted away from the type of thinking upon which the theory of \textit{parens patriae} is based.

The second question discussed in \textit{Arbeiter} is whether there exists,

\textsuperscript{21} Kent v. United States, 383 U.S. 541 (1965).
\textsuperscript{22} Application of Gault, 387 U.S. 1 (1967).
\textsuperscript{23} § 211.321 (1), RSMo 1959 (emphasis added).
\textsuperscript{24} State ex rel. Arbeiter v. Reagan, 427 S.W.2d 371, 376 (Mo. En Banc 1968).
\textsuperscript{25} \textit{Id.} at 377.
\textsuperscript{26} In \textit{Arbeiter}, the admissions were no longer secret anyway because of the notoriety of Arbeiter's first trial. \textit{Id.}, at 377.
\textsuperscript{27} \textit{Id.} at 380.
in Missouri, a proper procedure for discovery of a juvenile's social file. Although there was no right of criminal discovery at common law,\(^{29}\) scholars have argued extensively the pros and cons of the matter.\(^{30}\) This discussion has caused several jurisdictions,\(^{31}\) with the federal courts at the forefront,\(^{32}\) to develop and expand the area of criminal discovery. In Missouri the courts, not bound by the federal rules,\(^{33}\) have held that there is no general right of criminal discovery.\(^{34}\) While disclosure usually is a question within the discretion of the court,\(^{35}\) the courts have generally required that the information sought be admissible in evidence, and therefore relevant and material,\(^{36}\) and that good cause be shown for inspection.\(^{37}\) Courts will also


A compilation of the reasons for expansion of criminal discovery includes: (a) elimination of surprise results in fairer trials; (b) more effective use can be made of cross-examination; (c) defense counsel can better advise his client with more of the facts before him; (d) all parties can have equal access to the results obtained by the State's highly technical and effective investigatory equipment and procedures; (e) narrower issues will be presented to the jury; (f) dockets will be reduced by an increase in pretrial settlements; (g) expanded discovery has worked well in civil cases; (h) since an innocent defendant may be unaware of the circumstances surrounding the alleged crime, such discovery procedures are necessary for his defense; (i) the trial will be expedited.

Some reasons against expansion of criminal discovery are: (a) the defendant already has an unfair advantage in criminal proceedings; (b) dockets will be overcrowded due to fewer pleas of guilty; (c) there will be increased dishonesty because of the higher stakes involved in criminal cases than in civil cases; (d) subornation of perjury is possible (although it is argued that the normal safeguards against perjury will adequately prevent this problem from arising); (e) there will be a possibility of tampering with witnesses and a need to protect them from harassment; (f) there is no mutuality of discovery because of defendant's right against self-incrimination; (g) there may be a destruction of evidence; (h) current procedures, including continuance, are adequate to insure a fair trial; (i) there will be "fishing expeditions" into the work product of the other party.

\(^{31}\) Annot., 7 A.L.R.3d 8 (1965).


\(^{33}\) State v. Aubuchon, 381 S.W.2d 807, 815 (Mo. 1964); State v. Simon, 375 S.W.2d 102, 104 (Mo. En Banc 1964).

\(^{34}\) State v. Maxwell, 400 S.W.2d 156, 159 (Mo. 1966); State v. Aubuchon, supra note 33, at 813.

\(^{35}\) State v. Aubuchon, 381 S.W.2d 807, 814 (Mo. 1964); State ex rel. Clagett v. James, 327 S.W.2d 728, 290 (Mo. En Banc 1959); State ex rel. Missouri Pac. R.R. v. Hall, 325 Mo. 102, 104, 27 S.W.2d 1027, 1027 (En Banc 1930).

\(^{36}\) State v. Redding, 357 S.W.2d 103, 109 (Mo. 1962); State v. Gilliam, 351 S.W.2d 723, 727 (Mo. 1961), cert. denied, 376 U.S. 914 (1964); State v. Kelton, 299 S.W.2d 493, 497 (Mo. 1957); State ex rel. Headrick v. Bailey, 365 Mo. 160, 164, 278 S.W.2d 797, 740 (En Banc 1955); State ex rel. Terminal R.R. Ass'n v. Flynn, 363 Mo. 1065, 1071, 257 S.W.2d 69, 72 (En Banc 1953); State ex rel. Bostelmann v. Aronson, 361 Mo. 535, 544, 225 S.W.2d 384, 388 (En Banc 1950).

\(^{37}\) State v. Cody, 379 S.W.2d 570, 574 (Mo. 1964); State ex rel. Phelps v.
consider whether discovery will expedite the trial,\textsuperscript{38} whether the document is privileged,\textsuperscript{39} and whether production of it would be illegal, unreasonable, or oppressive.\textsuperscript{40} Moreover, discovery cannot be granted for "fishing expeditions,"\textsuperscript{41} for prying into the adversary's preparation for trial,\textsuperscript{42} merely to impeach a witness,\textsuperscript{43} or upon a mere suspicion that the document might contain relevant evidence.\textsuperscript{44} Discovery must also be within the jurisdiction of the court.\textsuperscript{45} Missouri courts have allowed inspection of memoranda used by a witness to refresh his memory when testifying in court,\textsuperscript{46} but not of memoranda used to refresh the memory of a witness outside of court.\textsuperscript{47}

To determine whether a subpoena duces tecum can be used for the discovery of a juvenile's records, a court must look to Missouri Criminal Rule 25.19,\textsuperscript{48} which provides for the issuance of such a subpoena when applied for by a party and when compliance would not be illegal, unreasonable, or oppressive.\textsuperscript{49} Although it has been argued that this rule does not provide a statutory basis for criminal discovery,\textsuperscript{50} the pre-trial production of a juvenile's records surely will expedite the trial and, since there is no broad system of criminal discovery in Missouri, it would seem that the rule should be interpreted liberally, allowing the subpoena to be issued.\textsuperscript{51} It was such a line of reasoning that led the \textit{Arbeiter} court, in effect, to allow the criminal discovery of documented matter without a showing of admissibility, relevance, or materiality and without any showing of good cause

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McQueen, 296 S.W.2d 85, 89 (Mo. En Banc 1956); \textit{State ex rel. Headrick v. Bailey}, \textit{supra} note 36, at 163, 278 S.W.2d at 740; \textit{State ex rel. Terminal R.R. Ass'n v. Flynn}, \textit{supra} note 36, at 1071, 257 S.W.2d at 72.

38. \textit{State ex rel. Phelps v. McQueen}, \textit{supra} note 37, at 89.


42. \textit{State v. Aubuchon}, 381 S.W.2d 807, 814 (Mo. 1964); \textit{State v. Kelton}, 299 S.W.2d 493, 497 (Mo. 1957); \textit{State v. McDonald}, 342 Mo. 996, 1004, 119 S.W.2d 286, 289 (1938).


47. \textit{State v. Miller}, 368 S.W.2d 353 (Mo. 1963).


50. \textit{State v. Engberg}, 377 S.W.2d 282, 286 (Mo. 1964); \textit{State ex rel. Phelps v. McQueen}, 296 S.W.2d 85, 89 (Mo. En Banc 1956).

other than a strong suspicion that the documents would contain incriminating statements made by the defendant.

It would thus appear that the state, or a defendant,\footnote{52} could compel discovery of an item under Missouri Criminal Rule 25.19 merely by applying for it and showing that compliance with the subpoena, if issued, would not be illegal, unreasonable, or oppressive. However, discovery is still within the discretion of the court\footnote{53} and the considerations of admissibility, relevancy, and materiality will probably remain important factors in determining to what extent the courts will allow criminal discovery in the future.

\textit{Arbeiter} could have a twofold effect on Missouri law. By destroying much of the confidentiality surrounding the juvenile disciplinary system the court displays an attitude vastly different from that upon which the old theory of \textit{parens patriae} is based. It is impossible to predict how this new thinking will change the current juvenile court system. The \textit{Arbeiter} court also displays a more liberal attitude toward criminal discovery than it has in the past. Although this attitude might lead one to predict an expansion in the use of criminal discovery in Missouri, recent cases show the court’s reluctance to allow such expansion.\footnote{54}

\textbf{Michael B. McKinnis}

\footnote{52. Since Mo. R. Crim. P. 25.19 (emphasis added) states, “A subpoena duces tecum may be issued . . . upon application of \textit{either} party . . . .” it would seem that a judicial interpretation of it concerning criminal discovery by the prosecution would apply with equal force to the situation in which the defendant is seeking criminal discovery.}

\footnote{53. Cases cited note 34 \textit{supra}.}

\footnote{54. State v. Balle, 442 S.W.2d 35 (Mo. 1969); State v. Yates, 442 S.W.2d 21 (Mo. 1969); State v. Coleman, 441 S.W.2d 46 (Mo. 1969).}
SEcurities Regulation: Who May Violate RULE 10b-5 By Remaining Silent

Securities and Exchange Commission v. Texas Gulf Sulphur Co.¹

The Securities and Exchange Commission brought this action against Texas Gulf Sulphur (TGS) and thirteen of its directors, officers, and employees for alleged violations of Section 10(b) of the Securities Exchange Act of 1934² and SEC Rule 10b-5.³ The complaint alleged that defendants had purchased shares of TGS, had caused others to purchase shares of TGS, had accepted TGS stock options, and had caused a misleading press release to be issued, all while in possession of secret, material information which defendants failed to disclose to the sellers. This information, which consisted of assay reports on ore samples, was corporate information, intended to be used only by the corporation, and available to the other defendants only because of their position in the corporation. The SEC alleged that by using this information to further their own interests in the purchase of securities, without disclosing the information to the sellers, the defendants violated Rule 10b-5.

Drilling completed in November, 1963, indicated the possibility of substantial mineral deposits in the Timmons, Ontario, area, and TGS began buying land near the site of the mineralization. A press release was issued on April 12, 1964 which, in effect, denied any substantial discovery. Then, on April 16, a second press release appeared confirming that a large body of ore had been discovered. The stock transactions which were the subject of the action were completed between November, 1963, and April 16, 1964.

The district court dismissed the complaint against all but two defendants, Crawford and Clayton,⁴ holding that the drilling results were not sufficiently indicative of a substantial mineral discovery to constitute "material" information when the stock transactions occurred. It found that only Crawford and Clayton had purchased shares after the information had become material. The appellate court affirmed in regard to Crawford and Clayton, but reversed dismissal of the complaint against the other defendants, except one Murray, who the appellate court agreed had no knowledge

3. 17 C.F.R. 240.10b-5 1968, states:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentalities of interstate commerce, or of the mails or of any facility of any national securities exchange,
   (a) to employ any device, scheme, or artifice to defraud,
   (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
5. The case is highly complex, involving many issues. This note covers only the question of what classes of persons might conceivably violate Rule 10b-5 by withholding material information.

Upon certain persons falls the duty either to communicate to prospective buyers or sellers of securities all of the material information they possess in regard to the securities concerned, or to refrain from trading such securities. Defendants held liable by the appellate court in *Texas Gulf Sulphur* were executives, directors, and employees of TGS, all of whom had a duty to the corporation not to disclose the information in order that the corporation might acquire mineral rights in the area at reasonable prices. Much of the importance of this case lies in the acceptance by the court of the SEC rules for deciding who is an "insider." The court then used these rules to expand the existing case law by including corporate employees below the executive level in the category of "insiders" liable under Rule 10b-5 for non-disclosure of material information.

Prior to the promulgation of Rule 10b-5, there was only a limited duty to disclose any information in a stock transaction. The only persons required to disclose information in regard to a transaction were those who owed some fiduciary duty to the other party in the transaction. The general rule in stock transactions was that officers and directors of a corporation owed no such fiduciary duty to the individual shareholders. However, in *Strong v. Repideo* a shareholder owning three-fourths of a corporation was held liable to a minor shareholder after the former, a director, purchased shares from the latter without revealing that the government had offered to purchase the assets of the corporation at a price which would greatly increase the value of the shares. The court ruled that even though there would nor-
mally be no fiduciary duty in such a situation, the "special facts" in the possession of the majority shareholder gave rise to a duty to disclose those facts. In Hotchkiss v. Fisher another director was held to have a duty to disclose material information to a shareholder before purchasing his stock. "Directors act in a fiduciary capacity in the management of corporate affairs, and a director negotiating with a shareholder for purchase of shares acts in a relation of scrupulous trust and confidence." However, any duty imposed was a matter of state law and varied considerably from state to state.

Based upon Rule 10b-5, the courts in the early cases of Kardon v. National Gypsum Co. and Speed v. Transamerica Corp. created a cause of action in situations formerly actionable only under the "fiduciary duty" or "special facts" doctrine. However, only recently has Rule 10b-5 been extended to any degree beyond these two doctrines. The major breakthrough came in a proceeding before the SEC. In Matter of Cady, Roberts & Co. the SEC adopted the so-called "relationship giving access" test to determine upon whom falls the duty to disclose all material information before trading in the securities involved. Under this test, this duty rests on two elements:

[F]irst, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.

Various relationships which a person might have with the corporation could be "relationships giving access" and could create a duty to disclose information before trading, thereby creating liability for non-disclosure.

It is well settled law that directors, officers, and major stockholders enjoy an "insider" relationship with the corporation, and as insiders, are liable for non-disclosure of material information. But the court in Texas Gulf Sulphur made no differentiation between those defendants who were officers or directors and those who were only employees, classing all of them as "insiders." The employees involved were an engineer, two geologists, a corporate attorney, and an office manager. The complaint was dismissed as to the office manager but only because he did not know about the discovery, not because of his position.

Members of the insider's family are evidently prohibited from trading in securities to the same extent as the insider himself. A portion of the shares in the Texas Gulf Sulphur case alleged to have been purchased by defendants Holyk and Mollison were actually purchased in the names of

12. Id. at 538, 16 P.2d at 535 (1932).
16. Id. at 912.
their wives. However, the court treated these transactions as if the defendants had made the purchases in their own names. Since there was no attempt to hold the wives liable for any of the trading, it follows that insiders will be held liable for such unlawful trading by members of their families.

Brokers who receive inside information have been held to be insiders or at least to be in violation of Rule 10b-5 if they trade in the security while in possession of undisclosed material information. In *Matter of Cady, Roberts & Co.*, a partner in a brokerage firm sold shares in the Curtis-Wright Corporation after being informed by an associate, who was also a director of Curtis-Wright, that the company was preparing to announce a dividend cut. The SEC found that his actions violated Rule 10b-5 without deciding if he was an "insider."20

The issuing corporation itself can be liable as an "insider."21 If the securities are callable at the issuer's option, there would seem to be no need for disclosure. However, in straight offers to purchase or sell shares, the corporation is under an obligation to disclose material information to the same extent as a director or officer would be if he had made the offer.22

One category of persons whose liability is uncertain is that of "quasi-insiders," i.e. persons who have gained information through business transactions with the corporation. This information may be in the form of secret financial data disclosed in order to borrow money or for some other corporate purpose; the information may be merely that the securities trader and the corporation have entered into some contract which is highly favorable to the corporation; or the trader may be attempting to buy outstanding shares, knowing that once he accumulates substantially all the shares, or at least controlling shares, he can increase the profit of the corporation or sell these shares at a higher price. There is little authority regarding possible liability in the first two situations. However, it seems probable that liability would be imposed for non-disclosure because there is a relationship giving access to information intended to be used only for corporate purposes. In regard to the third example, the available case law indicates that the non-shareholder or non-insider who is attempting to buy control of the corporation has no duty to disclose his plans. In *Mills v. Sarjem Corp.*, the defendant had offered to purchase substantially all of the stock in a bridge-owning corporation knowing that once it had completed these purchases, it could sell the shares in a block for more than the purchase price. The price offered for the shares by defendant was in excess of the market price but lower than the price for which they could be sold by defendant. The court concluded that since the offered price was above market, surely the shareholders knew that the defendant had some profit-making purpose in buying the shares.24

20. *Id.* at 912. *See also,* List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir. 1965), where dictum indicates broker would have been liable if he had possessed material information.
24. *Id.* at 764.
In Speed v. Transamerica Corp., on similar facts, but where the attempt at control was made by an existing shareholder, the defendant was held to have violated Rule 10b-5. The cases are distinguishable in that the defendant in Sarjem obtained his information outside the corporation while the shareholder in Speed obtained his information through the corporation. Professor Bromberg concludes that the Sarjem case would be decided differently today:

Since a tender offer from an outsider is frequently a prelude to further combination (by merger, asset sale, etc.) and the shares acquired in the tender offer may make the necessary vote a foregone conclusion, or even dispense with it entirely, it is probable that a disclosure of intention about this must be made. Slightly more broadly, he is likely to have to disclose his plans for operation or disposition of the business.

If this view is accepted by the courts and liability is imposed without any relationship between the offeror and the corporation and without the use of any information obtained from the corporation, there would appear to be liability without the fraud or deceit required by Rule 10b-5. Thus far no court has accepted this view, and it is possible that the question will not arise in the courts again, since in 1968, Congress added sections 14(d) and (e) to the 1934 Act. These sections require affirmative disclosures from any person making a cash tender offer for 10% or more of the outstanding shares of any class stock of a corporation registered under section 12 of the 1934 Act. It is unlikely that a person would violate Rule 10b-5 without violating new section 14(d) in situations such as Speed or Sarjem.

Another category of securities traders whose liability is uncertain is that of persons who, though not insiders themselves, receive material information from an insider. These are the so-called "tippees." In the Texas Gulf Sulphur case, three persons were advised to buy TGS stock or were given information about the stock by defendant Darke. Two of these persons then gave the information to three others. All six bought TGS stock prior to the official disclosure of the discovery. Defendant Darke was held liable for the purchases made by these six persons although no indication was given as to an appropriate remedy. However, the nature of the "tippees" liability (if liable at all) is unclear since they were not joined in the action. A reason for the failure to join them may have been that the SEC was uncertain of their liability, or that the Commission elected to hold only Darke liable. Another possibility is that the SEC did not want to complicate further an already complicated case.

There is case law indicating that the "tippees" could have been held liable. In Ross v. Licht five directors, officers, and "substantial" stockhold-

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27. Id. at 119.
28. Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967) appears to have rejected this theory in denying a claim for damages under Rule 10b-5.
ers joined with three of their friends to purchase outstanding shares and then to issue new shares to be sold to the public at a considerably higher price. The three friends were held liable along with the others as insiders, as tippees, and as aiders and abettors. The court stated, "If Sidney, Grapel and Bluestone were not insiders, they would seem to have been 'tippees' (persons given information by insiders in breach of trust) and subject to the same duty as insiders." The court gave considerable attention to the close relationship between the "tippees" and the management of the corporation and the fact that the "tippees" were actively involved in the plans which were concealed from the shareholders. However, if the statement by the New York district court is to be accepted literally, the mere fact that they were given information would be sufficient to create liability for trading. In Matter of Merill Lynch, Pierce, Fenner & Smith, the brokerage firm had obtained material information regarding Douglas Aircraft stock while underwriting an issue of new securities for Douglas. After passing this information to several favored investment firms who immediately sold their Douglas stock, the firm and several of its employees were held to have violated Rule 10b-5. The SEC has indicated that it intends to proceed against the "tippees" who traded in the Douglas stock and to test their liability.

In Texas Gulf Sulphur it seems likely that the three "tippees" who were given information by Darke had the required "relationship giving access," since they obtained their information from a corporate insider. In regard to the "tippees" who received information from the "primary tippees," there was a relationship giving access to information intended to be used only for corporate purposes, but the relationship was so indirect that it is not at all certain that liability for non-disclosure would be imposed.

In each instance it makes little, if any, difference under Rule 10b-5 whether the transaction is a sale or purchase, or whether the transaction is handled on a person to person basis or through brokers or exchanges, as long as one of the three requirements of Rule 10b-5 is met: use of (1) interstate commerce, (2) mails, or (3) any national securities exchange. The importance of the transaction lies in its substance rather than its form.

The "relationship giving access" test appears to be the best criteria available at this time for determining liability for non-disclosure. The court in Texas Gulf Sulphur firmly established this test by applying it in

31. Id. at 410.
34. However, note that all of the "tippees" were investment advisors under SEC jurisdiction. The relief sought consists of barring the "tippees" from "associating with or acting as broker-dealers."
35. But see SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 853 (2d Cir. 1968), cert. denied, --- U.S. ---, 89 S.Ct. 1454 (1969). The court, after holding Darke in violation of Rule 10b-5, noted that the actions of all of the "tippees" "certainly could be equally reprehensible."
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this very important case. It is submitted that the courts should not extend liability under 10b-5 any further or no one will be able to trade securities without fear of liability. If this test is broadened, Rule 10b-5 liability could extend indefinitely. As one professor jokingly foresees:

Under Rule 10b-5 whenever stock is sold, if the price goes up—the seller can sue the buyer; if the price goes down—the buyer can sue the seller; if the price remains absolutely the same, each one can sue the other for interest.41

This is certainly not the intention of the SEC in promulgating Rule 10b-5.

LYND K. MISCHIE

CODEFENDANT'S CONFESSION IN A JOINT TRIAL

Bruton v. United States1

George Bruton and William Evans were tried by a jury and convicted on a federal charge of armed postal robbery.2 During post-arrest interrogation, Evans had confessed to the robbery, implicating Bruton as an accomplice. Evans' confession, including the incriminating references to Bruton, was introduced in the joint trial. At the close of the government's case and again in his instructions to the jury, the trial judge instructed the jurors to disregard the confession in considering the evidence against Bruton. On appeal, Evans' conviction was reversed for the failure of the authorities to comply with the requirements of Miranda,3 but the conviction of Bruton was affirmed.4 The Supreme Court granted certiorari and reversed Bruton's conviction on the ground that the cautionary jury instruction was ineffective to protect Bruton's sixth amendment right of confrontation.

Evans' confession incriminating Bruton was not admissible against Bruton because of traditional hearsay limitations. Nor was it admissible against Bruton under the conspiracy exception to the hearsay rule because

41. 24 Bus. Law. 69 (1968).


3. Miranda v. Arizona, 384 U.S. 436 (1966). This decision requires that any person subjected to custodial police interrogation must first be informed that he has a right to remain silent, that anything said may be used against him, and that he has the right to have counsel present throughout the interrogation.

4. Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967). The circuit court assumed that the jurors, heeding the cautionary jury instruction, would be able to disregard the confession when considering the evidence against the non-declarant. See Delli Paoli v. United States, 352 U.S. 232 (1957). Therefore, it was immaterial to the affirmance of Bruton's conviction that Evans' conviction was reversed. Any infirmity in Evans' confession could not have tainted Bruton's conviction since the confession allegedly was not considered against Bruton.
that exception allows the extrajudicial statements of one conspirator into
evidence against another only if the statements were made in the presence
of the co-conspirator or were made with his implied authority or consent
in the furtherance of the conspiracy. Thus, in a joint trial a procedural
device protects the non-confessing defendant when the confession is offered,
but it is admitted against the confessing defendant.

The advantages of a single trial for multiple defendants have long been
recognized by the government. Joint trials are preferred over separate trials
for the ostensible reason that separate trials are duplicative and expensive.
Since extrajudicial statements are admissible in a joint trial only as admiss-
sions of the declarant, the court must guard against allowing the jury to
consider such declarations when determining the guilt or innocence of a
non-declaring codefendant. Heretofore, when the confession of a codefend-
ant was admitted, the widely accepted remedial device used to protect the
non-declarant was a cautionary jury instruction similar to the one used in
Bruton. Bruton clearly rejected this practice, expressly overruling Delli
Paoli v. United States, in which the Court had sanctioned the use of the
jury instruction as an effective safeguard for the non-declarant.

The Court in Bruton recognized that the admission of the codefendant's
confession may have prejudicial consequences beyond the normal hearsay
dangers. The primary reason for the exclusion of hearsay statements is the
inability of the opposing party to cross-examine the declarant. In a crim-
inal trial the inability of the defendant to cross-examine witnesses against
him violates the right of confrontation guaranteed to him by the sixth
amendment. The danger of a violation of the sixth amendment resulted
in the reversal of Bruton's conviction. The Court found that Evans' con-
fusion might have influenced the jury when it weighed the evidence against
Bruton, and thus the Court rejected the assumption that a cautionary jury
instruction is a suitable protective device for the non-declarant.

Although the Court alluded to possible "viable alternatives" that might supplant
the jury instruction, it failed to elaborate. Thus, one is led to ask whether

5. Krulewitch v. United States, 336 U.S. 440 (1949); Fiswick v. United States,
329 U.S. 211 (1946); Brown v. United States, 150 U.S. 93 (1893); 4 J.
Wigmore, Evidence §§ 1048-49 (3d ed. 1940).

6. For a discussion of other factors that may motivate a prosecutor to seek
a joint trial, see the concurring opinion of Justice Jackson in Krulewitch v. United
States, supra note 5. On evidentiary advantages generally, see Klein, Conspiracy—


9. Fifth amendment privileges available to the confessor preclude his ap-
ppearance as a witness. If the confession should influence the jury's deliberation
as to the non-confessor, the confessing codefendant would in effect be appearing
as a witness against the non-declarant. The sixth amendment guarantees to a de-
fendant the right to confront the witnesses against him. Id. at 128.

10. Jury research conducted at the University of Chicago has suggested that
the actual effect of a limiting instruction may be to compound the difficulty of the
jury in disregarding inadmissible evidence and give more weight to the evidence
than it would have had if nothing had been said. Broeder, The University of Chi-


12. Id. at 143.
it is possible to secure the advantages of a joint trial, which include the evidentiary advantages resulting from the admission of the confession of one defendant, and at the same time insulate the non-declarant in order to preserve his right of confrontation.

There are several alternatives to the jury instruction which might be used to protect a co-defendant but still permit a joint trial. One method is the deletion from the incriminating statement of all references to the non-confessing co-defendant. When all references to the non-declarant have been deleted, it is impossible for the jury to consider the confession against the non-confessor. A variation of this method is the substitution of a fictitious name for the non-declarant's name when it appears in the text of the confession. Each time the non-declarant's name is mentioned in the confession it is replaced by "Mr. X" or "Mr. Blank." In order to protect the codefendant, some courts require the deletion to be an effective one, and to be effective the deletion must exclude not only direct but also indirect identification of the non-confessor. Therefore, once his identity has otherwise been established, not only his name, but any portion of the confession which might inculpate the codefendant should be stricken. If his connection with the declarant has previously been established by independent evidence, any use of the confession would be greatly suspect as an encroachment upon the non-declarant's right of confrontation. A further limitation imposed by the courts demands that all deletions must be without prejudice to the confessor. The concern here is not only with the confessor's right to have the jury consider the complete text of the statement, but also with the jury's interest in hearing all of the evidence against the declarant.

Assuming that an "edited" confession conforms to the required standards, there still remains the question of whether a juror is likely to conclude for himself that "Mr. X" is actually the non-declaring codefendant. The jury having seen the defendants tried together and having heard the confession alluding to "Mr. X," it seems unrealistic to assume that the jurors will not deduce the real identity of the mysterious "anonymous no-

14. Malinski v. New York, 324 U.S. 401, 410-12 (1945); Oliver v. United States, supra note 13. The court should hesitate to substitute false names which do not sound fictitious for fear of giving the non-confessor the benefit of a wholly erroneous, favorable inference. 24 U. of Chi. L. Rev. 710, 713 (1957).
16. Id. at 530, 407 P.2d at 273, 47 Cal. Rptr. at 361.
17. Ibid. Similar rules concerning joint trial have been adopted in other jurisdictions and have been found workable. See, e.g., State v. Castelli, 92 Conn. 58, 101 A. 476 (1917); People v. Barbaro, 395 Ill. 264, 69 N.E.2d 692 (1946); People v. Bolton, 339 Ill. 225, 171 N.E. 152 (1930); State v. Rosen, 151 Ohio St. 339, 86 N.E.2d 24 (1949).
18. 72 Harv. L. Rev. 920, 990 (1959). As to dangers when law enforcement agents have discretion to reveal only selected portions of a statement, see United States v. Volkell, 251 F.2d 333, 337 (2d Cir.), cert. denied, 356 U.S. 962 (1955).
The probability seems remote that the device of deleting the non-declarant's name will effectively insulate the non-declarant from his co-defendant's confession.

A second alternative is the modified joint trial. This technique would permit the jury to hear all of the evidence admissible against both defendants with the exception of the confession or admission. The jury would then come to a verdict as to the guilt or innocence of the non-confessor alone. After this determination, the jury would hear the confessions or admissions and render a separate verdict as to the confessor. This plan, however, raises serious questions. What is the impact of the confession upon the jury when it is heard in an isolated proceeding? Does isolation of the confession lend more weight to the statement than it would have during the normal course of the trial—so much weight as to be unduly prejudicial? To what extent does such a procedure conflict with the standard cautionary jury instruction which warns the jury not to discuss the case with anyone, including their fellow jurors, before submission for their final deliberation? Can the jury effectively consider only one defendant at a time? The modified joint trial seems to require the jury to think in watertight compartments, the very mental gymnastics which Bruton expressly rejected. Thus, it appears doubtful that the Supreme Court would consider the modified joint trial among the "viable alternatives."

One alternative which would assure protection for the non-confessing codefendant, but diminishes the availability of the joint trial, was articulated by Judge Frank, dissenting in Delli Paoli. It may be described as the "sever or exclude" rule. Under this rule, if the confession were found to be prejudicial, the government would have two pre-trial options. It could sever the defendants for trial and admit the confession only in the separate trial of the confessor, or it could join the defendants for trial and not introduce the confession at all. Thus, the benefits of a joint trial would be retained only if the government thought there was sufficient evidence aside from the confession to sustain the declarant's conviction. Objections to severance, however, stem from the added burden on court dockets that would result from "expensive and duplicitous" separate trials. Further grounds for opposition to the sever or exclude rule ensue from the rooted common law doctrine that severance of properly joined defendants shall be in the discretion of the trial judge. Reviewing courts rarely find an abuse of this
deliberation.

24. Rizzo v. United States, 304 F.2d 810 (8th Cir. 1962); Costello v. United States, 255 F.2d 389 (8th Cir. 1958); Kansas City Star v. United States, 240 F.2d 643 (8th Cir. 1957); Hall v. United States, 168 F.2d 161 (D.C. Cir.), cert. denied, 334 U.S. 853 (1948).
discretion, and they have consistently found that the admission of a co-
defendant’s confession in a joint trial is not adequate grounds for sever-
ance.25

The opinion in the Bruton case demands a reassessment of these prior
attitudes toward severance. The Court did not speak directly to the question
of severance, nor did it attempt to suggest any alternatives to the jury in-
struction. But in overruling Delli Paoli, the Court effectively met and over-
came the chief resistance to the adoption of the sever or exclude rule. The
Court adopted Judge Lehman’s statement that, “[w]e secure greater speed,
economy and convenience in the administration of law at the price of
fundamental principles of constitutional liberty. That price is too high.”26

Thus, the balance between (a) the interest of the government in the greater
administrative efficiency resulting from joint trials, and (b) the interest
of the non-confessor in the protection of his right of confrontation, has
been struck in favor of the non-declarant and his separate trial. Further-
more, since the doctrine of severance as a matter of judicial discretion is
based upon case law which assumed the efficacy of the protective jury in-
struction, the Court’s rejection of the jury instruction substantially dimin-
ishes the doctrine’s vitality.

Procedural difficulties which might arise from the use of the sever or
exclude rule are mitigated by the amendment to rule 14 of the Federal
Rules of Criminal Procedure. This amendment allows the trial court, in
ruling on a pre-trial motion for severance, to order the prosecution to de-
liver for in camera inspection any statements or confessions made by de-
fendants which may be introduced into evidence at trial.27 Should the con-
fession prejudice the non-confessor, the Court would then decide whether
to sever the defendants for separate trials or to conduct a joint trial with
the confession excluded.28 The additional burdens upon criminal admin-
istration may not be nearly as great as claimed by opponents of the sever
or exclude rule since separate trials would be required only where the gov-
ernment believed the confession necessary to gain conviction of the de-
clarant. If other evidence is sufficient to support a conviction, a joint trial
would still be available.


statute that defendants accused of certain crimes be severed for trial. E.g., § 545.880,
RSMo 1963 Supp.

27. Fed. R. Crim. P. 14, Relief from Prejudicial Joiner:
   If it appears that a defendant . . . is prejudiced by a joinder . . . of
defendants . . . the courts may . . . grant a severance of defendants or pro-
vide whatever other relief justice requires. In ruling on a motion by a
defendant for severance the court may order the attorney for the govern-
ment to deliver to the court for inspection in camera any statements or
confessions made by the defendants which the government intends to in-
troduce in evidence at trial.

28. From the notes of the Advisory Committee on Rules it appears that the
purpose of the amendment to rule 14 is to provide a procedure whereby the issue
of possible prejudice can be resolved on the motion for severance. The judge may
direct the disclosure of the confessions or statements of the defendants to him for
in camera inspection as an aid to determining whether the possible prejudice
justifies ordering separate trials. Fed. R. Crim. P. 14, Advisory Committee Notes
(1966).
Although the various proposals designed to allow the introduction of a codefendant's confession in a joint trial allow efficiency, it is virtually impossible to prevent the confession from being prejudicially considered when the jury weighs the evidence against the non-declarant. In light of the important constitutional issues involved, the *Bruton* opinion may very well lead to the adoption of the "sever or exclude" rule as the only "viable" alternative available. It may no longer be possible to admit even an edited confession of a codefendant in a joint trial without violating the non-declarant's right of confrontation guaranteed by the sixth amendment.

**Stephen K. Taylor**

**DEFAMATION—ATTORNEY'S POWER, ATTORNEY'S NEMESIS**

*Theiss v. Scherer*¹

*Weiner v. Weintraub*²

In *Theiss* defendant, an attorney representing a party in an impending will contest, addressed a letter to the counsel for plaintiff, intimating that the plaintiff, who had a financial interest in the outcome of the contest, was a wastrel indulging in "a little piece of blackmail." Plaintiff sued defendant for libel. Defendant, however, interposed the defense that the statement arose out of, or was made in the course of, a judicial proceeding, and hence was *absolutely* privileged. The court agreed with defendant, holding that communications *between* attorneys are absolutely privileged "if they have relevance to, and are made during the course of, a judicial proceeding in which the attorneys are participating as counsel."³ The court bottomed its reasoning on a public policy consideration: rights of clients should not be imperiled by subjecting their attorneys to the fear of suits for libel or slander. An attorney is an officer of the court, the opinion noted, and thus abuses of the privilege are inhibited by being subject to disciplinary action.

In *Weiner* defendant sent a letter to the Grievance Committee of the New York City Bar Association charging the plaintiff, an attorney, with dishonesty and fraud. In plaintiff's libel suit, the court found for defendant. Because complaints charging professional misconduct were required by statute and court rule⁴ to be filed with the grievance committee of a bar

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¹. 396 F.2d 646 (6th Cir. 1968).
⁴. N.Y. Judiciary Law § 90 (7): A majority of the justices of the appellate division of the supreme court in each department may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings . . . .

Acting pursuant thereto the Supreme Court, Appellate Division, Second Dept., promulgated Part Four, Rule 12 of the court rules:

Upon application by the chairman or acting chairman of the Com-
association, the court held that such complaints initiated judicial, or at least quasi-judicial, proceedings to which the absolute privilege to communicate relevant or pertinent, though defamatory, material, would attach. The court also noted that it is in the public interest to encourage persons with knowledge of dishonest or unethical conduct by a lawyer to impart that knowledge to a grievance committee or other such body, and that this public interest outweighed the possible harm to plaintiff.

It has been uniformly held that statements made during the course of a judicial proceeding are absolutely privileged, and thus no action for defamation is maintainable. The privilege extends to judges, witnesses, and parties, to statements contained in affidavits and pleadings, and to statements by counsel. Although a majority of authorities agree that the privilege applies to statements in open court, there is some disagreement as to the extent to which statements made out of court are protected. While most courts stretch the privilege to cover such statements, a few extend it further than others.

mittee on Grievances of any recognized Bar Association in the Second Judicial Department disclosing that such committee is conducting a preliminary investigation of professional misconduct on the part of an attorney . . . the clerk of this court shall issue subpoenas in the name of the Presiding Justice for the attendance of witnesses and production of books and papers before such committee. . . .

Each committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths.


6. "Absolute privilege" confers an immunity from suit. On the other hand, a "qualified" or "conditional" privilege only bars action when the statement was made without legal malice and other requirements have been met. See generally PROSSER, TORTS, § 110, 805-823 (3d ed. 1964).


13. Cf. Renner v. Chilton, 142 Colo. 454, 351 F.2d 277 (1960); Wells v. Carter, 164 Tenn. 400, 50 S.W.2d 228 (1932).

14. In Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N.W.2d 521 (1951), the court held that the absolute privilege applied to conferences between an attorney and a prospective witness in an action then pending or contemplated. RESTATEMENT OF TORTS § 588 (1934), states that:

a. a witness is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding and as a part of judicial proceeding in which he is testifying, if it has some relation thereto. (Emphasis added.)

15. In Johnston v. Cartwright, 355 F.2d 32 (8th Cir. 1966), the court held that defamatory statements made by an attorney in a newspaper were absolutely privileged since "all signs pointed to incipient litigation and to the necessity for protective action." Id. at 37.

But in Kennedy v. Cannon, 229 Md. 92, 182 A.2d 54 (1961), the Maryland court refused to extend the absolute privilege to a statement made by defense counsel in a newspaper in the same article with statements of the prosecutor.
Whether a court will extend this absolute privilege to out-of-court statements is extremely important to attorneys such as the defendant in the Theiss case. While it is clear that many such statements by attorneys will be protected, there exists no clearly defined line where the absolute privilege becomes merely a conditional privilege.

16. Statements made in pursuance of some moral duty are only conditionally privileged.

17. Restatement of Torts § 586, comment a (1934).


19. See Restatement of Torts § 586 (1934), and comments.

20. Often the courts in these states use such words as “relevancy” or “pertinency,” but the overall structure of their opinions and the results reached indicate that they only require that the communication have some relation to the judicial proceeding. Thornton v. Rhoden, 24 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966); Seltzer v. Fields, 13 N.Y.2d 927, 244 N.Y.S.2d 72 (1963); Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960); Richeson v. Kessler, 73 Idaho 548, 255 P.2d 707 (1953).

21. See Taliaferro v. Sims, 187 F.2d 6 (5th Cir. 1951); Johnston v. Schlarb, 7 Wash. 2d 528, 110 P.2d 190 (1941).

22. Theiss v. Scherer, 396 F.2d 646, 649 (6th Cir. 1968). The court cited the Restatement, although it employed the phrase “relevant or pertinent.”

lished in a judicial proceeding even though such defamatory words are published during the progress of a trial." Thus defamatory letters having no relation to the matter in dispute would not arise out of nor would they be published in the course of a judicial proceeding. Consequently, they would have no claim whatsoever to the absolute privilege.25

Since the ultimate raison d'etre of the absolute privilege rests upon the exigencies of sound public policy,26 most jurisdictions, including England, have treated quasi-judicial proceedings commensurately with judicial proceedings. The absolute privilege has been applied to hearings before any tribunal performing a judicial function.27 This includes lunacy proceedings,28 bankruptcy proceedings,29 naturalization proceedings,30 election contest,31 and other activities connected therewith.32 Courts have also applied it to proceedings before purely quasi-judicial boards and commissions, such as a state labor commission,33 the National Labor Relations Board,34 the Civil Aeronautics Board,35 grievance committees of bar as-

25. This result would follow in another situation as well: it is generally held that the absolute privilege will not protect statements made in judicial proceedings where the court does not have jurisdiction over the subject matter. However, the mere fact that the defamatory statement was published in an insufficient bill or complaint does not necessarily destroy the privilege. Hager v. Major, 353 Mo. 1166, 186 S.W.2d 564 (1945). See also Annot., 158 A.L.R. 592 (1945).
26. In these cases the interests of society require that on certain occasions no civil liability attach to utterances or publications by individuals, even though such are false and malicious. Note, 1 Washburn L.J. 493 (1961).

But:

Emphasizing that it is the occasion which determines the privilege, and not the communication, the courts do not regard every exercise of judicial discretion as an automatic criterion for invoking absolute privilege: Nelkin, Defamation-Absolute Privilege as Extended to Quasi-Judicial Proceeding, 13 Mo. L. Rev. 320, 321 (1948).

"This rule should be and usually is confined strictly to cases in which the public service or the administration of justice require complete immunity...." Mills v. Denny, 245 Iowa 584, 68 N.W.2d 222 (1945).

27. See Nelkin, Defamation-Absolute Privilege as Extended to Quasi-Judicial Proceedings, 13 Mo. L. Rev. 320 (1948).
32. For example, the recording of a notice of lis pendens has been held absolutely privileged. Albertson v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956). Likewise the writing of a will has been held absolutely privileged since it is "a foundation of a legal proceeding." Nagle v. Nagle, 316 Pa. 507, 175 A. 487 (1934).
34. Johnston v. Cartwright, 355 F.2d 32 (8th Cir. 1966). This case is slightly confusing, in that defamatory statements in a newspaper were deemed absolutely privileged because they dealt with an election which the NLRB had ordered, while an alleged re-utterance of these statements after the election was found absolutely privileged because the speaker had come to the defense of the previous publication in anticipation of a lawsuit based thereon! In the opinion of this writer the court extended the privilege beyond the bounds of credulity in the second instance. Fear of the institution of judicial proceedings does not mean that statements arise out of such a possible proceeding or have relation thereto.
Courts have somewhat differing views as to what constitutes a quasi-judicial proceeding, but the apparent test for determining whether the absolute privilege attaches to proceedings before certain agencies is to scrutinize the agency's procedural requirements. If similar to the procedure in a court and the agency has power to punish for contempt, the court will generally include proceedings before that agency within the ambit of the privilege. On the other hand, some courts require that the agency's power in the matter be derived from a statute. Letters written to such agencies, inaugurating proceedings, have been deemed absolutely privileged in some cases, but only if the letters actually institute those proceedings. The mere possibility that they may be acted upon by the agency after review by some other independent body or individual is not enough to cloak them with the privilege.

In the area of disbarment proceedings, it is unclear whether letters of complaint are always absolutely privileged. English courts have declared such letters are in every instance absolutely privileged. The noted New York case, Weiner v. Weintraub, holds that they are absolutely privileged when state statutes have clothed the bar association committee involved with quasi-judicial powers. A majority of American jurisdictions seem disposed to follow Weiner and to extend the immunity, in proper cases. The Oregon Supreme Court in Ramstead v. Morgan has gone so far as to hold that a letter of complaint written to the Oregon State Bar Association absolutely privileged, even though the body was not a creature of the legislature, because the bar's own trial procedure had the trappings of a judicial proceeding. There is, however, a dearth of judicial comment regarding the Ramstead proposition that letters sent to bar associations which are not clothed by statute with authority of a judicial nature are absolutely privileged.

40. Bartlett v. Christhif, 69 Md. 219, 14 A. 518 (1888).
41. See Note, 35 N.C.L. Rev. 541 (1957).
42. Id. at 545.
44. White v. United Mills Co., supra note 43.
45. Snowden v. Nolan, 125 A.2d 52 (D.C. Mun. App. 1956). The defendant in this case sent letters to the Chief of Police charging the plaintiff patrolman with dishonesty. The Chief did not bring the review board's attention to them.
46. Lilley v. Roney, [1892] 61 L.J.Q.B. 727. Letter of complaint written to Incorporated Law Society. The court stated that the action should have been for malicious prosecution, which raises other interesting questions.
Since there are but a few Missouri cases bearing directly upon the problems involved, the Missouri position must be gleaned as much from dicta as from holdings of individual cases. In accord with the majority American view, Missouri courts grant immunity to defamatory statements made in the course of judicial proceedings when such statements are uttered by the parties, the court, or counsel, or are contained in the pleadings, motions, affidavits, or other papers filed in court. However, no immunity will be afforded unless it appears that the court which entertained the proceeding had jurisdiction over the subject matter, and also that the statement was sufficiently relevant to the matter in controversy.

While there are no Missouri cases involving letters between attorneys, dicta in other decisions indicate that such correspondence will be given the closest scrutiny before being declared immune from suit. In *Laun v. Union Electric Co. of Missouri* the Missouri Supreme Court refused to allow the defendants to claim absolute privilege in a libel action based upon an allegedly libelous complaint filed in federal court. The defendants were not parties to the prior suit, but had merely supplied the information upon which the complaint was based. The court noted that "when interest or legal or moral duty is relied on as the basis of an immunity or a defense the privilege asserted is conditional and not absolute." The defendants, "not in character as parties or pleaders to that privileged occasion or instance [the judicial proceeding]", could not claim the absolute privilege.

At the minimum it would appear that a Missouri attorney claiming the absolute privilege as to a letter written to another attorney must establish that he represented a party to the proceeding. Whether the judicial proceeding must be pending or merely contemplated is conjectural. The answer depends upon whether Missouri courts will adopt the *Restatement's "some relation" test* as utilized in *Theiss*. To this date Missouri courts have been uniform in their use of the terms "relevancy" and "pertinency," but the substantive definition of those terms seems to be somewhat nebulous.

Missouri decisions are in accord with the view that the absolute privilege should be extended to statements made in proceedings before quasi-professional malfeasance because they have a substantial common interest therein. See *Lee v. W. E. Fuetterer Battery & Supplies Co.*, 323 Mo. 1204, 23 S.W.2d 45 (1929).

51. *Hager v. Major*, 353 Mo. 1166, 186 S.W.2d 564 (1945); *Laun v. Union Electric Co. of Mo.*, 350 Mo. 572, 166 S.W.2d 1065 (1942).

52. *Hager v. Major*, *supra* note 51.


54. *Jones v. Brownlee*, 161 Mo. 258, 61 S.W. 795 (1901); *Hyde v. McCabe*, 100 Mo. 412, 13 S.W. 875 (1890).

55. *Laun v. Union Electric Co. of Mo.*, 350 Mo. 572, 166 S.W.2d 1065 (1942).

56. *Id.* at 585, 166 S.W.2d at 1073. A conditional privilege confers no absolute immunity from suit. See *supra* note 6.

57. *Id.* at 582, 166 S.W.2d at 1071.

58. *White v. United Mills Co., Inc.*, 240 Mo. App. 443, 208 S.W.2d 803 (K.C. Ct. App. 1948); *Hager v. Major*, 353 Mo. 1166, 186 S.W.2d 564 (1945); *Laun v. Union Electric Co. of Mo.*, 350 Mo. 572, 166 S.W.2d 1065 (1942); *Jones v. Brownlee*, 161 Mo. 258, 61 S.W. 795 (1901); *Hyde v. McCabe*, 100 Mo. 412, 13 S.W. 875 (1890). The court has employed these terms somewhat mechanically, without speaking directly to their precise definitions.
judicial administrative bodies and agencies exercising a judicial function. The Missouri Supreme Court has emphasized in dictum, however, that the body or agency must have been established by statute and that the communication must be "provided for and required by law." Statements made in proceedings before private bodies (such as the Trial Committee of the Brotherhood of Railway Carmen) are only conditionally privileged.

In an early case, Lee v. Fuetterer Battery and Supplies Co., the Missouri Supreme Court declared that a letter of complaint addressed to the grievance committee of the St. Louis Bar Association was only conditionally privileged. (Unfortunately, it was not argued before the court that the letter should be absolutely privileged.) In reaching its conclusion the court found the bar association akin to corporations, churches, medical societies, and the like, communications within such bodies being only conditionally privileged. The only relevant statute dealing with disbarment proceedings and complaints (now Section 484.200, RSMo 1959) did not grant, and still does not grant to bar association grievance committees such as the one involved in the Lee case any authority to handle complaints about professional misconduct. The statute declares that charges may be exhibited and proceedings had thereon in a court of law, not before bar grievance committees.

Following the Lee case, Missouri adopted an integrated bar system in which attorneys are governed by rules promulgated by the supreme court. Many other states have such a system, but Missouri is rather unique in that the supreme court and a special agency created by it, the Missouri Bar Administration, perform the disciplinary functions which the bar associations themselves perform in other integrated states. In the case of

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59. The only Missouri decision directly in point is White v. United Mills Co., Inc., 240 Mo. App. 443, 208 S.W.2d 803 (K.C. Ct. App. 1948). The Missouri Supreme Court held that a notice of separation sent by an employer to the Kansas Labor Commissioner was absolutely privileged. Although the court applied Kansas law, it was probably declarative of the law in Missouri. See Brown v. Globe Printing Co., 213 Mo. 611, 112 S.W. 462 (1908), and Nelkin, Defamation-Absolute Privilege as Extended to Quasi-Judicial Proceedings, 13 Mo. L. Rev. 320 (1948).
60. Pulliam v. Bond, 406 S.W.2d 635, 640 (Mo. 1966).
61. Ibid.
62. 323 Mo. 1204, 23 S.W.2d 45 (1929).
64. § 484.200, RSMo 1959:
Charges against an offending attorney shall be in writing and verified, and may be preferred by any member of the bar in good standing, or by any judge of a court of record required by law to be a person learned in the law. Such charges may be exhibited and proceedings had thereon in the supreme court, in any of the courts of appeals, or in the circuit court of the county in which the actions or practices complained of shall have been committed or the accused resides.
66. The Bar Administration is composed of Bar Committees, made up of at least four lawyers, in each of the forty-three judicial circuits, an advisory committee, and the General Chairman of Bar Committees.
In re Richards,97 decided in 1933, the Missouri Supreme Court declared that it possessed the inherent power to disbar an attorney, independent of any action of the legislature. Attorneys were said to be officers of the court and thus could be controlled by court rules. Following this decision the supreme court adopted Rules 35 through 38 (presently Rules 4 through 8) governing Missouri attorneys. At present all complaints concerning misconduct by an attorney, and proceedings based thereon, are governed by Supreme Court Rule Five. Circuit Bar Committees have been established under the authority of Rule 5.01, and these committees, composed of lawyers, have been given power to investigate matters of professional misconduct.68 When the majority of the members of a Circuit Bar Committee finds reasonable cause to believe an accused attorney is guilty of professional misconduct, the committee must hold a formal hearing, after notice to the accused. At this hearing the attorney is given the right to refute the charges. Should a majority of the committee then find that there is probable cause to believe the accused is guilty of misconduct, the committee must file an information in the circuit court, and, by leave of that court, may file the information in the supreme court. Both the Circuit Bar Committees and the accused attorneys are given the right to compulsory process.69 In general the powers and duties given the Circuit Bar Committees by the court rules make them patently quasi-judicial bodies.70

Since most, if not all, complaints regarding professional misconduct by Missouri attorneys will be addressed to a Circuit Bar Committee, the important question is whether these complaints will be held absolutely privileged as they were in Weiner v. Weintraub. Because the Missouri Supreme Court extends this immunity from suit only to communications addressed to or made before bodies which are established by statutes or which exercise a judicial function, it is essential to determine whether the Circuit Bar Committees meet either of those requirements. Missouri courts have never spoken directly on this question and it therefore is left for one to surmise the answer.

It is obvious that the Circuit Bar Committees have been given sufficient powers of a judicial nature for one to assert that they indeed exercise a judicial function, for they, in effect, have been delegated some of the power conferred upon courts by Section 484.200, RSMo 1959.71 An acceptable argument can also be made that the committees have been established pursuant to statute. Section 484.040, RSMo 1959 grants the supreme court power to admit and license persons to practice as attorneys. Section 484.200 gives the court the responsibility for hearing charges of professional misconduct.

67. 333 Mo. 907, 68 S.W.2d 672 (En banc 1933). The Wisconsin Supreme Court has turned this reasoning back on itself and held that it might refuse to integrate the bar despite a contrary statutory dictate from the legislature. Integration of Bar Case, 244 Wis. 8, 11 N.W.2d 694 (1943).
68. Missouri Supreme Court Rule 5.03.
69. Missouri Supreme Court Rule 5.04:
   Upon application under the provisions of Section 5.03 of this rule, the clerk of this Court shall issue writs of subpoena, including subpoena duces tecum and dedimus to take dispositions . . . .
70. See generally Missouri Supreme Court Rule Five.
71. See supra note 64.
Taken together these statutes must be read as an outward declaration that the supreme court is to exercise some form of disciplinary authority over all attorneys practicing within the state. Since there is no statute or constitutional provision which prohibits the court from delegating this authority to bodies under its control, the creation of the Circuit Bar Committees for the purpose of exercising the supreme court's disciplinary authority seems proper, and can be viewed as pursuant to statutory authority. Thus, it follows that the absolute privilege applies to Bar Committee proceedings in Missouri.

In addition, Missouri decisions concerning the Bar Committees indicate that the courts regard them as if they indeed exercised the judicial function of disciplining errant members of the bar, and that the courts consider hearings before them substantially equivalent to hearings before a court of law. Failure of a Circuit Bar Committee to prefer charges against an attorney has been held to amount under Rule Five to a finding that he was not guilty.\(^2\)\(^2\) A Bar Committee may dismiss an information even after it has been filed in a court of law.\(^2\)!\(^3\) Further, the supreme court has stated that the Canons of Ethics adopted by it as rules have the same force and effect as decisions of the court.\(^2\)!\(^4\) Given these decisions and the overall nature of the integrated bar in Missouri, it can reasonably be predicted that in a future case the supreme court will hold complaints to Circuit Bar Committees absolutely privileged.

The overall national tableau of decisions in cases of defamation which concern attorneys at law grant the lawyer considerable freedom to malign and abuse. Concomitantly, however, these decisions must be viewed as forcing upon him a tantamount responsibility to exercise personal discretion. While he is subject to only limited verbal rebuke by a judge in court for abusing his privilege, he may be prevented from bringing a libel action against those who malign him before his own bar association in jurisdictions which follow Weiner. Missouri courts in the future will probably follow the liberal lead on the subject of defamatory statements by counsel and will most likely hold that complaints to the Circuit Bar Committees are absolutely privileged. The Lee case indicates, however, that letters of complaint written to other bar association bodies will only be conditionally privileged since the supreme court has established particular agencies to investigate professional misconduct.

MICHAEL R. TURLEY

\(^{72}\) In re Sizer, 134 S.W.2d 1085 (Spr. Mo. App. 1939).
\(^{73}\) In re Pate, 107 S.W.2d 157 (Spr. Mo. App. 1937).
\(^{74}\) In re Wilson, 391 S.W.2d 914 (Mo. 1965).