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Recent Cases

SEARCH INCIDENT TO ARREST: A LINE IS DRAWN

Chimel v. California

Police officers arrested petitioner Chimel inside his home for the burglary of a coin shop. Without a search warrant and over Chimel's objection the officers thoroughly searched his house, including the attic, garage, and workshop. Numerous coins, medals, and tokens were seized. Although the arrest warrant was held to be invalid because the supporting affidavit was set out in conclusory terms, the trial court found that the officers had probable cause, hence the arrest was valid without a warrant. The seized items were admitted over objection as evidence properly searched for and seized incident to arrest. The Supreme Court of California affirmed the conviction.

The United States Supreme Court reversed on the ground that the evidence used to convict Chimel had been seized in violation of the fourth amendment. The opinion of the Court, delivered by Justice Stewart, attempted to explain how far the Constitution will permit an officer to search incident to arrest. Such a search can include only "a search of the arrestee's person and the . . . area from within which he might gain possession of a weapon or destructible evidence."

While the area beyond the reaching radius of the arrestee can, as a general rule, be searched under a search warrant, the Court stated that the scope of search incident to arrest cannot be so broad:

No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items. The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.

The Court recognized that a warrantless search incident to an arrest is proper in some instances, and that if the cases of United States v. Rabino-

3. Chimel v. California, supra note 1, at 765.
4. Id.
5. Id. at 766.

Although this note examines only the area limitations of a search incident to arrest, there are other requirements that must be fulfilled:

1) The arrest must be legal; that is, either based upon an arrest warrant or probable cause that a crime has been committed. State v. Cueze, 249 S.W.2d 373 (Mo. 1952).
2) The search must not be too remote from the arrest in time. State v. Darabceck, 412 S.W.2d 97, 102 (Mo. 1967).

(231)
Chimel and Harris v. United States had been followed, the search in Chimel would have been constitutional. Rabinowitz and Harris stood for the proposition that the place of arrest can be searched incident to arrest—"place" meaning the room or rooms over which the arrestee has dominion. The Court rejected this standard and held that insofar as Rabinowitz and Harris are in conflict with Chimel, they are no longer to be followed, and that the area searched in Chimel was clearly beyond the constitutional limitations. For reasons that are not stated, the Chimel Court declined to expressly overrule United States v. Rabinowitz. In fact, Chimel uses some of the same words found in Rabinowitz to express the new, more restricted scope of search incident to arrest. But the duplication of phrases is apparently intended only to convey a continuity of form, not substance. The Chimel Court uses several phrases from Rabinowitz and redefines them to convey a new meaning.

For example, both Chimel and Rabinowitz restrict the scope of search to the area within the arrestee's "immediate control." While this term was used in Rabinowitz to encompass the entire room of arrest, including the contents of a desk, safe, and file cabinet, Chimel redefines "immediate control" to mean the area within which an arrestee might get his hands on a weapon or destructible evidence. In so doing, Chimel seems to have succeeded in constructing a verbal rule which has been vainly sought by some justices of the Court for two decades.

Prior to Chimel several justices felt that the area of search incident to an arrest should not exceed the necessities of the arrest situation—the

9. While admitting that the scope of search in both Harris and Rabinowitz was more restricted than the case at bar, the Court noted:
   The rationale that allowed the searches and seizures in Rabinowitz and Harris would allow the searches and seizures in this case. No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items. Chimel v. California, 395 U.S. 752, 766 (1969).
10. Id. at 768.
11. Id.
14. "[W]e have refused to permit use of articles the seizure of which could not be strictly tied to and justified by the exigencies which excused the warrantless search." Warden v. Hayden, 387 U.S. 294, 310 (1967). See also Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

In the recent case of State v. Moody, 443 S.W.2d 802 (Mo. 1969), the Missouri Supreme Court seems to have ignored this rule. Although recognizing that a reason for search incident to arrest was "to prevent the possible destruction of contraband or evidence relating to the offense for which the arrest was made," (emphasis added) the court upheld a drug possession conviction in which a packet of drugs which the police found in a search of defendant's person incident to an arrest for a traffic violation was admitted into evidence. The arresting officers evidently went beyond a protective "pat-down" for weapons, which in itself might have been going too far, since the crime was only a traffic violation. See Monica, "Stop and Frisk": The Policeman's Friend, 34 Mo. L. Rev. 425 (1969). The court indicated that so long as the arrest was not a mere pretext to search, a general search could be made of the arrestee's person, regardless of the nature of the crime charged.
“necessities” being the need to protect the arresting officer, the need to prevent escape, and the need to prevent destruction of evidence.\textsuperscript{15} A variety of terms were used in attempts to verbalize such a rule. Justice Frankfurter used “immediate physical surroundings . . . extension of the person”\textsuperscript{16} and in a different case “projection of his person . . . immediate custody.”\textsuperscript{17} Justice Stewart has previously spoken in terms of “immediate vicinity,”\textsuperscript{18} and Justice Black, “immediate control.”\textsuperscript{19} Attempts to create a one phrase rule have proven to be inadequate because such phrases, standing alone, have been so vague that other judges have been able to use the same words to allow searches incident to arrest to be conducted in much larger areas. For example, one arrestee’s “immediate possession and control” was said to include a closet in the room of arrest.\textsuperscript{20} In a Missouri case, an arrestee’s “control” was said to extend to a locked room adjacent to the room of arrest.\textsuperscript{21}

One reason identical phrases have not led to identical results is that such expressions as “custody,” “possession,” and “control” have been intended by some judges as an expression of an actual physical ability to hold or reach, while other judges have intended the same words to express a broader property-law concept of control.\textsuperscript{22} 

Chimel made it clear that “immediate control” shall mean the actual physical ability to hold or reach, thus rejecting the broader definition of “control” as used in the law of property.\textsuperscript{23}

Just as it reused but redefined “immediate control,” the Chimel Court

\begin{itemize}
  \item \textsuperscript{15} Chimel v. California, 395 U.S. 752, 763 (1969).
  \item \textsuperscript{16} United States v. Rabinowitz, 389 U.S. 56, 72 (1950) (dissenting opinion).
  \item \textsuperscript{17} Harris v. United States, 331 U.S. 145, 168 (1947) (dissenting opinion).
  \item \textsuperscript{18} Stoner v. California, 376 U.S. 483, 486, rehearing denied, 377 U.S. 940 (1964).
  \item \textsuperscript{19} Preston v. United States, 376 U.S. 364, 367 (1964).
  \item \textsuperscript{20} Marron v. United States, 275 U.S. 192, 199 (1927).
  \item \textsuperscript{21} State v. Ciarelli, 416 S.W.2d 944 (Mo. 1967).
  \item \textsuperscript{22} This misapplication of terms has previously been noted in several Supreme Court cases: Warden v. Hayden, 387 U.S. 294, 304 (1967); Stoner v. California, 376 U.S. 483, 488, rehearing denied, 377 U.S. 940 (1964); Jones v. United States, 362 U.S. 257, 266-67 (1960); Harris v. United States, 331 U.S. 145, 164 (1947) (dissenting opinion).
  \item \textsuperscript{23} Chimel v. California, 395 U.S. 752, 763 (1969). The rejection of the proprietary definition of “control” in Chimel should have been anticipated in light of the Court’s notice in Warden v. Hayden, 387 U.S. 294 (1967), that property concepts were not controlling in fourth amendment cases. “The premise that property interests control the right of the Government to search and seize has been discredited.” Id. at 304.
  \item The Court had previously divorced property rights from constitutional rights on the question of “standing” to assert fourth amendment protections. See Jones v. United States, 362 U.S. 257 (1960), where standing was held not to depend on a personal possessory interest in the premises searched. In Katz v. United States, 389 U.S. 347 (1967), the Court stated that “[t]he Fourth Amendment protects people, not places.” Id. at 351. And in Mancusi v. DeForte, 392 U.S. 364 (1968), the Court stated that “capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.” Id. at 368. See Steps, Standing to Object to Unreasonable Search and Seizure, 54 Mo. L. Rev. 575 (1969).
\end{itemize}
borrowed other phrases from United States v. Rabinowitz\(^2\) and redefined them to achieve a stricter scope of search. The Court agreed with Rabinowitz that the constitutionality of a search incident to arrest depends on the “reasonableness” of the search as determined by “the facts and circumstances—the total atmosphere of the case.”\(^2\)\(^6\) However, the Court followed Justice Frankfurter's dissenting opinion in that case, stating that the “reasonableness” of a search must be determined in light of the reasons which underlie the fourth amendment, such as the history of the colonial evils and the remedy which the framers intended.\(^2\)\(^8\)

The fourth amendment was a reaction to the British practice of making warrantless exploratory searches. Therefore, if “the facts and circumstances” of a warrantless search show that it was exploratory and not limited to meeting only judicially recognized necessities, then the search is unreasonable and in violation of the fourth amendment.\(^2\)\(^7\)

A casual reading of Chimel might lead one to believe that the arresting officer must confine his attentions at the scene of arrest to the area within reach of the arrestee. This is not necessarily so. Chimel confines the scope of search but not the scope of seizure. The Court has consistently allowed an officer, while making a lawful arrest, to seize fruits and evidence of crime, or contraband, which is in “plain sight.”\(^2\)\(^8\) It has been recognized that there is really no search involved in a “plain sight” seizure, and therefore Chimel does not apply.

Once an officer embarks on a search incident to arrest, there is uncertainty as to exactly how far from the person of the arrestee he may search.\(^2\)\(^9\) Chimel rules that the search may not extend beyond the “area from within which (the arrestee) might gain possession of a weapon or destructible evidence.”\(^3\)\(^0\) Does this mean the arresting officer must not search beyond the arm’s length of the arrestee? If permitted to go beyond arm’s length, to what extent can the search be carried? A definitive answer must await a United States Supreme Court decision. However, until a clarifying opinion is handed down, decisions of state courts and lower federal courts will set the standards for the permissible area of search under Chimel.

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25. Chimel v. California, 395 U.S. 752, 765 (1969). Since the “facts and circumstances” of any two cases are never exactly alike, the inclusion of this phrase gives an easy out for those courts which would prefer not to follow the constitutional interpretations of the United States Supreme Court.
26. Id.
27. Id. at 761. For a more thorough examination of the reason and purpose underlying the fourth amendment, see Boyd v. United States, 116 U.S. 616 (1886).
28. Trupiano v. United States, 334 U.S. 699, 704 (1948). See State v. Reask, 409 S.W.2d 75 (Mo. 1966), gambling paraphernalia in “plain view” of officers who broke into apartment was proper subject of seizure; State v. Baines, 394 S.W.2d 312 (Mo. 1965), cert. denied, 384 U.S. 992 (1966), package of marijuana tossed to the floor in “plain sight” of an officer was proper subject of seizure; State v. Engberg, 377 S.W.2d 282 (Mo. 1964), stolen bottle of whiskey in “plain view” on dresser in room of arrest was proper subject of seizure.
30. 395 U.S. at 763.

https://scholarship.law.missouri.edu/mlr/vol35/iss2/7
The Court of Special Appeals of Maryland has construed Chimel to allow a search beyond the arm's length of the arrestee and into the area where an arrestee might grab a weapon by lunging. But the writer of a dissenting opinion in a Rhode Island case persuasively argued that his colleagues (who did not mention Chimel in their majority opinion) were in conflict with Chimel because they permitted a search of a car ten feet from the point of arrest on the basis of a possibility that the arrestee could have leaped to the car and grabbed a concealed weapon. In a California case, it was stated that Chimel did not prevent a search of "articles customarily carried by an arrested person . . ." The court then listed which articles would be subject to search incident to arrest:

In the category of such articles we include a woman's purse, a man's wallet, a jacket, a hat, an overcoat, and a brief case in use at the time of arrest, even though these articles may not be on the immediate person of the arrestee at the moment of arrest.

Another area left uncertain by Chimel is whether dangers from persons other than the arrestee can serve to justify an expansion of the area of search incident to arrest. Chimel, by its plain wording, prohibits a search of other rooms of the premises as well as "closed or concealed areas" within the room of arrest. But this does not necessarily mean that the arresting officer must stand by helplessly until a bushwhacker in a closet decides to make his move. The Court has never prohibited law officers from protecting themselves from immediate dangers. It is reasonable to assume that the Court would find a self-protective, cursory search for hidden assailants to be within constitutional limits if the arresting officer has reasonable grounds to believe his safety is threatened. In Terry v. Ohio the Court recognized that a self protective search without a warrant could be constitutional if the officer conducting the search could "point to specific and articulable facts which, taken together with rational inferences from those facts," would cause a man of reasonable caution to believe that the search was appropriate. Chimel makes it clear, however, that an arrest, in and of itself, does not automatically give rise to reasonable fears of danger sufficient to justify the search of an entire dwelling without a warrant.

32. State v. Moore, 256 A.2d 197 (R.I. 1969). If this type of reasoning were to prevail, the search of the Chimel household could be upheld. After all, who could foretell whether the police could have stopped Chimel from dashing into his bedroom and emerging with a loaded pistol which might have been hidden under the mattress. Id. at 205.
34. Id.
35. 395 U.S. at 763.
36. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Terry v. Ohio, 392 U.S. 1, 23 (1968). In Terry, the Court took note in footnote 21, at 24, that 335 police officers were killed and 9,118 injured in the course of 23,851 assaults on policemen between 1960 and 1966.
38. Id. at 21.
Chimel also makes it clear that an arrest does not automatically allow an expanded search based upon fear of the destruction of evidence at the hands of persons other than the arrestee. In his dissent in Chimel, Justice White points out that since the arrestee's wife was present in the house at the time of arrest, the police officers were justified in conducting as extensive a search as they did in order to prevent the wife from destroying or concealing the stolen property during the time the officers would have been out getting a search warrant.\(^{39}\) The majority opinion's silence on this point, coupled with its plain language describing the maximum permissible area of search, left an inference that the need to guard against possible destruction of evidence by a person other than arrestee cannot be used as an excuse to expand the scope of search incident to arrest.

Although the Chimel opinion leaves little latitude for a police officer to search incident to arrest beyond an arrestee's reach, there is no prohibition against an expanded search without a warrant if facts are known to the arresting officer which would allow a search without warrant regardless of the fact that an arrest has been made. A purposeless, rummaging, exploratory search of a premises incident to arrest is absolutely prohibited. But searches without warrant of all or part of a premises may be allowed where probable cause and "exigent circumstances" exist.\(^{40}\) An example of such a situation is found in State v. Novak,\(^{42}\) where police officers conducted a warrantless search after learning of specific and articulable facts which would have permitted them to reasonably believe that a prompt, warrantless search would be appropriate.\(^{42}\) Whether the United States Supreme Court will recognize such an exception to the warrant requirement in order to protect evidence which, before Chimel, may have been protected from concealment or destruction by a search incident to arrest, must await another decision of the Court.

One question of immediate concern is whether Chimel is to be given retroactive effect. In Von Cleef v. New Jersey\(^{43}\) and Shipley v. California,\(^{44}\)

\(^{39}\) 395 U.S. at 775.


\(^{41}\) 428 S.W.2d 585 (Mo. 1968).

\(^{42}\) In Novak police officers came upon two or three men unloading boxes from a truck at 1:00 a.m. Upon seeing the officers, the men fled on foot. One of the policemen trailed the men to an apartment. The other officer, by radio, requested that a police cruiser be sent to the store designated by the labels on the boxes remaining on the abandoned truck. Within ten minutes a burglary of the store was confirmed. The officers at the apartment, getting no response to their knocks, forced their way in, arrested the occupants, and searched the rooms. In answer to the defendant's argument that one officer should have watched the apartment while another left to get a warrant, the court observed:

> Appellant's argument . . . overlooks the opportunity of defendant and the other occupants to remove the Carp labels from the boxed merchandise and commingle it with other merchandise in the apartment and thereby destroy its identity as Carp's property and fruits of a specific burglary.

\(^{43}\) Id. at 593.

The Novak court also upheld the search of the entire apartment as incident to arrest. This justification for the search appears to be directly in conflict with Chimel and is probably no longer controlling in Missouri.


both dealing with searches incident to arrest and both handed down the same day as Chimel, the Court declined to rule whether Chimel should be given retroactive effect. In his concurring opinion in Von Clee, Justice Harlan argued that Chimel should be applied to cases pending on appeal. The Supreme Court of Alaska has applied Chimel to cases which were pending on direct review on July 23, 1969, the date of the Chimel decision. However, the Supreme Court of California and the Court of Special Appeals of Maryland have looked to standards used by the United States Supreme Court in Linkletter v. Walker to determine whether an opinion dealing with criminal procedure should be given purely prospective effect. The persuasive conclusions of both state courts were that Chimel should be given purely prospective effect, that is, it shall not apply to searches made prior to July 23, 1969. The United States District Court for the Southern District of New York has also ruled that Chimel shall be applied purely prospectively.

Because the fourth amendment search and seizure requirements have been "incorporated" into the fourteenth amendment and have been enforced by the "exclusionary rule," guidelines set down in Chimel are binding on the fifty states. Chimel will have a particularly disruptive effect on law enforcement in Missouri, because the scope of search and the items subject to seizure are specifically delimited by statute. Even before Chimel the statutory laws on search and seizure were, at best, inconsistent and incomplete. For example, Section 301.390, RSMo 1959, authorizes an officer to seize any motor vehicle, trailer, or motor vehicle tire from which the serial number has been removed. Even though the possession of such property is illegal, there is no authorization to search for such items. But the most glaring omission is the absence of a statute authorizing the issuance of a warrant to search for evidence or instrumentalities of crime. Missouri law enforcement officers, in the past, have relied on searches incident to arrest to conduct such searches not authorized by statute. In fact, the Missouri Supreme Court went so far as to suggest that such a method be used to locate a murder weapon. Although

45. 395 U.S. at 817.
49. 381 U.S. 618 (1965).
51. Wolf v. Colorado, 338 U.S. 25 (1949). Justice Harlan, just as he had done in so many "incorporation" cases, reminds the reader that his concurrence in Chimel is based on independent due process—fundamental rights grounds—and not on a belief that the fourth amendment, or any other part of the Bill of Rights, should be incorporated into the fourteenth amendment and applied to the states.
52. Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule, which prohibits the use of unconstitutionally obtained evidence in a criminal prosecution, was adopted in Missouri in State v. Owens, 302 Mo. 348, 259 S.W. 100 (1924), and is now embodied in Mo. R. Crim. P. 33.08.
54. In State v. Wright, 336 Mo. 135, 77 S.W.2d 459 (1934), the court reversed a murder conviction even though a gun and a coin bag linking defendant to the crime had been obtained in a search of defendant's home made with a valid war-
Chimel would seem to require that the Missouri courts no longer allow state police officers to conduct extensive exploratory searches incident to arrest, the true impact of the case is uncertain, for there is reason to believe that the Supreme Court of Missouri will attempt to lessen the effect of Chimel by reading it as narrowly as possible.\textsuperscript{55}

Because of Chimel, revision of the Missouri search warrant statutes is essential. The scope of search should be expanded to include such items as burglar tools, weapons, and "mere" evidence.\textsuperscript{56} Warrant procedures should also be modernized. The written affidavit,\textsuperscript{57} with the requirement that it be read by the magistrate,\textsuperscript{58} and the hand carried warrant\textsuperscript{59} may be unnecessarily time consuming in this day of instantaneous communication.\textsuperscript{60}

In the past, the Supreme Court of the United States has found it difficult to develop a rule governing the scope of search incident to arrest which strikes a proper balance between the individual's interest in privacy and the public's interest in effective law enforcement, and which at the same time conforms to the fourth amendment's standard of reasonableness. The number of times the Court has changed direction on the warrant. The warrant, specifying stolen property as the object, was shown to have been requested as a subterfuge to search for the gun and other evidence. The court noted that the proper way to search for these items would have been to arrest defendant while he was at home. \textit{Id.} at 143, 77 S.W.2d at 463.

55. In State v. Moody, 443 S.W.2d 802 (Mo. 1969), the first Missouri case to cite Chimel (merely to support the rule that a search without a warrant may be made incident to arrest), the Missouri Supreme Court upheld the admission of evidence obtained in a search of the arrestee's person incident to arrest, the arrest being for a traffic violation. This ruling appears to be inconsistent with the reasoning of the Terry, Sibron, and Chimel cases. The Moody court all but confesses that its decision was based on policy, not precedent.

We believe that police officers, while in the performance of their official duties, are entitled to all the safety and protection we can give them within constitutional limitations. \textit{Id.} at 804. While the statement taken alone is innocuous, the context of its delivery indicates that the Missouri court will allow relatively more thorough searches in the interest of an officer's safety.


A search incident to arrest for "mere evidence" was specifically approved in Missouri in State v. Glenn, 431 S.W.2d 200 (Mo. 1968), which cites Warden v. Hayden.

57. \textit{Mo. Const., art. I, § 15}; \textit{Mo. R. CRIM. P.} 33.01(a). There is no such requirement in the United States Constitution.

58. \textit{See} State v. McCowan, 331 Mo. 1214, 56 S.W.2d 410 (1932).

59. \textit{Mo. R. CRIM. P.} 33.02 requires that a copy of the warrant be left at the place where property is seized.

60. Just as law enforcement officers now exchange information instantaneously by radio and telephone, judges could acquire the information necessary for the issuance of a warrant and give the warrant to the officer on the scene using the same channels of communication. Such information could be exchanged orally, with an audio recorder tape to preserve the record; or facsimile documents could be sent and received by radio or wire on portable fax transceivers.
issue of scope of search incident to arrest indicates the difficulty of arriving at a permanently workable balance.\textsuperscript{61} Although \textit{Chimel} is the most recent in a series of conflicting cases, it should not be read as merely another deviation. \textit{Chimel} comes closer than any previous case to achieving the long recognized intent of the fourth amendment that, except where a warrantless search is necessary to meet a particular emergency, a judge of the law, not an enforcer of the law, should decide whether and in what manner the privacy of the citizen shall be violated by a police intrusion.\textsuperscript{62}

D\textsc{ale} C. D\textsc{oerhoff}

EXTENSION OF PRODUCTS LIABILITY TO A LAND DEVELOPER

\textit{Avner v. Longridge Estates}\textsuperscript{1}

Avner purchased property on a hillside in the Santa Monica Mountains, Los Angeles County, in 1960 from a vendor who had built a house on the tract. The vendor had previously purchased the property from Longridge Estates, owner of a larger tract of land which it had developed into residential lots. Portions of the rear slope of the lot failed, first in February, 1962, and again in November, 1965. The lot pad also settled "allegedly due to the decomposition of organic matter and insufficient compaction at the time of the lot preparation."\textsuperscript{2} Plaintiff, Avner, brought actions based, \textit{inter alia}, on strict liability against Longridge Estates, as well as against the general engineer and the soil engineer who prepared the lot, claiming improper filling and grading. The trial court sustained a demurrer to plaintiff's cause of action based on strict liability\textsuperscript{3} because "there is no doctrine of strict liability as to the manufacture of residential lots."\textsuperscript{4} The Court of Appeal, Second District, reversed the judgment, instructing the trial court to overrule the general demurrers. The court stated, "\textit{[W]}e conclude that the manufacturer of a lot may be held strictly liable in tort for damages suffered by the owner as a proximate result of any defects in the manufacturing process."

\begin{itemize}
\item \textsuperscript{61} Justice White, joined by Justice Black, gives as one of his main reasons for dissent the "untimely fifth" switch that \textit{Chimel} makes in the law of search incident to arrest. \textit{Chimel} v. California, 395 U.S. 752, 770-72 (1969).
\item 2. \textit{Id.} at ---, 77 Cal. Rptr. at 635.
\item 3. Demurrers to six of plaintiff's eight causes of action were also sustained on the further ground that the three-year statute of limitations had run. \textit{Avner v. Longridge Estates}, --- Cal. App. 2d ---, 77 Cal. Rptr. 633 (1969). The subject matter of this note deals solely with the cause of action of strict liability in tort.
\item 5. \textit{Id.} at ---, 77 Cal. Rptr. at 639.
\end{itemize}
Application of the theory of strict liability to the field of products liability appeared as early as 1944 in Chief Justice (then Justice) Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co.* Nineteen years later, with Justice Traynor again writing the majority opinion, the principle of strict liability was firmly established as the law in California in the case of *Greenman v. Yuba Power Products, Inc.* *Greenman* was followed in 1964 by *Vandermark v. Ford Motor Co.*, which extended strict liability to make it clear "that the manufacturer of a completed product cannot escape [liability] . . . by proving that the manufacturer of a component part or a dealer was responsible for the defect."

Turning from sellers of goods to sellers of real property, the California courts looked to the Supreme Court of New Jersey which had in 1965 applied strict liability to the builder-vendor of a mass-produced home. Basing its holding (in part) on that of the New Jersey case, the California Court of Appeal in 1969 moved closer to the present position, by imposing strict liability on a builder vendor of a mass-produced home in *Kriegler v. Eichler Homes, Inc.* The *Kriegler* decision placed California

7. 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900 (1963). Plaintiff was injured by a power tool given to him by his wife. An action against the retailer and the manufacturer resulted in judgment for the retailer against plaintiff, and for plaintiff against the manufacturer. Plaintiff and the manufacturer appealed, and the Supreme Court of California held:

A manufacturer is strictly liable in tort when an article he places on the market knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

The court affirmed the judgment for the defendant retailer.
8. 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964). Plaintiff brought an action against both the manufacturer and dealer of an automobile for injuries resulting from an accident caused by defects in the braking system.
9. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, 5-175 (1966). Frumer and Friedman further state, "Moreover, under Vandermark, the retailer of a defective product, as well as the manufacturer, is strictly liable in tort." *Ibid.* For an in-depth discussion of the development of the law of products liability in California, see Lascher, *Strict Liability In Tort For Defective Products: The Road To and Past Vandermark*, 38 So. Cal. L. Rev. 30 (1965).
10. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). Plaintiff brought an action against a builder-vendor of a mass produced home for injuries sustained by his child as a result of excessively hot water from a defective faucet. Plaintiffs not only advanced a cause of action based on strict liability, but on a negligence theory as well. The court reversed a judgment for defendant builder-vendor and remanded for a new trial. The holding was based in part on two prior New Jersey cases: Santor v. A. and M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (defective carpeting); and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (defective automobile). The court could find "no meaningful distinctions" to be made between the sale of mass produced homes and the sale of mass produced automobiles and, therefore, "the warranty and strict liability principles . . . should be carried over into the field of reality . . . ." *Schipper v. Levitt, supra* at 90, 207 A.2d at 325 (1965).
12. 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). Plaintiff's predecessor bought one of over 4,000 mass produced homes constructed by defendant. A decision based on strict liability in tort was upheld for plaintiff as a result of damage sustained due to defective steel tubing in a radiant heating system.
on the verge of the application of strict liability to the developer of a mass-produced residential lot in *Avner v. Longridge Estates*.\(^\text{13}\)

While Missouri courts have not yet taken a position comparable to that of California in *Avner*, products liability plaintiffs can now recover, at least for personal injury, on a cause of action based solely in tort on a theory of strict liability.\(^\text{14}\) The development of the Missouri decisions on this point appeared in two stages. From 1936\(^\text{15}\) to 1963\(^\text{16}\) Missouri courts wrestled with the problem of a plaintiff's recovery from a manufacturer, absent the traditional requirement of privity of contract.\(^\text{17}\) A shorter stage of development extended from the 1963 rejection of the requirement of privity to a clear, unequivocal adoption of the *Restatement (Second)* position regarding strict liability\(^\text{18}\) in 1969.\(^\text{19}\)

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We are unable to distinguish the obligation of a builder to a purchaser for a defective radiant heating system installed in a cement floor slab... from the obligation of a manufacturer of a lot to a purchaser for defective subsurface conditions resulting from improper filling and grading that cause instability. *Avner v. Longridge Estates*, *supra* at —, 77 Cal. Rptr. at 639.


18. *Restatement (Second)*, of Torts § 402 (A) (1965):

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In the latter stage, reference to the Restatement position came initially in 1966 in the case of Hacker v. Rector.20 The following year, the language of the St. Louis Court of Appeals in Williams v. Ford Motor Co.22 led one writer to note that Williams was "the Missouri decision that can be fairly interpreted as an express adoption of the Restatement section 402(A)."23 However, because the cause of action in Williams was for breach of an implied warranty of fitness, and the language of the court was partially couched in those terms, there was some question as to the exact state of Missouri law in spite of the persuasive authority that Williams adopted the Restatement position.24

All doubt was removed in 1969, however, in Keener v. Dayton Electric Manufacturing Co.,24 involving an action for wrongful death after plaintiff's husband was electrocuted lifting a sump pump from a basement floor while standing in ankle deep water. Plaintiff's petition alleged that the pump was defective by reason of not being equipped with a ground wire or an overload protector. Though the case was reversed and remanded for new trial due to an improper jury instruction, the court's opinion adopted the Restatement position explicitly along with clear and substantial reasons for its adoption.25 Missouri is now clearly a strict liability state.26

A comparison of present Missouri products liability law with that of California leads to an observation concerning the path of products liability development in Missouri since 1963. The pattern of California law since Greenman v. Yuba Power Products Inc.,27 through Kriegler v.

20. Hacker v. Rector, 250 F. Supp. 300 (W.D. Mo. 1966). Plaintiffs, who were 'guest passengers' in one defendant's car, brought an action against the other defendant, manufacturer of an allegedly defective tire. The District Court overruled a motion to dismiss on grounds of lack of privity between plaintiffs and manufacturer. The court reached the conclusion that, "the Morrow case obviously adopted the rationale of the rule stated in Section 402(A), of the Restatement, Second Torts, although it did not do so expressly." Id. at 801.

21. 411 S.W.2d 443 (St. L. Mo. App. 1966). Plaintiff was injured in a car manufactured by defendant which had allegedly defective power steering.

22. Krauskopf, supra note 17, at 468-69.

23. Id.

24. 445 S.W.2d 362 (Mo. 1969).


(1) "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers and sellers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Greeman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901.

(2) "The main advantage to Missouri courts in fully adopting the Restatement theory could be release from the shackles of warranty language." Krauskopf, Products Liability, 52 Mo. L. Rev. 459, 469.

(3) "It is essential now that the Bench and Bar of Missouri be given some sense of direction in products liability cases."


Eichler Homes Inc. and Avner v. Longridge Estates has been an extension of the principle of strict liability in tort into fields heretofore untouched by products liability cases. On the other hand, Missouri courts since the clear rejection of the privity requirement in Morrow have been concerned with articulation of the grounds for recovery which finally culminated in Keener. This seems to place Missouri presently in a position comparable to that of California following Greenman.

Another comparison to be noted between the law of Missouri and California lies in the type of recovery which has been allowed by the two states. California has allowed a cause of action for damage solely to the defective product itself without personal injury or damage to other property, while Missouri as yet has not. The recent Missouri cases leading up to and including Keener have been personal injury cases, and while recoveries for damage to property have been allowed since 1959 no case has yet granted relief when the article merely destroys itself. If such a case should arise, Missouri courts would be faced with a decision as to just what interpretation should be given when applying Restatement §02(A) now that it has been adopted. This is not to say that Missouri has not kept pace with the development of products liability law, but merely places California in the forefront as far as recoveries by plaintiffs are concerned.

After noting Missouri's express adoption of strict liability and Cal-

30. States other than California have allowed recoveries similar to that in Kriegler. See, e.g., Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968), strict liability applied under an implied warranty of fitness to allow recovery for damages resulting from a fire in a defective fireplace; Waggoner v. Midwestern Development, Inc., 83 So. Dak. 57, 154 N.W.2d 503 (1967), where an exception to caveat emptor was made to apply an implied warranty theory of real estate sale by a builder-vendor; Bethlany v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966), and Carpenter v. Donohue, 154 Colo. 78, 388 P.2d 899 (1964), implied warranty said to exist, and a departure was made from caveat emptor. The action in Carpenter was also based on express warranties and fraud, however.

It should be noted that none of the cases cited above, except Schipper and Humber, mention strict liability though they reach essentially the same result through the implied warranty language. It should be further noted that in all the above cases except Schipper, privity existed between plaintiff and defendant. Thus, aside from the New Jersey decision in Schipper and California in Kriegler, no state has yet applied strict liability in tort to a builder-vendor of real property, without the requirement of privity. Further, no state except California has yet applied strict liability to a developer of the land itself in a products liability case.

33. Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959). Defendant's manufactured fish food allegedly caused death to plaintiff's trout. It was held that defendants implicatedly warranted the fitness of the product as a "complete" fish food.
34. "To adopt the Restatement position is to be in the forefront of surging legal change." Krauskopf, supra note 17, at 469.
35. See note 30, supra.
California's further extension of the concept, one is led to ask what would be necessary to place Missouri law where California law is today. In other words, what would Missouri have to do in order to apply strict liability in tort to a developer of mass-produced lots? Initially, Missouri would have to extend strict liability to a builder-vendor of mass-produced homes. This presents some major hurdles. There exists fifty-three years of contrary Missouri authority on this point which has never been questioned. In addition, the doctrine of caveat emptor appears to stand directly in the path of recovery in this area. The California courts seem to have resolved the problem, basing the Kriegler decision on Schipper v. Levitt & Sons, Inc. which stated:

*Caveat emptor* developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder-vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.

Missouri courts on the other hand have given no indication that caveat emptor would fail to be a bar in the instance of a seller of mass-produced homes. Therefore, it is open to question whether a Missouri court would dismiss the long established rules, indicated above, so summarily. It is to be noted, however, that the adoption of the Restatement position in Keener shows Missouri's willingness to take a progressive approach to products liability when good reason for it can be shown. Therefore, it seems possible that when, and if, the point is raised, and if the application of strict liability to the builder (manufacturer) vendor of mass-produced real property seems advisable, the courts will so act. Once this is done, applying strict liability in tort in the *Avner* situation would be easy.

The relative ease or difficulty with which Missouri courts might move to the *Avner* position leads to the more basic question of whether Missouri should adopt such a position.

Since the application of strict liability to the developer of mass-

37. Flannery v. St. Louis Architectural Iron Co., 194 Mo. App. 555, 185 S.W. 760 (St. L. Ct. App. 1916). Recovery was denied for collapse of a garage roof under heavy snow accumulation due to a latent defect in steel support rods. The Flannery case is mentioned in Krauskopf, *Products Liability*, 33 Mo. L. Rev. 24, 30 (1968). Professor Krauskopf notes the Schipper decision, and indicates that the application of the rule therein "in Missouri would require overruling or distinguishing Flannery v. St. Louis Architectural Iron Co."
38. Whaley v. Milton Const. & Supply Co., 241 S.W.2d 23 (St. L. Mo. App. 1951). The rule set forth in Flannery, supra note 37, that a builder was only bound to perform in a workmanlike manner, and that no warranty of fitness was implied, was affirmed. Plaintiff brought an action against a builder-vendor of a mass produced home for various defects in the house.
40. Id. at 91-92, 207 A.2d at 326.
produced lot itself is not a far reaching extension beyond application of the principle to real property in the first place (i.e. to the builder vendor of mass produced home),\textsuperscript{41} the basic question really is, should Missouri apply strict liability to the sale of manufactured, mass-produced real property? A good argument can be made for an affirmative answer viewed in the light of \textit{Kriegler v. Eichler Homes Inc.}\textsuperscript{42} As previously noted, the California court justified its holding and rejection of \textit{caveat emptor} on the same basis as did the New Jersey court in \textit{Schipper}. Indeed both courts justified the application of strict liability to the manufacturer of real property in the same manner as it has been reasoned that the manufacturer of chattel should be held accountable for defects in his products.\textsuperscript{43} In the limited situation involving a developer manufacturer of real property, \textit{Restatement 402(A)} liability seems warranted. This is definitely not meant even to suggest a total rejection of \textit{caveat emptor} in the sale of real property. Nevertheless, in the narrow scope of \textit{Schipper}, \textit{Kriegler}, and \textit{Avner}, where the buyer and seller "are not on equal footing,"\textsuperscript{44} and adequate inspection is not available to the buyer,\textsuperscript{45} the holding, if so limited, seems justified. Thus, if the aforementioned hurdles can be overcome in the proper factual situation, Missouri could justifiably adopt the California position of \textit{Kriegler} and \textit{Avner}, further expanding upon its adoption of the \textit{Restatement} position.

\textbf{Gary S. Dyer}

\textsuperscript{41} See footnote 13 \textit{supra}.
\textsuperscript{42} 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).
\textsuperscript{43} See footnote 10 \textit{supra}, and text.
\textsuperscript{45} Id.
CONGRESSIONAL REDISTRICTING: MISSOURI AGAIN FAILS TO MEET CONSTITUTIONAL REQUIREMENTS

Kirkpatrick v. Preisler

In 1967 the Missouri Legislature made its third attempt in seven years to draw up a congressional redistricting plan that would be constitutionally permissible.\(^2\) The plan divided the state into ten congressional districts. The districts created by the 1967 Act varied from 13,542 above an ideal equal district to 12,260 below it. The most populous district was 3.13% above mathematical equality and the least populous district was 2.83% below the ideal.\(^3\) On December 29, 1967, the United States District Court for the Western District of Missouri held that the 1967 Missouri Congressional Redistricting Act did not comply with article I, section 2, of the United States Constitution\(^4\) and was therefore void.\(^5\) The Supreme Court affirmed in a 6-3 decision, holding that Missouri’s ten congressional districts did not satisfy the “as nearly as practicable” constitutional standard for population apportionment and that Missouri had no legally acceptable justification for the population variances among the districts.\(^6\)

Until 1962, there was no remedy in the federal courts for the often times gross inequalities that existed between populations of various state

3. Kirkpatrick v. Preisler, 394 U.S. 526, 529 (1969). The redistricting effected by the 1967 Act, based on a population of 4,319,813 according to the 1960 census, is as follows:

<table>
<thead>
<tr>
<th>District No.</th>
<th>Population</th>
<th>% Variation From Ideal</th>
</tr>
</thead>
<tbody>
<tr>
<td>one</td>
<td>439,746</td>
<td>+ 1.3</td>
</tr>
<tr>
<td>two</td>
<td>436,448</td>
<td>+ 1.03</td>
</tr>
<tr>
<td>three</td>
<td>436,099</td>
<td>- .95</td>
</tr>
<tr>
<td>four</td>
<td>419,721</td>
<td>- 2.84</td>
</tr>
<tr>
<td>five</td>
<td>431,178</td>
<td>- .19</td>
</tr>
<tr>
<td>six</td>
<td>422,238</td>
<td>- 2.26</td>
</tr>
<tr>
<td>seven</td>
<td>436,769</td>
<td>+ 1.11</td>
</tr>
<tr>
<td>eight</td>
<td>445,523</td>
<td>+ 3.13</td>
</tr>
<tr>
<td>nine</td>
<td>428,223</td>
<td>- .87</td>
</tr>
<tr>
<td>ten</td>
<td>423,368</td>
<td>- 1.88</td>
</tr>
</tbody>
</table>

Ideal population per district .................................. 431,981
Average variation from ideal .................................... 1.6%
Ratio of largest to smallest district .......................... 1.06 to 1
Number of districts within 1.88% of ideal .................... 7
Population difference between largest and smallest district ........................................... 25,802

4. Article I, § 2 of the United States Constitution states:
The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature.

https://scholarship.law.missouri.edu/mlr/vol35/iss2/7

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legislative or congressional districts. In almost every state the difference between the number of persons in the least populous district and the most populous district was quite significant. The basis of the federal courts’ failure to consider reapportionment cases was a rationale exemplified in Colegrove v. Green where Justice Frankfurter stated, “[C]ourts ought not to enter this political thicket.”

However, in March 1962 in the landmark case of Baker v. Carr the Supreme Court held that federal courts had jurisdiction to determine whether state legislative apportionments violated the fourteenth amendment. Since Baker there has been a steady stream of decisions which have expanded and developed the rationale enunciated in that decision. For example, in 1963 the Supreme Court held that Georgia’s county-unit system used in electing statewide officials violated the equal protection clause of the fourteenth amendment. This marked the first time the federal courts had invalidated a state law because of a conflict with the “one man-one vote” ideal. Then in 1964, in Wesberry v. Sanders, the Court held that the Constitutional mandate that representatives be chosen “by the People of the several states” meant:

[A]s nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s . . . . To say that a vote is worth more in one district than in another would . . . run counter to our fundamental idea of democratic government . . . . ”

Four months after Wesberry, reapportionment decisions dealing with the legislatures of fifteen states were handed down by the Supreme Court within a one week period. In one of these decisions, Reynolds v. Sims.

9. Id. at 556.
12. R. DIXON, DEMOCRATIC REPRESENTATION—REAPPORTIONMENT IN LAW AND POLITICS 172 (1968), states that “in its most elemental connotation, the ‘one man-one vote’ idea denotes simply the principle of majority rule in the filling of a given office in a given constituency.”
the Court speaking through Chief Justice Warren undertook to enunciate certain standards against which apportionment laws would henceforth be tested. It was stated that there must be "substantial equality of population among the various districts" and the districts must be "as nearly of equal population as is practicable."

Despite the vagueness of the standards, lower courts moved quickly to implement the pronouncements of the Supreme Court while most states immediately began to draw up legislation that would comply with the standards set down in Wesberry and Reynolds. However, in most cases the states' attempts to comply with the "one man-one vote" ideal have not succeeded. Much of the blame for this must ultimately lie with the Supreme Court's failure to set definite standards by which the states could be guided. Missouri's futile attempts since 1960 to meet the "one man-one vote" ideal have been illustrative of this point.

In 1961, following the 1960 population census which reduced Missouri's number of Congressional representatives from 11 to 10, the state legislature divided the state into ten congressional districts as required by the Missouri State Constitution. On January 4, 1965, the Federal District Court for the Western District of Missouri ruled that the 1961 Missouri Congressional Redistricting Act was unconstitutional because of its failure to comply with the standards set forth in Reynolds and Wesberry. The district court, however, withheld judicial action "until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem." In accordance with this decision, the Seventy-third General Assembly enacted the 1965 Congressional Redistricting Act. This Act was likewise held to be constitutionally invalid and on January 9, 1967 this judgment was affirmed by the Supreme Court. Following this decision, the Seventy-fourth General Assembly of Missouri once again attempted to meet the constitutional requirements and enacted the statute held unconstitutional by the district court and affirmed by the Supreme Court in Kirkpatrick.

18. Id. at 559.
19. Id. at 577.
21. Mo. Constr. art. 5, § 45, provides:
   When the number of representatives to which the state is entitled in the house of the congress of the United States under the census of 1950 and each census thereafter is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.
23. Id. at 191.
25. Preisler v. Secretary of State of Missouri, 257 F. Supp. 953 (W.D. Mo. 1966). However, the district court permitted the 1966 congressional elections to be conducted under the constitutionally void 1965 Act.
Missouri made two primary arguments in *Kirkpatrick* in defense of the 1967 Act. The first was that the variances between the districts was so small as to be *de minimis*, and therefore the "as nearly as practicable" standard was satisfied. Second, and in the alternative, Missouri argued that any variances could be justified by such considerations as: maintaining compactness and regularity of district lines; drawing district lines to correspond with county lines; historical factors; projection of population movements within the state; and the presence of transient or nonvoting military personnel and college students within the proposed districts. Missouri further argued that the reapportionment law was the most equitable bill that political compromise between different interest groups in the Missouri Legislature would allow.

In response to these arguments, the Court clearly indicated that Missouri and other states had failed to grasp the *Wesberry* and *Reynolds* standards stating, "We are required in this case to elucidate the 'as nearly as practicable' standard." The Court then stated that there is no fixed numerical standards nor arbitrary cut off points; rather, each state must make a "good-faith effort" to achieve precise mathematical equality. The Court also recognized that the extent to which this equality can be achieved may vary from state to state and from district to district. However, if a state has not made a "good-faith effort" to achieve mathematical equality, any variance, no matter how small, must be justified. Applying this reasoning to the *Kirkpatrick* situation, the Court rejected Missouri's *de minimis* argument concluding that Missouri had failed to make a "good-faith effort" to avoid population variances.

Having previously held that the burden is on the state to prove that variances are justified, the Supreme Court then dealt with the question of whether Missouri had met this burden. The Court rejected Missouri's

30. *See* note 3 *supra*.
32. *Id.* at 530.
33. *Id.* at 551. It was stated in Missouri's appellant brief at page 11 that some Missouri legislators, when drawing up the 1967 Act, felt if they achieved a 2 percent level of variance they would meet the standard.
35. The Supreme Court in January, 1967, decided the Florida case of *Swann* v. *Adams*, 385 U.S. 440 (1966), in which the Court stated, "*De minimis* deviations are unavoidable. . . ." The language was the basis for Missouri's *de minimis* argument which was rejected in *Kirkpatrick*. It should be noted that after *Swann* the Supreme Court never again stated that *de minimis* deviations were unavoidable.
36. The facts indicated that district make-up much closer to the ideal of population equality had been proposed in earlier versions of the bill but rejected by the 1967 Missouri legislature.
37. *See* *Swann* v. *Adams*, 385 U.S. 440, 445 (1967). The Supreme Court in *Kirkpatrick* puts special emphasis on the fact that the burden is on the states to justify their particular reapportionment plans. This is quite significant because it makes the states' task of drawing up a workable plan even more difficult. Furthermore, under the new "equal numbers" constitutional standard for apportionment found in *Kirkpatrick* any plan would be open to attack merely by showing a more equal plan would be possible. There is thus no presumption in favor of the validity of a state's apportionment plan.
argument that population variances were necessary to avoid fragmenting areas with distinct economic and social interests on the basis that "[n]either history alone, nor economics or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes."38 Missouri's arguments that deviations from equality were the result of an attempt to keep the districts geographically compact39 by drawing lines along existing county or municipal lines were similarly discarded. The Court also refused to accept the argument that the 1967 Act was the best possible compromise among the Missouri legislators following the district court's finding that "the rule is one of 'practicability' rather than political 'practicability.'"40 In discarding Missouri's contention that certain population variances resulted from the legislature's attempt to take into account large numbers of non-voting college students and military personnel in order to base reapportionment on eligible voter population rather than total population, the Court, while assuming this technique to be valid, stated that Missouri had made no "good-faith effort" to ascertain eligible voter population.

In regard to Missouri's contention that variations in some of its districts resulted from attempts to project population shifts during the ten years between population censuses, the Court, although rejecting this argument in the Missouri situation, stated that "[w]here these shifts can be predicted with a high degree of accuracy, states that are redistricting, may properly consider them."41 The Court made it clear, however, that this was not meant to be a loophole for the states, and population trends must be "thoroughly documented and applied throughout the state in a systematic, not an ad hoc, manner."42

By rejecting all of Missouri's justifications, the Court gives the distinct impression that it will be a rare case in which a state can justify any deviation from exact numerical equality among districts.43 The Court seems to have abandoned its previous approach of allowing some de-

41. 394 U.S. 526, 535.
42. Id.
43. In Wells v. Rockefeller, 394 U.S. 542 (1969), the companion case to Kirkpatrick, the Supreme Court reversed the United States District Court for the Southern District of New York which had sustained the validity of New York's 1968 congressional districting statute. The Court, relying exclusively on its opinion in Kirkpatrick, held that New York had failed to make a good faith effort to achieve equal numbers in each district. New York in its re-districting plan sought to treat seven sections of the state as homogeneous regions and to divide each of these regions into congressional districts of equal population. Thirty-one of New York's 41 congressional districts were drawn up under this plan. The remaining ten districts were constructed by grouping whole counties together. These ten districts were of equal population. However, when compared with the other thirty-one districts these districts did not meet the standard of equal numbers in all districts. This was an attempt by New York to keep intact regions with distinct interests and to maintain county lines. The Court held that these were not legally acceptable justifications for departing from the standard of precise equality.
gree of flexibility. The new standard appears to be a simple arithmetic approach based solely on gross population which assumes that “equal numbers” means “equal representation.”

Admittedly, the Supreme Court has solved one serious problem, malapportionment. However, this has been at a cost of creating or worsening a number of other problems. Complete stress on “equal numbers” in all districts can easily lead to political and racial gerrymandering, anti-minority districting practice, and disregard for natural boundary lines.

Furthermore, the Court faces the complex problem of how to apply this strict standard to local governmental units. Application of the standard of “equal numbers” to each unit of local government may be impossible to enforce and in all likelihood will cause political chaos.

Now that the Supreme Court has remedied the more flagrant abuses, a more sophisticated approach to the problem of fair and effective representation is required. Unfortunately, the Supreme Court in *Kirkpatrick* has summarily rejected the idea of a maximum allowable deviation. If the problem were approached in this way, the *Reynold’s* goal of “substantial equality” would be achieved and our system of effective representation through the political process would not be unnecessarily burdened by an unwarranted emphasis upon exact equality.

**Patrick E. Murphy**

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44. In *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), the Court stated: It is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable Constitutional requirement.

Also in *Reynolds v. Sims*, 377 U.S. 533, 578 the Court stated: For the present we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements . . . .


MISSOURI ABROGATES THE "NO DUTY" RULE AS TO SOCIAL GUESTS: RESTATEMENT (FIRST) ADOPTED

Wells v. Goforth

Plaintiff Wells was a social guest in defendant Goforth's home. While leaving the home, plaintiff slipped and fell on an icy portion of defendant's front porch, sustaining injuries. Upon trial, plaintiff recovered $12,500 damages. Defendant appealed to the St. Louis Court of Appeals, but pursuant to Supreme Court Rule 84.05, the case was transferred to the Missouri Supreme Court, which reversed and remanded. In reversing, the Missouri Supreme Court recognized that although a finding of "active" negligence (one of the many exceptions to the common law rule that a landowner or occupier owes "no duty" of care to those who go on his lands as trespassers or licensees) would have allowed recovery, an icy porch "is not an ultrahazardous condition and a failure to warn of the condition was not active negligence."

Of significance, however, is the fact that court remanded for a new trial stating that there was a possibility that the plaintiff could establish liability under the rule of section 349 of the Restatement (First) of Torts, which would make the landowner liable for unreasonably dangerous conditions known to the landowner, and which the court explicitly adopted as the new standard by which to judge a landowner's potential liability. (The court specifically rejected the rule of Restatement (Second) of Torts which, among other things, would permit liability to be imposed without specific knowledge on the landowner's part of the injury-producing condition.) The court held that while the evidence as presented was insufficient for an affrmance under the new rule because "there [was] no evidence from which it [could] be found, without resorting to guess work, conjecture, or speculation, that defendants knew of the icy con-

1. 443 S.W.2d 155 (Mo. En Banc 1969).
2. The terms "landowner," "occupant," "occupier," and "possessor" should be understood as synonymous where the issue is liability to an entrant upon the land. Although title to the land may be helpful in determining who is or is not a possible defendant in a suit brought by an injured licensee, the determinative factor is control. This is explained in Note, 1 WILAMETTE L. J. 314, 315 (1960): Technically, however, not even occupancy is the basic ingredient. The real vital fact is control—who has primary control and authority over the land at the time and place of injury?
2 Restatement (First) of Torts § 329 (1934), comment c, indicates that even a disseisor can be a possessor in this sense.
3. The "no duty" rule, which meant basically that the licensee took the premises as he found them, is fully explained later.
5. Id. at 158. That the Missouri Supreme Court adopted the Restatement (First) rule should come as no surprise. The older rule of the common law has long been under attack by legal scholars (See W. Prosser, Law of Torts 390 (3d ed. 1964)), usually criticized as being contrary to public policy or as placing "property rights" above "human rights." This dichotomy has become increasingly popular with courts that have been influenced by the social sciences.
dition," plaintiff would be allowed a new trial in order to test her case under the new rule.8

The limitations on the liability of land occupants to persons entering upon their land have long constituted an exception to general negligence theory. Occupants of land were once held to owe no duty of ordinary care to entrants upon their land and were thus insulated from liability under traditional negligence theory for injuries caused by the usage or dangerous nature of the land.9 Later courts distinguished between injuries to entrants which stemmed from the condition of the premises and those injuries which were caused by some affirmative act of the possessor (the so-called "active-passive" negligence distinction).11 In addition entrants were classified as trespassers, licensees, or invitees ("business visitors"),12 these classifications being a crucial factor in determining legal rights when someone suffered injury on the lands of another.13 This system of classification, based upon the purpose for which the entry was made, has extended into modern law from origins in English common law.14

The classification of trespasser signifies "[a] person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."15 Ordinarily, the possessor of land is not liable to a trespasser for injuries arising out of the condition of his land or his active negligence.16 A licensee is "[a] person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission."17 Prior to the Wells case, there was a general rule in Missouri, with several important exceptions which will be discussed later, that a landowner owed "no duty" to a licensee. Most protected by the law is the invitee (business visitor) who is "[a] person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly

7. Id. at 159.
8. Id. at 160.
9. McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45 (1936).
12. "Business visitor" is the term used in 2 Restatement (First) of Torts § 332 (1934).
13. Wolson v. Chelist, 284, S.W.2d 447, 448-49 (Mo. 1955). The court said: [I]n legal contemplation, the duty and the precautions to be taken in the fulfillment of the duty arise out of the legal relationship between the one (trespasser, licensee, or invitee) who goes upon the land and the occupier or possessor thereof.
14. The classifications, and various duties under them, were established by the time of Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856). In Southcote the court stated that "[t]here is a distinction between persons who come on business and those who come by invitation." However, England, by statute, has abolished the distinction between licensees and invitees. Occupiers' Liability Act of 1957, 5 & 6 Eliz. 2, c. 31 (1957). Both classes of entrants are now treated alike.
15. 2 Restatement (First) of Torts § 329 (1934).
16. Id. § 553; Restatement (Second) of Torts § 533 (1965).
17. 2 Restatement (First) of Torts § 330 (1934).
connected with business dealings between them."18 An invitee19 is normally owed a duty of ordinary care,20 although formal expression of the obligation in such specific phrases as "make the premises safe" leaves doubt as to whether the "duty" and the general negligence test are truly congruent. Economic benefit to the occupier of land is the most widely used test for conferring the status of "invitee" and is the test employed by Missouri courts.21 Since economic benefit is determinative, it is well settled law in Missouri and elsewhere that a social guest in a home is a licensee and not an invitee.22

As previously noted, the shielding of land occupants from liability to entrants upon their land represents a common law doctrine which was an exception to general negligence principles. Nevertheless, in some special areas exceptions were grafted onto this common law doctrine which in practice allowed recovery in certain types of cases. There were at least eight of these exceptional types of cases where a failure to use ordinary care could result in the land occupant's liability. 1) The occupant was under a duty to refrain from doing "wilfull or wanton" acts resulting in injury to all classes of entrants.23 2) The law imposed a duty to avoid injuring licensees and invitees by an affirmative act of negligence.24 3) The occupant had an affirmative duty to dispel or dismantle "attractive nuisances" which lured a child upon his land and resulted in injury.25 4) The doctrine of "hidden snares, traps, or pitfalls," which prohibits land occupants' standing by and allowing licensees to venture

18. Id. § 882.
19. Porchey v. Kelling, 353 Mo. 1034, 1041-42, 185 S.W.2d 820, 823 (1945): "The word 'invitation' is not used in its popular sense but in the legal sense, indicating an entry for the benefit of the possessor or in the mutual interest of the possessor and entrant."
20. 2 Restatement (First) of Torts § 343 (1934). See, e.g. Glaser v. Rothschild, 221 Mo. 180, 186, 120 S.W. 1, 3 (En Banc 1909).
21. Gilliland v. Bondurant, 332 Mo. 881, 901, 59 S.W.2d 679, 688 (1933). The court noted that while economic benefit is the rule, in rare cases of long, customary entrance of potential customers, or persons coming for an educational purpose, an invitation would be implied. See W. Prosser, Law of Torts 396 (3d ed. 1964).
22. Wolfson v. Chelist, 284, S.W.2d 447, 448 (Mo. 1955), was quite explicit on the status of a social guest: It seems to be the almost universal rule in Anglo-American jurisdictions that a social guest in a home is not an invitee in a legal sense, but is, in law, a licensee... Prosser writes "[A] social guest, however cordially he may have been invited and urged to come, is not in law an invitee." W. Prosser, Law of Torts 387 (3d ed. 1964).
24. Glaser v. Rothschild, 221 Mo. 180, 120 S.W. 1 (1909). See also Atterbury, Torts—Landowners Liability to a Licensee—Active-Passive Negligence Distinction, 33 Mo. L. Rev. 33, 94 (1968), where "active negligence" is defined as "a failure to use reasonable care in the commission of an act resulting in harm to another."
25. This, coupled with the special leniency exhibited by courts in finding contributory negligence on the part of the child trespasser or licensee, comprises this major exception of "attractive nuisance." Bichsel v. Blumhost, 429 S.W.2d 301, 303 (K.C. Mo. App. 1968); Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742, 745 (Mo. 1952).
into ultrahazardous hidden peril, was an “exception to the rule and that a licensee takes the premises as he finds them.” 5 The “hard-by” rule required the land occupant to use reasonable care to assure that users of a public way who inadvertently strayed a few feet onto their land were not injured. 27 6 “Discovered” trespassers, who are simply trespassers whose presence upon the land is known by the occupant, were also protected against active negligence 28 on the part of the land occupant. 7 Railroads had a duty to watch for trespassers where they were known to frequent the right-of-way. 29 8 Occupants who used ultrahazardous substances on their lands, such as explosives, were required to exercise care commensurate with the risks involved. 30

The above exceptions indicate that in Missouri, even prior to the adoption of Restatement (First) in the Wells case, many licensees were allowed recovery when injured on the lands of another. The essential prerequisite to a recovery was to categorize the case as one falling into one or another of the exceptions. Nevertheless, occupants of land were largely secure from the threat of potential liability arising from the normal usage of their lands because there was no general duty of care owed to all licensees.

The rule which the court rejected in Wells, and which has heretofore been referred to as the “no duty” rule, 31 was formulated in Missouri in

26. Bichsel v. Blumhost, supra note 25, at 306. The court went on to define “ultrahazardous” as including that which is “highly dangerous to life and limb.” This is a somewhat more liberal definition than many would give. “Ultrahazardous” is more often used in conjunction with cases involving explosives. See Wells v. Goforth, 443 S.W.2d 155, 157 (Mo. En Banc 1969), where the Missouri Supreme Court said “this Court declined to extend the hidden peril exception to situations other than those involving harmful chemicals, explosives and other inherently dangerous materials.”

27. Bichsel v. Blumhost, 429 S.W.2d 301 (K.C. Mo. App. 1968). See also Patterson v. Gibson, 287 S.W.2d 853, 856 (Mo. 1956), which is cited in Bichsel.

28. McVicar v. W. R. Arthur & Co., 312 S.W.2d 805, 812 (Mo. 1958). Note that the duty of care owed is ordinary care, and it does not include anticipation of the possibility that the discovered adult trespasser will move from a safe area to an unsafe one.

29. Everett v. St. Louis & S.F. R.R., 214 Mo. 54, 112 S.W. 486 (1908); Ahnfeld v. Wabash R.R., 212 Mo. 280, 111 S.W. 95 (1908).

30. Wells v. Goforth, 443 S.W.2d 155, 157 (Mo. En Banc 1969). The court cites Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742, 748 (Mo. 1952): In Boyer the court concluded that “[t]he duty to keep explosives in such manner as not to injure others requires care commensurate with the risk involved. The status of the injured party does not necessarily control.”

31. In order to better assess the rejection of the “no duty” rule in light of the Restatement (First) rule, a hypothetical is helpful. First, consider a case under the no duty rule: A is the occupant of Blackacre. A invites B to join a hunt on Blackacre when the season opens. A week before the season opens, A noticed that a footbridge over a deep gully had been undercut. Unfortunately, A forgets this fact. Later, when B joined A on the hunt, B, unaware of the defect, fell through the bridge and suffered severe injuries to his spine. Seeing the mishap, A recalled that he had made a mental note to fix the bridge. Assuming that the defective bridge would not be considered a “hidden trap or pitfall,” under the no duty rule A could not be held liable to B because, while A clearly knew of the defect on his land, his only duty to B was to avoid “wilful” or active injury to him. B, in other words, as a social guest, could not complain since his invitation was a gratuity and he “took the premises as he found them.”
two early cases, Kelly v. Benas and Glaser v. Rothschild, both decided in 1909. As the Glaser court enunciated:

In such cases as this the root of the thing, the deciding question is: Do the facts raise a duty, a breach of which is shown? . . . The general rule is that the owner or occupier of premises lies under no duty to protect those from injury who go upon the premises as volunteers or merely with his express or tacit permission from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier. A bare licensee (barring wantonness, or some form of intentional wrong or active negligence by the owner or occupier) takes the premises as he finds them.

A survey of American and English jurisdictions indicates that this rule was in accord with the majority of courts at the time of adoption in Missouri. It was the rule in Missouri until the Wells decision and was applied as late as 1968.

The rule adopted in Wells imposes upon a land occupant a general duty either to warn licensees of the defects on the property which are known to him, or to make such defects safe. The Restatement (First) of Torts section 342 states:

A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he

(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

Now consider the same facts except that instead of a faulty bridge, A sees B about to toss a lighted cigar through the open door of a shed which A has recently filled with explosives. (A shed full of explosives is obviously an ultra-hazardous condition on the premises.) In this situation, B could recover under the “no duty” rule because explosives must be handled in a manner commensurate with their potential hazard, and B is entitled to a warning of such a danger.

33. Glaser v. Rothschild, supra note 32, at 184, 120 S.W. at 2 (citations omitted).
34. E.g., Lucas v. Walker, 22 Cal. App. 296, 301, 134 P. 374, 377 (1913); Fox v. Warner-Quinlan Asphalt Co., 204 N.Y. 240, 243, 97 N.E. 497, 498 (1912); Watson v. Manitou & Pikes Peak Ry., 41 Colo. 138, 142, 92 P. 17, 19 (1907). See also Southcote v. Stanley, 156 Eng. Rep. 1195 (Ex. 1856), and McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45 (1936). In 1945 the Missouri Supreme Court noted that while the Missouri rule was not in accord with the Restatement (First), it was in harmony “with the majority of the jurisdictions.” Porche v. Kelling, 353 Mo. 1034, 1042, 185 S.W.2d 820, 825 (1945).
36. Under the rule of Restatement (First), the hypothetical in note 31 supra illustrates a changed result. Since A knew of the defective bridge and failed to warn B, he is liable to B to the extent of his bodily injuries. Obviously, A is liable to B under the Restatement (First) rule if he fails to warn of the shed full of explosives. The only escape from this conclusion lies in the remote possibility that A could reasonably have expected B to discover the risks for himself, or the equally remote possibility that A might not have realized the danger to B where the bridge was the injury producing instrumentality.

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(b) invites or permits them to enter or remain upon the land, without exercising reasonable care
(i) to make the condition reasonably safe, or
(ii) to warn them of the condition and the risk involved therein.37

Under this rule the crucial factor to be determined is the occupant’s knowledge of the defect.38 The Wells opinion states, “We do not believe a possessor of land should be subject to liability for bodily harm . . . unless the possessor is himself aware of the condition.”39 However, the court held that “a possessor’s ‘knowledge’ may be proved by circumstantial evidence,”40 but the finding of a possessor’s knowledge from circumstantial evidence must not be the “result of guesswork, conjecture or speculation . . . .”41 Thus, liability, to a great extent, is predicated upon a subjective element in the proof—the actual scienter of the defendant to be charged.

The possessor, in addition to knowing of a defect, must realize that it constitutes an unreasonable danger to his licensee in order for him to be subject to liability.42 But some defects could conceivably be dangerous only at certain times of the day or night, or only under certain conditions. Thus, if a licensee exceeds the bounds of his license by coming upon the premises at a different time of day than that contemplated by the possessor, or at a different location, proceeds with some activity other than that expected by the possessor, or in any other way abuses his licensor’s gratuity, the possessor cannot be deemed to have realized that a particular condition on the premises constituted a hazard to the licensee when it otherwise would not have. The possessor would not be liable to the licensee under such circumstances.43

A possessor of land has two options under Restatement (First). He can either make the known hazardous condition safe for licensees, or warn licensees of the potential hazard.44 Whichever alternative the possessor chooses, he must proceed with reasonable care.45 However, under no circumstances need the possessor inspect his premises in order to discover, cure or be able to warn of all possible defects.46 Nor are licensees en-

37. 2 Restatement (First) of Torts § 342 (1934). Comment b of § 340 indicates that the term “risk” means “not only the existence of a risk but also its extent.” Id. § 340, comment b.
38. 2 Restatement (First) of Torts § 342 (1934).
40. Ibid.
42. 2 Restatement (First) of Torts § 342, comment j (1934).
43. Id.
44. 65 C.J.S., Negligence § 68 (1966).
45. Id.
46. 2 Restatement (First) of Torts § 342, comment c (1934). It should be noted, however, that the Wells court neither adopted nor rejected any of the comments or examples following this section. While the body of § 342 is now law in Missouri, the materials in the Restatement (First) explaining it are not necessarily the law also.
titled to special physical preparation of the premises for their safe visit.47 The possessor is entitled to expect that his licensees will use their own faculties to discover potential dangers to their persons.48 Since the liability of the possessor under this rule is predicated not upon a duty to keep his premises in a safe condition, but rather upon a duty to give a warning of dangerous conditions,49 a permanent notice in the form of a sign could be considered sufficient to fulfill a possessor’s duty to warn. In fact, the comments in the Restatement (First) specifically suggest that a sign be used.50

Since the duty owed to a licensee is to warn him of danger, the assumption necessarily follows that if by any means whatsoever the licensee becomes aware of the conditions which might imperil him, the possessor is not liable for subsequent injuries.61 Therefore, even though adopting a new rule which enlarges liability, the court has left untouched the stricter contributory fault rule traditionally applicable to cases involving the liability of landowners. Under this rule the plaintiff is barred from recovering if, at the time the injury was sustained, he knew62 of the injury producing condition, regardless of whether exposing himself to it was reasonable under the circumstances. Moreover, and despite what would appear to be the less disabling criteria of Restatement (First), which the Missouri Supreme Court has approved,63 it is clear that under Missouri Approved Instruction section 22.03 a plaintiff is barred even if he was unaware of the “condition” if in the exercise of reasonable care he could have known of it.64

Although section 22.03 applies only to “invitees,” since invitees are owed more care than “licensees,” it is difficult to believe that the Supreme Court Committee intended to make it easier for licensees to recover than for invitees. Such a rule is more limiting than the normal contributory negligence rule because, under the latter rule, the plaintiff is not barred, even if he knew of the injury producing condition, if the jury nevertheless believes that he used “that degree of care (for his own safety) that an ordinarily careful and prudent person would use under the same or similar circumstances.”65 Similarly, by requiring the plaintiff, as a condition to recovery, to show that he was not aware, and that by the exer-

47. 2 Restatement (First) of Torts § 342 comment e (1934).
48. Id.
49. 65 C.J.S., Negligence § 63 (1966).
50. 2 Restatement (First) of Torts § 342, comment b (1934). The only requirements are that the sign present an “adequate disclosure of the condition” if “the risk is not disclosed by a mere notice of the condition.” The sign probably would not fulfill the duty if the licensee was a child.
51. 2 Restatement (First) of Torts § 342, comment b (1934), makes this proposition clear. See also, W. Prosser, Law of Torts 391 (3d ed. 1964), and 2 Restatement (First) of Torts § 340 (1944).
52. 2 Restatement (First) of Torts § 340 (1934). Note comment e.
53. Restatement (First) of Torts, Missouri Annotations § 340 (1956).
55. Mo. Approved Instr. § 11.02 (1969). For example, in Missouri, under Mo. Approved Instr. § 32.01 (1969), a plaintiff is not barred from recovery if he failed to keep a careful lookout so long as his failure was not negligent as defined in Mo. Approved Instr. § 11.02 (1969).
exercise of reasonable care could not have been aware, of the injury producing condition, the burden of pleading and proving freedom from contributory negligence is placed upon the plaintiff, whereas this issue is normally an affirmative defense which must be pleaded and proved by the defendant.\textsuperscript{56} 

The rejection, by the Missouri Supreme Court, of the more liberal test of the Restatement (Second) is more understandable when one compares that Restatement's distinction between the duty owed by a landowner towards an invitee, and that owed to a licensee. It is submitted that under the Restatement (Second) the only difference between those obligations is that the defendant is liable to the licensee if he "knows or has reason to know of the condition . . . ," whereas he is liable to the invitee if he "knows or by the exercise of reasonable care would discover the condition . . . ," a distinction so technical as, arguably, to dispose of any substantial difference between the two classifications.\textsuperscript{57} If the Restatement (Second) has taken a long step in reducing the immunity of a landowner with respect to injuries sustained on his property by licensees, California has gone all the way. In Rowland v. Christian\textsuperscript{58} the California Supreme Court abolished the special immunities enjoyed by landowners and ruled that the special relationship, if any, between the landowner and the status of the entrant-plaintiff were aspects of the "same or similar circumstances" test of general negligence theory which would hold a defendant liable only if he failed to use that degree of care which the ordinarily careful and prudent person would use under such "same or similar circumstances."

The courts of Missouri have not gone nearly so far as either the Restatement (Second) of Torts or Rowland v. Christian. Therefore, the net effect of the Wells case, it would seem, is to give greater "protection" to social guests, while retaining a modicum of immunity to the landowner. The duty to warn of known defects on the premises is now comprehensive as to all licensees—the most numerous class of entrants.

\textbf{William H. Pennington}

\textsuperscript{56} § 509.090, RSMo (1959); W. Prosser, \textit{Law of Torts} 426 (3d ed. 1964). 
\textsuperscript{57} \textit{Restatement (Second) of Torts} §§ 342, 343 (1965). 
MUST SERVICE OF PROCESS BE PERSONAL IN ORDER TO OBTAIN IN PERSONAM JURISDICTION?

State ex rel. Dorn v. Morley

Oscar Stein filed suit against Janet Dorn for rent past due and re-possession of certain premises. The constable specified that relator was "not found" in the City of St. Louis. In accordance with section 535.030(2), RSMo 1959, the special service of summons provision in "Landlord-Tenant Actions," an order of "Publication of Notice" was posted in four public places for ten days. That statute provides that if personal service cannot be given because defendant is "not found," service may be made by posting notice in four public places. On the return date judgment by default was entered against relator for both the past due rent and restitution of the premises. Restitution was made but Dorn challenged the personal judgment as to rent past due because there had been no personal service of summons upon her. She also challenged the constitutionality of section 535.030(2) as not providing a method of notice reasonably calculated to inform a defendant of the pendency of a suit.

Judge Holman, speaking for a unanimous court, reversed the per-
personal judgments for rent past due stating, "It has always been the law of this state that a personal judgment cannot be rendered . . . unless there had been personal service of summons upon [the defendant] . . ."6 Turning to section 535.030(2), the statute allowing constructive service of process in "Landlord-Tenant Actions," the court held that "to the extent that it may be construed to authorize a personal judgment such as the one entered against relator [without personal service], it is unconstitutional and void."6

Since the restitution of premises had already been made (thereby rendering the in rem issue moot), the court did not rule on the general attack made by relator that section 535.030(2) was unconstitutional in that it does not provide a method of notice reasonably calculated to inform a defendant of the pendency of a suit as required by due process. However, strong dicta by the court indicated the statute, even when applied to in rem proceedings, would be unconstitutional and advised magistrates to use some form of service more reasonably calculated to provide actual notice until the General Assembly has corrected the statute by proper amendment.7

There can be no doubt that the holding in Dorn is required by both the Missouri decisions8 and the statutes;9 that is, personal judgments require personal service. However, the court, in holding that this result "is required by the due process clauses of both the State and Federal Constitutions,"10 is overstating the federal requirements. Although Missouri courts may have interpreted the due process clause in the Missouri Constitution as requiring personal service, the federal courts and courts of several other states have not been so strict. Thus, while the United States Supreme Court suggested in the case of Pennoyer v. Neff,11 that a personal judgment

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6. Id.
7. Id. at 931.
8. In the early case of Hamill v. Talbott, 81 Mo. App. 210 (K.C. Ct. App. 1899), the Kansas City Court of Appeals took the liberal view that "a judgment may in such a case [when a state citizen is absent from the state] be rendered against and charge a defendant in personam without any personal service . . . ." However, in Moss v. Fitch, 212 Mo. 484, 111 S.W. 475 (1908), the Supreme Court of Missouri took a much more conservative position and decided that personal service was required for personal judgments. Since that time Missouri courts have followed the precedent laid down by Moss. See Beckmann v. Beckmann, 358 Mo. 1029, 218 S.W. 2d 566 (En Banc 1949); State ex rel. McIndoe v. Blair, 238 Mo. 132, 158, 142 S.W. 326, 381 (En Banc 1911); State ex rel. Jones v. Miller, 349 S.W.2d 534, 537 (St. L. Mo. App. 1961); Elvins v. Elvins, 176 Mo. App. 645, 651, 159 S.W. 746, 748 (St. L. Ct. App. 1913).
9. Legislative intent with respect to service of process by publication is clearly that such service shall be valid only for certain in rem judgments. Section 506.160 (1), RSMo 1959 provides:

Service by mail or publication shall be allowed in all cases affecting a fund, will, trust estate, specific property, or any interest therein, or any res or statute within the jurisdiction of the court, or in any special proceedings in which notice by mail or by publication is authorized . . . but such service shall not warrant a general judgment against such defendant. (Emphasis added)
11. 95 U.S. 714 (1877).
by constructive service of process upon a nonresident is contrary to due process of law (a holding that has been greatly limited by later cases).\textsuperscript{12} This decision was never applied to personal judgments against residents of the state where it is impracticable or impossible to get actual personal service.\textsuperscript{13}

The federal courts, in fact, appear to make no distinction at all between service for in personam and in rem proceedings in the determination of adequacy of notice.\textsuperscript{14} Professor Leflar makes the statement that "[t]he Constitutional requirements for both are the same . . . ."\textsuperscript{15} Various state courts have also held that personal service is not always a prerequisite to personal judgment when the defendant is a resident.\textsuperscript{16} Confusion apparently arises from the failure to distinguish between personal jurisdiction and adequacy of notice. In Missouri these two areas of law have been blurred to the extent that personal jurisdiction is held to depend upon adequacy of notice. Federal courts and legal writers indicate that these are two separate questions.\textsuperscript{17}

The failure to draw a distinction between personal jurisdiction and adequacy of notice has led Missouri courts to misinterpret federal authority as requiring personal service in order to obtain in personam judgments.


\textsuperscript{13} Jacobs v. Roberts, 223 U.S. 261 (1912). In this case the Court held that due process was afforded defendants by substituted process by newspaper publication after diligent inquiry to find defendants has been made. See also Santiago v. Nogueras, 214 U.S. 260 (1909); Ballard v. Hunter, 204 U.S. 241 (1902); Nations v. Johnson, 65 U.S. (24 How.) 69 (1860); Ouseley v. Lehigh Valley Trust & SafeDeposit Co., 84 F. 602 (C.C.E.D. Pa. 1897).

\textsuperscript{14} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950). In speaking of the distinction between in rem or in personam in so far as some courts require different service of process according to classifications, the Court said, "But in any event we think the requirements of the Fourteenth Amendment do not depend upon a classification for which the standards are so elusive and confused generally . . . ."


\textsuperscript{16} Griffen v. County of Cook, 369 Ill. 380, 389, 16 N.E.2d 906, 911 (1938). The court stated:

[A] judgment in personam may be obtained against a resident of the State by constructive service, if it appears actual service of process cannot be had upon him, and notice is given in such manner the reasonable probabilities are the defendant will receive notice of the pending action or proceeding before a judgment or decree is rendered against him. Accord, Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 59 S.E. 476 (1907); Clearwater Mercantile Co. v. Roberts, Johnson, Rand Shoe Co., 51 Fla. 176, 40 So. 436 (1905); Connecticut-Trust & Safety Dep. Co. v. Wead, 172 N.Y. 497, 65 N.E. 261 (1902); Fernandez v. Casey & Swasey, 77 Tex. 492, 14 S.W. 149 (1890); Ware v. Robinson, 9 Cal. 109 (1858).

\textsuperscript{17} See R. CRAMPTON & D. CURRIE, CONFLICT OF LAWS 557 (1968) where, in reference to Mullane v. Central Hanover Bank & Trust Co., these authors state that the "decision clearly distinguishes between personal jurisdiction, which is a conflicts question, and notice, which is not."
Nevertheless, under present Missouri doctrine, one who purposely absents himself from his place of abode, hides out, or uses subterfuge to mislead the server, cannot be personally bound by judgment in that suit. There are many situations that work a hardship on the party seeking redress because personal service is not possible or practical. In view of the federal doctrine and many state doctrines permitting substituted or constructive process, and in view of the increased reliability of modern communications, a review and perhaps revision of the Missouri rule would be most appropriate.

The second facet of Dorn that has significance for practicing attorneys and magistrate judges in Missouri is the dicta indicating that the statute, even as applied to in rem proceedings, might be found to be unconstitutional because it does not "provide a method of giving notice which is reasonably calculated to inform a defendant of the pendency of the suit . . . ." Unlike the holding in Dorn, this dicta has ample precedent in several United States Supreme Court cases. The case of Mullane v. Central Hanover Bank & Trust Company, while restating the federal rule that publication may be justifiable "where it is not reasonably possible or practicable to give more adequate warning," held that "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." The Mullane principle has been reaffirmed in a case with a factual situation closely analogous to that of Dorn. The Supreme Court has also taken the position that "[t]o dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required . . . ." In the Dorn case, registered mail would have been more likely to provide actual notice than those methods authorized by statute. Thus, the Missouri court seems correct in deciding that section 535.030(2), RSMo 1959 would be unconstitutional even when applied only to in rem proceedings.

18. In Mitchell v. Hines, 305 Mich. 296, 9 N.W.2d 547 (1943), defendant outran the process server and locked himself in a house. Service was invalid when the server threw the summons into the kitchen because it was not personally served.
19. The United States District Court for the Western District of Missouri has recently stated in Adams Dairy Co. v. National Dairy Products Corp., 293 F. Supp. 1135, 1144 (W.D. 1968) that:

The Supreme Court of Missouri applies the same standards applied by the Supreme Court of the United States to due process questions presented under the due process clauses contained in both the Missouri and federal constitutions.

There is, however, no authority in the Missouri State courts on the point. See, however, Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 440 (1952), rehearing denied, 343 U.S. 917 (1953), where the Court said that federal due process does not compel a state to open its courts to the full extent permitted by due process.
20. 442 S.W.2d at 930.
22. Id. at 318.
25. It should be noted that the dicta of the Dorn case was not expressly extended to State ex rel. Williams v. Weisman, 442 S.W.2d 931 (Mo. En Banc 1969)
To remedy this probable statutory infirmity, the court recommended that magistrates "order some form of service more reasonably calculated to provide actual notice, in addition to that required by section 535.030(2)." Missourians and magistrates might assume that that dicta indicates approval of the use of other than personal service to obtain in rem jurisdiction within the scope of the statute as long as it is reasonably calculated to provide notice. Such reliance may not be well founded.

It is generally accepted that if "constructive service is in certain situations substituted in the place of personal service . . . a strict and literal compliance with the provisions of the law must be shown in order to support the judgment . . . ." Missouri courts have consistently maintained the requirement of strict compliance with service of process statutes that are in derogation of the common law. Furthermore, Missouri courts have stated that "[a]ctual notice, given in any manner other than that prescribed by statute, cannot supply constitutional validity to the statute or to service under it." Finally, in a situation directly related to the dicta addressed to magistrates in the Dorn case, the Missouri Supreme Court followed the federal case of Wuchter v. Pizzutti in holding that:

[E]ven actual notice, gratuitously furnished under a statute which does not contain adequate requirements for notice, is insufficient . . . for such a statute does not meet the requirements of due process.

In light of these decisions, magistrates would be ill-advised to rely on any form of constructive service designed to provide notice of in rem proceedings under section 535.030 even if the form of service is reasonably calculated to provide actual notice.

JOHN R. PHILLIPS

(discussed note 4 supra). The statute in the Williams case, § 534.090, RSMo 1959, does provide for service by registered mail to be attempted before an order of publication can be issued "if the plaintiff has stated in his complaint . . . the last known address of the defendant . . . ."


27. 42 AM. JUR. PROCESS § 66 (1942).

28. See Kelly v. Murdagh, 184 Mo. 937, 938, 83 S.W. 437, 438 (1904), where the court held that service by publication in an in rem proceeding was invalid because a newspaper published a corrected version of an incorrect court order. The reasoning of the court was that the newspaper could not correct the errors of the court; therefore, the service was not made in conformity to the statutes even though the correct version did appear in the newspaper; Davison v. Arne, 348 Mo. 790, 155 S.W.2d 155 (1941); Johns v. Hargrove & Ruth Lumber Co., 219 S.W. 967 (Mo. 1920); Harness v. Cravens, 126 Mo. 233, 28 S.W. 971 (1894); But see State ex rel. Texas Portland Cement Co. v. Sale, 232 Mo. 166, 132 S.W. 1119 (1910).


30. 276 U.S. 13, 24 (1928). In that case the defendant received substituted service out of state in addition to the service authorized by statute that the court decided was invalid. The court stated that the process which was over and above the statute did not serve notice because such notice "[n]ot having been directed by the statute . . . cannot, therefore, supply constitutional validity to the statute or to the service under it."


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SECURITIES REGULATION—DEPUTIZATION UNDER SECTION 16(b) OF THE SECURITIES EXCHANGE ACT OF 1934

_Feder v. Martin Marietta Corporation_¹

George M. Bunker, President and Chief Executive of Martin Marietta Corporation (hereinafter referred to as Martin), served on the Board of Directors of Sperry Rand Corporation (hereinafter referred to as Sperry) from April 29 to August 1, 1963. During this period Martin purchased 101,300 shares of Sperry stock, augmenting its previous holding of 700,000 shares. In the period between August 29 and September 6, 1963, Martin sold its entire portfolio of Sperry stock at a profit.

Plaintiff, a Sperry stockholder, after making proper demand,² which was not complied with, filed this action under the provisions of section 16(b) of the Securities Exchange Act of 1934³ to recover, on behalf of Sperry, the profit made by Martin on the 101,300 shares bought during Bunker’s directorship. Plaintiff alleged that Martin “deputized” Bunker to represent its interests on the Sperry Board thus making Martin a “director” within the purview of section 16(b). The trial court felt that there was insufficient evidence to support a finding of deputization and gave judgment for defendant.⁴ The Court of Appeals for the Second Circuit reversed, holding that the factual findings of the lower court were

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2. Section 16 (b) provides that suit may be instituted at law by the owner of any security of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request. 15 U.S.C. § 78p (b) (1964). However, the sixty day waiting period may be waived where the issuing corporation is controlled by the offending insider. Grossman v. Young, 72 F. Supp. 875 (S.D.N.Y. 1947).
3. 15 U.S.C. § 78p (b) (1964). This section provides:
   For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.
"clearly erroneous," and making an affirmative fact finding of deputization.  

Section 16(b) was designed to prevent possible unfair use of inside information by making officers, directors, and beneficial owners of ten percent of any class of registered equity security liable to the issuer for any profit made by such person on a short-swing purchase and sale of such security. Any shareholder of the issuing corporation may institute proceedings on behalf of the corporation under section 16(b) even though he may not have been a shareholder at the time of the short-swing transaction. The suit may be brought in the federal district court in any district where the defendant is found, where he transacts business, where any act or transaction constituting the violation occurred, or where an exchange, if used, is located. Venue requirements are satisfied for the entire claim if any one of the transactions involved occurred within the forum district and nationwide service of process is allowed. All profits are recoverable, and a settlement with the issuing corporation is no defense to a section 16(b) action brought by a stockholder.

7. Section 16(a) specifies any class of equity security registered pursuant to § 12 of the Act, 15 U.S.C. § 78l (1964). This includes both those securities listed on an exchange and the equity securities of an issuer with over $1 million in gross assets and 500 or more shareholders registered under § 12(g).
8. The time of "short swing" is 6 months minus one full period from midnight to midnight since the law doesn't take into account fractions of a day. Stella v. Graham-Paige Motors Corp., 232 F.2d 299 (2d Cir. 1956), cert. denied, 359 U.S. 914 (1959).
11. "Purchase and sale" has been interpreted to mean any combination of purchase and sale or sale and purchase which, on matching of an equal number of shares of the same security, shows a purchase price lower than the sale price. Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir.), cert. denied, 320 U.S. 751 (1943).
12. Section 16(b) actions need not conform with the requirements of derivative actions by shareholders set out in Fed. R. Civ. P. 23. This is because the purpose of the statute, discouragement of insider trading, is remedial. Benisch v. Cameron, 81 F. Supp. 882 (S.D.N.Y. 1948). A § 16(b) action is, however, a true class action subject to Fed. R. Civ. P. 23(c). Pottish v. Divak, 71 F. Supp. 737 (S.D.N.Y. 1947).
17. Profit from a purchase and sale, or a sale and purchase, is measured by matching up the lowest purchase price transaction with the highest sale price transaction within a six month period. Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943). See also 2 L. Loss, Securities Regulation 1063 (2d ed. 1961).
Because the statute is broadly remedial and recovery runs to the issuing corporation,

we must suppose that the statute was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty. 19

This high standard, coupled with the relative ease with which suits may be brought, has caused section 16(b) to be called the most "cordially disliked provision in all these statutes from the point of view of those whom it affects."20 Because Feder expands its scope of applicability, section 16(b) may become even more cordially disliked.

Judge Learned Hand, concurring in Rattner v. Lehman,21 first hinted that a deputization theory, such as that advanced in Feder, might be recognized. In Rattner, a partner of Lehman Brothers sat on the board of Vultee Aircraft Corporation. During his directorship, the Lehman partnership bought and sold Vultee stock within a six month period at a profit of $15,000. In a shareholder's suit to recover this profit from the partnership, summary judgment for Lehman Brothers was granted.22 The decision was affirmed by the Court of Appeals23 with Hand saying:

I wish to say nothing as to whether, if a firm deputed a partner to represent its interests as a director on the board, the other partners would not be liable. True, they would not even then be formally 'directors'; but I am not prepared to say that they could not be so considered.24

Section 3(a)(7) of the Act defines "directors" as "any director of a corporation or any person performing similar functions"25 and section 3(a)(9) defines "person" as "an individual, a corporation, a partnership . . . ."26 The proposition that a corporation may be treated as a jural person is well established27 and corporations have been held liable under section 16(b) as beneficial ten percent shareholders.28 However, until Feder, no court had ever based a decision on a deputization theory, although it has been recognized several times in dicta.29

20. 2 L. Loss, supra note 17, at 1087.
21. 193 F.2d 564 (2d Cir. 1952).
23. Rattner v. Lehman, 193 F.2d 564 (2d Cir. 1952).
24. Id. at 567.
In Blau v. Lehman,30 which involved the same type of factual situation as Rattner, one Thomas, a Lehman Brothers partner, was a director of Tide Water Associated Oil Co. While Thomas held this post, and within a six month period, Lehman Brothers bought and sold Tide Water stock, realizing a profit. Blau, seeking to force the partnership to disgorge its profits, sued under section 16(b), claiming that Lehman Brothers had deputized Thomas to represent its interests on the Tide Water Board. The trial court found no evidence to support this allegation.31 Although the Supreme Court refused to overturn this finding as it was not "clearly erroneous,"32 Justice Black, writing for the Court, stated that:

No doubt Lehman Brothers, though a partnership, could for purposes of § 16 be a 'director' of Tide Water and function through a deputy. . . . Consequently, Lehman Brothers would be a 'director' of Tide Water, if as petitionor's complaint charged Lehman actually functioned as a director through Thomas, who had been deputized . . . to perform a director's duties, not for himself but for Lehman.33

The Southern District of New York through dictum also recognized the validity of the deputization theory in Marquette Cement Manufacturing Co. v. Andreas,34 where Andreas, the sole trustee of nineteen trusts which held all the shares of the Andreas Corporation, sat on Marquette's Board while the Andreas Corporation sold Marquette stock for a short-swing profit. In regard to plaintiff's contention that the Andreas Corporation was a director because trustee Andreas was its deputy, the court said "[t]hat such a deputization is possible seems clear after Blau v. Lehman, but its existence is a question of fact to be settled case by case."35

The Feder court noted four evidentiary factors which led to the finding of the existence of deputization. First was the "unique position" of Bunker as chief executive officer of Martin. He had personal approval of all investments, particularly Martin's purchases and sales of Sperry stock. This position eliminated the necessity of showing a disclosure of information or consultation with others by the alleged deputy.36 Although actual use of inside information by a deputizing corporation need not be proven,37 it seems clear that if the deputy were a person of lower

33. Id. at 409-10.
35. Id. at 967.
37. It should be recognized that the court in the noted case also found that there had in fact been discussions between Bunker and other Martin officials of Sperrys' affairs, and Bunker had participated in sessions in which Martin's investment in Sperry was reviewed. Feder v. Martin Marietta Corp., 460 F.2d 260, 264 (2d Cir. 1969), cert. denied 396 U.S. 1036 (1970).
executive rank a disclosure of relevant information concerning the issuing corporation would have to be shown. 38

Second, the court found a "specific intent" that Bunker act as Martin's representative in the Martin Board's formal consent to Bunker's taking the Sperry directorship. Although this consent was standard procedure for any Martin officer planning to assume a directorship, it became especially significant because the board learned of the large block of Sperry stock held by Martin before passing the authorization. The value of this evidence was enhanced by Bunker's testimony that he thought the Martin Board would "draw the inference" that his presence on Sperry's Board would be to Martin's advantage. 39

Third, the court found in Bunker's letter of resignation evidence that Sperry itself felt Bunker was serving on the board in Martin's behalf. In the letter, Bunker noted that when he became a director, Sperry personnel felt that the Martin ownership of a substantial number of Sperry shares should have representation on the board, and that since such representation was no longer necessary, he was resigning. 40

Finally, Bunker's admission that Martin had representatives serving on other boards showed that the concept of deputization was not foreign to Martin. While Bunker tried to distinguish between his position and that of the other representatives, plaintiff contended that those differences (e.g., corporate supervision of directorship activities) were explained by Bunker's "position of ultimate authority," that the other deputies reported to Bunker, and that it was senseless to expect Bunker to report formally to himself. 41 The trial court rejected this contention, finding no proof that Bunker had appointed himself. 42 However, the appellate court agreed with plaintiff, feeling that the evidence justified a finding of deputization. 43

Clearly Feder will have a significant effect on business practices. Corporate investment officers and their authorizing superiors now have notice that their service as directors of other corporations may subject their firms to liability. Although they had fair warning in Blau of possible liability through the deputization theory, the quantum of evidence necessary to support such a finding was undetermined. Feder clears up some of the uncertainty, but major questions are left unanswered.

The court held that all four evidentiary factors cited were conclusive of deputization. However, the last two factors, Sperry's understanding that Bunker was representing Martin's interests 44 and the exist-

42. Id. at 948.
44. Even if the issuing corporation consents to the presence of a deputy on its board of directors, such consent would not be a defense for the deputizing cor-
ence of Martin's other deputies are actually only cumulative evidence of Martin's intent to deputize. Intent and disclosure of inside information or participation in investment decisions are the two essential elements of a plaintiff's case. The court's refusal to say that these two factors are enough for a *prima facie* case may indicate that a substantial degree of proof will be required.

The issue in a deputization suit should be the point at which the deputizing corporation becomes a "director." Once this is resolved, liability follows automatically, for the use or even existence of inside information is not relevant to a Section 16(b) action.45 Thus, both the discussion in the *Blau* opinion concerning the failure to disclose confidential information and the existence of Bunker's "unique position" in *Feder* represent irrelevant factors unless the courts mean that deputization can be found only when the deputy actually *functions* as a deputy and his firm receives substantial benefit from his presence on another board.

Left unanswered by *Feder* is whether intent and benefit are both necessary to sustain an allegation of deputization. If the deputy is actually channeling information back to his own company, arguably it should make no difference what reason he may have had for initially assuming the position.46 Conversely, if a corporation sends one of its officers to the board of another corporation with the intention of receiving a benefit thereby, is it significant whether it actually received such benefit? In light of the objective nature of the Section 16(b) action, it would seem not.

It is apparent that deputization is far from a settled doctrine. The court's prior liberal interpretation of Section 16(b)47 hints at a broad application of the concept. Conceivably, either of the situations mentioned above could lead to liability. *Feder* should serve, if *Blau* failed to do so, as a *caveat* for all corporations and partnerships who deal in the securities of corporations in which they may be classified as directors.

**Michael J. Thompson**

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45. "A subjective standard of proof, requiring a showing of an actual unfair use of inside information, would render senseless the provisions of the legislation limiting the liability period to 6 months." *Smolowe v. Delendo Corp.*, 136 F.2d 231, 236 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

46. For a pre-*Feder* discussion of this approach, see W. Painter, *Federal Regulation of Insider Trading* 89 (1968).

DIRECT IMPEACHMENT OF AN ADVERSE PARTY

Wells v. Goforth

As plaintiff, a social guest, was departing defendant's home she stepped on an ice-covered portion of the front porch, slipped and fell. Having sustained injuries from the fall, she brought an action for damages in the Circuit Court of St. Louis County. At trial, plaintiff called defendant to testify as an adverse party-witness, and, being dissatisfied with his testimony, plaintiff attempted to impeach defendant by introducing evidence of an inconsistent written statement made by him prior to trial. Following the rule that a party may not impeach his own witness, even if such witness is an adverse party, the court rejected plaintiff's evidence. The court did, however, award judgment for the plaintiff in the amount of $12,500. Defendant appealed and the case was transferred to the Missouri Supreme Court.

The supreme court reversed and remanded the case to the trial court on the issue of liability only, holding that while plaintiff had failed to establish defendant's liability, the trial court had committed reversible error in rejecting plaintiff's evidence. Although the decision represents a significant change in land-owner liability in Missouri, only the issue of plaintiff's evidence will be considered here.

1. 443 S.W.2d 155 (Mo. En Banc 1969).
2. § 491.030, RSMo 1959:
   Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided, that the party so called may be examined by the opposite party, under the rules applicable to the cross examination of witnesses.

For a discussion of the relationship between statutes allowing a party to call his opponent as a witness and the rule against direct impeachment of one's own witness see 3 J. WIGMORE, EVIDENCE § 916 at 436 (3d ed. 1940). Prior to Wells, the Missouri statute was not interpreted as allowing direct impeachment of the adverse party. Frank v. Wabash R.R., 295 S.W.2d 16, 23 (Mo. 1956).

3. While there are exceptions to this general rule, it has been used repeatedly in Missouri decisions. E.g., Frank v. Wabash R.R., 295 S.W.2d 16 (Mo. 1956); Smith v. Ohio Millers Mut. Fire Ins. Co., 320 Mo. 146, 6 S.W.2d 920 (En Banc 1928); Black v. Epstein, 221 Mo. 286, 120 S.W. 754 (1909); Imhoff v. McArthur, 146 Mo. 371, 48 S.W. 456 (1898); Chandler v. Fleeman, 50 Mo. 239 (1872); Hutchinson v. Stienke, 353 S.W.2d 137 (St. L. Mo. App. 1962); Gallatin ex rel. Dixon v. Murphy, 217 S.W.2d 400 (K.C. Mo. App. 1949); Luzzader v. McCall, 198 S.W. 1144 (K.C. Mo. App. 1917).

4. Upon defendant's application the case was transferred to the Missouri Supreme Court pursuant to Mo. R. Civ. P. 84.05 (h).

5. The court held that plaintiff had failed to establish defendant's knowledge of the ice. In so holding, the court noted that had the trial court permitted the attempted impeachment, plaintiff may have established such knowledge. It follows, then, that the prior written statement contained an admission of defendant's knowledge, yet plaintiff made no attempt to introduce defendant's statement as an admission. As Judge Storckman points out in his concurring opinion in Wells, had plaintiff so introduced the statement the whole problem of direct impeachment would have been avoided. Wells v. Goforth, 443 S.W.2d 155, 160 (Mo. En Banc 1969).
Prior to Wells, it had been well settled in Missouri that a party would not be permitted to impeach his own witness. 6 This rule first arose in primitive trial proceedings where the sole function of the witness was to swear to the veracity of the proponent. 7 In such a proceeding, the party could choose anyone he pleased as a witness or "oath-helper," 8 and it became accepted that the party, in calling a witness, guaranteed his credibility and was bound by his testimony. 9 While the nature of judicial proceedings has undergone considerable change since the adoption of the rule against direct impeachment, there are still three principal reasons cited by the courts in support of continued application of the rule. First, there exists the notion that since a party is free to choose whomever he wishes as a witness, his case must stand or fall by the testimony of that witness. 10 This concept from its outset was clearly rejected in Missouri. 11 Second, it is argued that in bringing a witness before the court, the proponent is representing both to the court and to the jury that the witness is worthy of belief and hence, the proponent guarantees the credibility of the witness. 12 However, while courts frequently cite this argument as the controlling reason for not allowing impeachment, 13 it appears inconsistent with the well-established practice of allowing the proponent to introduce contradictory evidence. 14 Finally,

6. As to direct impeachment of an adverse party, see cases cited note 3 supra. As to direct impeachment of other witnesses see, e.g., Humes v. Salerno, 351 S.W.2d 749 (Mo. 1961); State v. Castino, 264 S.W.2d 372 (Mo. 1954); Crabtree v. Kurn, 351 Mo. 628, 173 S.W.2d 851 (1943); State v. Gregory, 339 Mo. 153, 96 S.W.2d 47 (1936); Pulitzer v. Chapman, 337 Mo. 298, 85 S.W.2d 400 (En Banc 1935); State v. Drummins, 274 Mo. 632, 204 S.W. 271 (1918); Dunn v. Dunnaker, 87 Mo. 597 (1885); Brown v. Wood, 19 Mo. 475 (1854).

7. 3 J. Wigmore, Evidence § 896 (3d ed. 1940). The court, in Wells, appears to have relied heavily upon Wigmore in modifying the rule as it applies to impeachment of adverse parties.

8. Id.

9. Id. See also, Thomas, The Rule Against Impeaching One's Own Witness: A Reconsideration, 31 Mo. L. Rev. 364 (1966).

10. J. Wigmore, supra note 7, at § 897.

11. Brown v. Wood, 19 Mo. 475, 476 (1854). The court held that while a party cannot impeach his own witness because his testimony fails to establish a fact, "the party is not precluded from showing the fact by another witness, although, in so doing, he may show the first witness guilty of perjury." Accord, Frank v. Wabash R.R., 295 S.W.2d 16, 22 (Mo. 1956), plaintiff is not bound by defendant's testimony unless it is the only evidence on a particular point; Smith v. Millers Mut. Fire Ins. Co., 320 Mo. 146, 168, 6 S.W.2d 920, 926 (En Banc 1928), a party is not absolutely bound by a witness' testimony; Rodan v. St. Louis Transit Co., 207 Mo. 392, 408, 105 S.W. 1061, 1066 (1907), "If A puts B on the stand to prove a certain state of facts, this does not preclude A from putting C, D, or E on the stand and proving a different state of facts ... ." Imhoff v. McArthur, 146 Mo. 371, 372, 48 S.W. 456, 457 (1898), a party is not bound by a witness' testimony, even if he calls the other party.

12. 3 J. Wigmore, supra note 7, at § 898.


14. Cases cited note 13 supra. For cases allowing contradictory evidence, see cases cited note 11 supra.
perhaps the most legitimate reason is that the rule protects the witness from improper abuse by the proponent.\(^{15}\)

The general rule against impeachment of one's own witness, however, has not existed without exception. As early as 1885 the Missouri Supreme Court recognized that where a party had been "entraped" into calling an adverse witness, he was entitled to impeach the witness by the introduction of a prior inconsistent statement.\(^{16}\) This exception, however, has been strictly limited. First, the party must show actual and reasonable surprise at the testimony of the witness.\(^{17}\) A mere showing that the testimony was not expected is insufficient.\(^{18}\) The party must establish to the court's satisfaction not only that the testimony came without reasonable warning\(^{19}\) but also that the witness actually led the proponent to believe that the testimony would be otherwise.\(^{20}\) Second, the proponent must establish that he was damaged by the surprise testimony.\(^{21}\) The fact that the witness fails to testify favorably for the proponent, does not testify fully as to certain matters, or has made inconsistent extra-judicial statements more favorable to the proponent, standing alone, does not entitle the proponent to impeach him. Rather, the witness must "go further, and by relating wholly contradictory facts become in effect a witness for the adverse side."\(^{22}\) Thus, even though this exception has had a long history in Missouri, the requirements for impeachment under it are so strict that its frequency of use has been far from overwhelming.

Although the exception to the rule against direct impeachment of one's own witness appears to be strictly limited to situations closely approaching an intentional misrepresentation to the proponent, the proponent does have the benefit of some favorable considerations. First, the trial judge

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15. J. Wisegore, supra note 7, at § 899. See also Crabtree v. Kurn, 351 Mo. 628, 647, 173 S.W.2d 851, 859 (1943).
16. Dunn v. Dunnaker, 87 Mo. 597, 600 (1885).
18. Cases cited supra note 17; Thomas, supra note 9, at 369.
has discretion in deciding whether the proponent has established a case of entrapment, and ultimately, whether his impeaching evidence is admissible. Thus, it is entirely feasible that the trial judge might liberalize the requirements for a showing of surprise and damage, particularly where the proponent presents an effective argument. Second, where the proponent is able to show that he was compelled to call a particular witness, either as a matter of law or because the witness is the only person having personal knowledge of the facts in question, the appellate courts have indicated, at least in dicta, that the requirement of actual and reasonable surprise may be enforced less strictly. Finally, the proponent has at his disposal a "tactic" which, while not allowing direct impeachment, may reduce the damage inflicted by the witness, that of refreshing the witness' memory. In situations where the witness' testimony is disappointing, but not sufficiently so to warrant a claim of surprise, the proponent may be allowed to have the witness examine his own prior inconsistent statement outside the hearing of the jury. The prior inconsistent statement is not evidence in and of itself, but its use in this manner may cause the witness to change his testimony, thus avoiding the necessity of impeachment altogether.

It is readily apparent that the major effect of Wells is to remove the requirement of showing surprise and damage before a party will be permitted to directly impeach his opponent when called as an adverse witness. A careful examination of the decision, however, will reveal that its effect is not as far-reaching as one might suppose.

The decision is clearly limited to the impeachment of an adverse party. By citing Wigmore, the court establishes the adverse party as a separate category of witness to be called by the proponent. The court points out that none of the traditional reasons for the rule against impeachment would be violated by the creation of this new exception.


24. State v. Castino, 264 S.W.2d 372, 375 (Mo. 1954); Mooney v. Terminal Ry., 352 Mo. 245, 260, 176 S.W.2d 605, 611 (1944).


26. For a complete discussion of the problem of direct impeachment as well as the use of this tactic to overcome unexpected and damaging testimony see, Thomas, supra note 9, at 368.

27. Even if the court allows impeachment, the prior inconsistent statement may not be used affirmatively to satisfy the proponent's burden of proof where the witness is not a party. Where, however, the witness changes his testimony, the changed testimony is substantive evidence. Thomas, supra note 9. Where the witness is the adverse party and the prior inconsistent statement is admissible as an admission it can be admitted as substantive evidence as well. Wells v. Goforth, 443 S.W.2d 155, 160 (Mo. En Banc 1969); Pulitzer v. Chapman, 337 Mo. 298, 319, 85 S.W.2d 400, 410 (En Banc 1935).


29. 3 J. WIGMORE, supra note 7, § 916: If there is any situation in which any semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the opposing party is himself called by the first party, and is sought
parently, the court is yet unwilling to declare these traditional reasons meaningless. Thus, if the party is to be allowed to directly impeach any witness other than his opponent, he must still show surprise and damage.

Moreover, even though a party may now directly impeach his opponent, there is strict limitation as to the method of such impeachment. The court in no way suggests that it would sanction any method of direct impeachment other than by a prior inconsistent statement. In addition, most inconsistent statements usable as a basis for impeachment of the adverse party would be independently admissible as admissions\(^\text{30}\) making rare the instances where the exception is needed.

In conclusion, the practical effect of Wells is little. However, a party called as a witness now knows that if his prior statements are inconsistent with his testimony, he will be subject to the same impeachment by his opponent as if he had been testifying in his own behalf. The court then has at least scrapped the fiction that when a party calls his opponent as a witness, he vouches for his opponent's credibility.

JOHN KEAY WALLACE, III

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\(^{30}\) J. Wigmore, \textit{supra} note 7, §§ 897-99. See note 5 \textit{supra}.