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Recent Cases

FORUM NON CONVENIENS IN MISSOURI—
HISTORY AND APPRAISAL

State ex rel. Chicago, R.I. & Pac. Ry. v. Riederer

On May 29, 1969, Scantlin brought an action under the Federal Employers’ Liability Act against the Chicago, Rock Island and Pacific Railroad in the Circuit Court of Jackson County, Missouri. He sought damages of $100,000 for alleged injuries received in Liberal, Kansas on July 29, 1966, while employed as a switchman by defendant. The railroad filed a verified motion to dismiss the suit under the doctrine of forum non conveniens on the grounds that all witnesses to the accident were located in Liberal, Kansas, over 400 miles from Kansas City, and that the necessary medical witnesses were located in either Liberal or Hayes, Kansas, 260 miles from Kansas City. Defendant argued it would be subjected to considerable and unnecessary expense if the action were allowed to proceed in Missouri courts, and offered to waive any right to rely on any statute of limitations in a subsequent action by Scantlin if the action were dismissed in Missouri upon its motion. Scantlin opposed the motion to dismiss averring: (1) that the doctrine of forum non conveniens was not available in Missouri for F.E.L.A. actions, and (2) that even if the doctrine were available it could not be properly applied to the instant facts. The trial judge, relying on State ex rel. Southern Ry. v. Mayfield, ruled that he did not have the discretionary right to entertain a motion based on the doctrine of forum non conveniens when the action was brought under the F.E.L.A.

Defendant then brought this proceeding for mandamus in the Supreme Court of Missouri to compel the trial judge to exercise his discretion in determining the motion to dismiss on its merits under the doctrine of forum non conveniens.

1. 454 S.W.2d 36 (Mo. En Banc 1970).
3. Restatement (Second) of Conflict of Laws § 84 (Proposed Official Draft, Part I, 1967) states the doctrine of forum non conveniens as follows:
A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.
5. 362 Mo. 101, 240 S.W.2d 106 (En Banc 1951).
non conveniens. The court, sitting en banc, held that the doctrine of forum non conveniens is available in transitory F.E.L.A. suits brought in Missouri. Mayfield was overruled insofar as it conflicted with this holding. A peremptory writ of mandamus was issued.

The historical origin of the doctrine of forum non conveniens is open to some debate. It has been suggested that the doctrine is rooted in the common law.6 On the other hand, some courts have suggested that the doctrine was "created" by a law review writer in the late 1920's.7 Whatever the origin of the doctrine, it is now firmly established in American jurisprudence, having been at least nominally accepted in many state jurisdictions8 and by the federal courts.9 As Riederer indicates, the doctrine has


In six jurisdictions the doctrine has been accepted but no case has arisen on appeal where the doctrine was applied resulting in the dismissal of the action: Arkansas: Running v. Southwest Freight Lines, 227 Ark. 839, 303 S.W.2d 576 (1957); Kansas: Gonzales v. Atchison, T.S.F.Ry., 189 Kan. 689, 371 P.2d 193 (1962); Louisiana: Stewart v. Litchenberg, 148 La. 195, 86 So. 734 (1920) (not using "forum non conveniens" terminology), but see Trahan v. Phoenix Ins. Co., 200 So.2d 118 (La. App. 1967), cert. denied, 251 La. 47, 202 So.2d 697 (1967). (The court states: "The doctrine of 'forum non conveniens' is foreign to our jurisprudence."") 200
been accepted in Missouri. The terminology “forum non conveniens” was first used by Missouri courts in State ex rel. Southern Ry. v. Mayfield, the First Mayfield Case. The case consolidated two proceedings in mandamus seeking to compel trial courts to entertain motions for dismissal under the doctrine. Both actions were brought by non-residents in the Circuit Court of St. Louis under the Federal Employers’ Liability Act. Both defendant railroads were foreign corporations maintaining agents in St. Louis. Both accidents occurred outside of Missouri, one 650 and the other 700 miles from St. Louis. The court refused to issue mandatory writs, ap-
parently basing their decision on two grounds. First, the court held that the United States Supreme Court's rulings in *Baltimore & O.R.R. v. Kepner*\(^\text{11}\) and *Miles v. Illinois C.R.R.*\(^\text{12}\) barred state courts from using the doctrine of *forum non conveniens* to dismiss F.E.L.A. actions.\(^\text{13}\) Second, the court held that even if Kepner and Miles were not controlling, Missouri could not apply the doctrine because the state policy was to allow all Missouri citizens, resident or non-resident, to maintain F.E.L.A. actions in Missouri courts; to deny non-citizens this right would violate the "privileges and immunities clause" of the United States Constitution.\(^\text{14}\)

The defendant railroads were granted certiorari and carried the case to the Supreme Court in *Missouri ex rel. Southern Ry. v. Mayfield*.\(^\text{15}\) Mr. Justice Frankfurter, delivering the opinion of the Court, said Kepner and Miles did not compel a state court to accept F.E.L.A. actions "... if in similar cases the State for reason of local policy denies resort to its court and enforces its policy impartially ... so as not to involve discrimination against ..." F.E.L.A. suits.\(^\text{16}\) The Court went on to point out that the "privileges and immunities clause" did bar discrimination between suits on the basis of citizenship; however, state courts could properly refuse to entertain suits on the basis of residency of the parties.\(^\text{17}\)

Upon remand the Missouri Supreme Court again addressed the issue of *forum non conveniens* in *State ex rel. Southern Ry. v. Mayfield*,\(^\text{18}\) the so-called Second Mayfield Case. With the supposed compulsion of Kepner and Miles removed, the court again rejected the doctrine, this time using broader language indicating that the doctrine was not available to dismiss any transitory cause of action. Again, the opinion hinged on the "privileges and immunities clause." The court stated:

The policy of this state has been to bar none of its citizens from its courts where there is proper venue and jurisdiction of the parties and subject matter, and this applies to citizens who are residents as well as non-residents.\(^\text{19}\)

11. 314 U.S. 44 (1941).
13. Both *Kepner* and *Miles*, in holding that state courts could not enjoin F.E.L.A. actions brought by their citizens in another state's courts, used language that strongly suggested that F.E.L.A.'s special venue provisions (45 U.S.C. § 55 (1954); 28 U.S.C. § 1445 (a) (1962)) rendered that type of action free from attack on grounds of *forum non conveniens*.
14. U.S. Const. art IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states. . . ."
16. Id. at 4. The court stated that *Kepner* and *Miles* were not controlling even prior to the enactment of 28 U.S.C. § 1404 (a) (1962) (See note 9 supra), citing *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929). However, Mr. Justice Jackson in a concurring opinion stated:

Certainly a state is under no obligation to provide a court for two non-resident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that state from manditory consideration of the same case. *Missouri ex. rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 6 (1950).
18. 362 Mo. 101, 240 S.W.2d 106 (En Banc 1951).
19. Id. at 107, 240 S.W.2d at 108.
This policy was said to be widely followed in Missouri case law and specifically grounded in constitutional and statutory provisions. The court cited Article I, Section 14 of the Missouri Constitution as requiring the announced result. Section 507.020, RSMo 1949 [now Section 507.020, RSMo 1969] was said to have been a legislative declaration of comity, and, having been held mandatory in State ex rel. Pacific Mut. Life Ins. Co. v. Grimm, it likewise required that the doctrine of forum non conveniens be rejected in Missouri.

In the Second Mayfield Case, the court's assessment of the posture of Missouri case law was doubtlessly correct. In several prior cases the state's courts had been asked to decline jurisdiction over transitory actions. Those cases had to contend with reasoning more than faintly similar to the parlance common to the doctrine of forum non conveniens today. In all instances the court felt compelled not to dismiss. These cases were all decided, however, before the doctrine of forum non conveniens started to bloom in this country. Taken at face value and considering the apparent unequivocal stance the court chose to adopt, it appeared the Mayfield Cases laid to rest the doctrine of forum non conveniens in Missouri. Today, however, it is clear that the decisions were vulnerable. The court, by discussing the doctrine essentially in terms of principles and precedents, had failed to come to grips with the true policy issues involved, i.e., the value of doctrine as a tool of judicial management.

In 1952 a change in attitude concerning the doctrine of forum non conveniens started to become apparent in Missouri. In that year the Missouri Supreme Court published the Proposed Rules of Civil Procedure. Section 18.03 of those proposed rules sought to adopt the doctrine of forum non conveniens. Section 18.03 led to heated debate among Missouri attorneys. The section was opposed by a faction led by the Kansas City and St. Louis bars. It was argued that the rule would force Missouri residents

20. Mo. Const. art I, § 14: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."

21. § 507.020, RSMo 1969: "Whenever a claim exists under the law of another state, action thereon may be brought in this state by (1) The person or persons entitled to the proceeds of such claim if he or they are authorized to bring such action by the laws of said other state . . . ."

22. 239 Mo. 135, 143 S.W. 483 (En Banc 1911).

23. Bright v. Wheelock, 323 Mo. 840, 20 S.W.2d 684 (1929) ("inconvenience" to defendant no bar in F.E.L.A. action); Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524, 184 S.W. 999 (En Banc 1916) (suit by Ariz. corp. against Pa. corp. on insurance policy issued out of state for damages incurred in Colo. held properly entertained in state); State ex rel. Pacific Mut. Life Ins. Co. v. Grimm, 239 Mo. 135, 143 S.W. 483 (En Banc 1911) (transitory suit on insurance policy not dismissable because (1) defendant claims possible difficulty in compelling appearance of out-of-state witnesses, (2) expense, (3) harassment; 7 other cases decided per curiam to same effect on same day); Lessenden v. Missouri Pac. Ry., 238 Mo. 247, 142 S.W. 332 (En Banc 1911) (no "fraud upon the law"); Newlin v. St. Louis, S.F. Ry., 222 Mo. 375, 121 S.W. 125 (1909).

24. Report of the Committee of the Kansas City Bar Association on Proposed Rules of Civil Procedure, 9 J. Mo. B. 1 (1953); Brief of Kansas City Bar Ass'n to Mo. Sup. Ct. on Proposed Rules (1953); Brief of Lawyer Ass'n of St. Louis to
to litigate actions arising outside the state in foreign courts, and took no cognizance of statutes of limitation. F.E.L.A. actions were mentioned as a point of specific concern. This, it was argued, was unfair and unconstitutional and "would drastically affect the earnings of Missouri attorneys and prevent them from handling [as] many cases arising outside Missouri as now." Other factions of the state bar supported Section 18.03. In reply to the criticism it was said:

[T]he fear that legal business will be dragged from the state has been expressed. Not only are these protestors expressing an improper motive, but they are probably wrong in gauging the effect of the change. If the volume of out-of-town cases, for which special consideration is always sought, is reduced, then local cases can be tried more expeditiously and lawyers can dispose of their business and can realize their fee sooner.

Rule 18.03 was never adopted. It seems, however, to have signaled the fact that the doctrine of *forum non conveniens* might still possess vitality in this state. It also focused the controversy on the doctrine's practical aspects.

Mo. Sup. Ct. on Proposed Rules (1955); see also Brief for Respondant as Amicus Curiae at 1, Loftus v. Lee, 308 S.W.2d 654 (Mo. 1958) (K.C. Bar Ass'n as amicus curiae).


26. Id. at 6.


28. Blackmar, supra, note 27 at 70, 71.

29. It is beyond the scope of this article to examine in depth the question of which practical considerations have influenced the courts of this country in their adoption of the doctrine of *forum non conveniens*. Preliminary research, however, indicates the courts have consciously or unconsciously sought to limit "forum shopping" and perhaps control what they consider undesirable practices by certain members of the bar.

(1) Forum shopping:

"On occasion, a plaintiff will bring suit . . . [in a foreign jurisdiction] in the belief that he may there secure a larger or an easier recovery or in the hope that the inconvenience and burden of making a defense will induce the defendant to enter a compromise, to contest the case less strenuously, or to permit judgment to be entered against him by default."

Restatement (Second) of Conflict of Laws § 84, comment a at 310, 311 (Proposed Official Draft, Part I, 1967). Numerous cases allude to the burden foreign transitory suits place on their already crowded dockets. The proposition that "forum shoppers" seek out large urban areas in search of tactical advantages seems to be born out by the fact that while 45% of the all state jurisdictions in this country accept the doctrine, the doctrine has been accepted in 55% of those jurisdictions containing the top 50 cities by population (with another 14% favorably disposed towards the doctrine). In those jurisdictions containing none of the top 50 cities the doctrine has only been accepted at a rate of 33%, with another 41% favorably disposed. Of the leading 15 states by population, 10 accept the doctrine and another is favorably disposed toward it.

(2) Undesirable Practice: Justice Doyle in State ex. rel. Great N. Ry. v. District Court, 139 Mont. 453, 474-7, 365 P.2d 512, 523-4 (1961) (especially concurring
In 1956, five years after the Second Mayfield Case, the court adopted the doctrine of *forum non conveniens* in Missouri in *Elliott v. Johnston*. The facts of the case were somewhat bizarre. All parties were Kansas residents involved in an automobile accident in Kansas. Plaintiff's attorney, apparently without the permission of his clients, arranged with the defendant, without the knowledge of his insurer, to bring the suit in Nevada, Missouri. On defendant's insurer's motion to "quash service," the trial court "of its own motion" dismissed the action because the parties' fraudulent "and collusive conduct" constituted "a legal fraud upon the court and taxpayers of Vernon County." The Missouri Supreme Court, using the terminology "*forum non conveniens*" for the first time in the proceedings, held that while this might not have been a case of fraud, the trial court did have an inherent discretionary power to decline jurisdiction and the power was properly applied here.

*Elliott* uses language almost diametrically opposed to that quoted above from the Second Mayfield Case, stating that the plaintiff's "right is not one of the absolutes of the law so as to compel retention of jurisdiction and opinion) gives an interesting opinion as to the practical considerations behind the doctrine of *forum non conveniens*:

There is and has been, in a mid-western state, a highly organized law firm, complete with "bird dogs" or solicitors, fee-splitting contracts with laymen, ambulances fully equipped with sirens and red lights, who contact the injured railway employee or his next of kin, at times before a physician can see the claimant... This writer, basing this opinion on personal knowledge obtained as a practicing lawyer and as a former officer of the Montana Bar Association concludes, without any reservation, that this firm, a detriment to the legal profession, is as free from ethical practice as a brick is from oil. It can be safely assumed that the proximate cause of the twelve states adopting the legal principle of "*forum non conveniens*" comes as the end result of this firm's activities, or other law firms using the same general unethical tactics. (Id. at 476, 365 P.2d at 524).

Little specific authority can be offered in support of Justice Doyle's assertions, but see Atchison, T. & S.F. Ry. v. District Court, 298 P.2d 427, 430 (Okla. 1956), cert. denied, 352 U.S. 879 (1956) (doctrine is "an attempt to stop the wholesale indiscriminate importation of foreign causes of action in this jurisdiction") and Price v. Atchison, T. & S.F. Ry., 42 Cal.2d 577, 268 P.2d 457 (1954), cert. denied, 348 U.S. 839 (1954). Query: What, if any, weight has this type of thinking had in the decision of motions for dismissal under the doctrine of *forum non conveniens* in F.E.L.A. actions, especially in light of Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964), which holds that some of the union practices described above are not the unauthorized practice of law? Justice Doyle also suggests that the doctrine may be of more importance to those jurisdictions with a non-integrated bar because of the greater difficulty in controlling undesirable practices. This contention seems to be supported by the fact that the doctrine is accepted by 59% of those jurisdictions with non-integrated bars and favorably considered by another 9% but is only accepted in 34 1/2% of those jurisdictions with an integrated bar.


of the causes in Missouri." The Second Mayfield Case and other prior Missouri cases were distinguished because:

1. Here have been several Missouri cases which involved the doctrine but the fact was not recognized or fully appreciated.
2. In addition there was present one significant factor which gave all those cases some nexus with Missouri and its courts.

The court pointed out that in all prior cases this nexus was supplied by the fact that the defendant was either a railroad with tracks or an agent in Missouri, or an insurance company which had authorized service of process upon the superintendent of insurance. "[T]f they were not in point of fact citizens and residents of Missouri, they were residents for purpose of suit." The court did not mention Article I, Section 14 of the Missouri Constitution or Section 507.020, RSMo 1949, both of which were deemed decisive in the Second Mayfield Case. The "privileges and immunities clause" argument raised in the Mayfield Cases was obviated because the court had looked to the residency of the parties, saying that "distinction or denial based in part not upon citizenship but upon residence has some basis and validity and is not wholly unreasonable."

In Loftus v. Lee the Missouri Supreme Court again considered the doctrine of forum non conveniens. It held the doctrine was not repugnant to Article I, Section 14 of the Missouri Constitution and Section 507.020, RSMo 1949 stating:

When Section 14 is considered in its entirety and complete context, it is found to mean that our courts are open to every person to the end that justice be neither denied or delayed. Therefore, while there can be no doubt that our constitution and general venue statutes make it the policy of this State that our courts shall be open to every person, it is also a primary constitutional duty of courts to function to the end that right and justice be administered without sale, denial, or delay. Neither . . . were intended to mean that our courts be required to submit to an abuse of their process by non-residents.

In Loftus the trial court dismissed a suit between the two residents of the metropolitan Kansas City, Kansas area involving an automobile collision which had taken place in Kansas City, Kansas. The defendant was served with process in Jackson County, Missouri while attending business school, her only contact with the state of Missouri. It was held that the trial court

34. See cases note 23 supra.
36. Id. at 889, 292 S.W.2d at 595.
37. Id.
38. Id. at 888, 292 S.W.2d at 595.
39. 308 S.W.2d 654 (Mo. 1958) (K.C. Bar Association appeared as amicus curiae for appellant).
40. See note 20 supra.
41. See note 21 supra.
42. 308 S.W.2d 654, 660 (Mo. 1958).
had abused its discretion by applying *forum non conveniens* to dismiss the action on these facts, although the acceptability of the doctrine in Missouri was affirmed.

Both Elliott\(^{43}\) and Loftus\(^{44}\) were careful to distinguish F.E.L.A. actions from non-statutory types of tort action in the application of *forum non conveniens*. But, as the discussion above has shown, these cases had completely repudiated the rationale of the Second Mayfield Case. The instant case, *State ex rel. Chicago, R.I. & Pac. Ry. v. Riederer*\(^{45}\) was a predictable\(^{46}\) extention of the doctrine in Missouri, bringing the state in line with other jurisdictions which have decided that issue.\(^{47}\) It is significant to note that the court in *Riederer* stated that the "basic factors to be weighed", when the court is considering a motion under the doctrine, apply equally to

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44. Loftus v. Lee, 308 S.W.2d 654, 657 (Mo. 1958).
45. 454 S.W.2d 36 (Mo. En Banc 1970).

In three jurisdictions the doctrine has been specifically accepted for F.E.L.A. actions but no case has arisen on appeal where the doctrine has been applied to dismiss an action. *Kansas*: Gonzales v. Atchison, T. & S.F. Ry., 189 Kan. 689, 371 P.2d 198 (1962); *Missouri*: State ex rel. Chicago, R.I. & Pac. R.R. v. Riederer, 454 S.W.2d 36 (Mo. En Banc 1970); *Utah*: Mooney v. Denver & R.G.W.R.R., 118 Utah 307, 221 P.2d 628 (1950) (accepting the doctrine) and 123 Utah 223, 257 P.2d 947 (1953) (same case, approving doctrine's application).


In two jurisdictions opinions suggest that the doctrine would be available in the proper situation. *Georgia*: Atlantic Coast Line R.R. v. Pope, 209 Ga. 187, 71 S.E.2d 243 (1952), *rev'd*, 345 U.S. 379 (1952); *Indiana*: Kern v. Cleveland C., C. & St. L. Ry., 204 Ind. 595, 185 N.E. 446 (1933); Cleveland, C., C. & St. L. Ry. v. Shelly, 96 Ind. App. 273, 170 N.E. 328 (1933). (These cases approve the use of injunctions against residents of the state to enjoin them from proceeding in F.E.L.A. actions brought in another state. This practice was specifically disapproved by the Supreme Court. Pope v. Atlantic Coast Line R.R., 345 U.S. 379 (1952). Nevertheless, the language of the state opinions evince acceptance of the philosophy behind the doctrine of *forum non conveniens*). *See also* Atlantic Coast Line R.R. v. Pope, 93 Ga. App. 550, 92 S.E.2d 300 (1956).
F.E.L.A. and non-F.E.L.A. cases. That is to say, the standard for dismissal is the same in all transitory cases in the nature of a tort.

The question then remains: under what circumstances may the court exercise its discretion to dismiss an action under the doctrine of forum non conveniens? The answer in Missouri is unclear. In the instant case Judge Finch states that the factors to consider

include place of accrual of the cause of action, location of the witnesses, the residence of the parties, any nexus with the place of suit, the public factor of the convenience to and burden upon the court, and the availability to plaintiff of another court with jurisdiction of the cause of action which affords him a forum for his remedy.

The court, in ruling on a motion to dismiss under the doctrine, apparently enters into a balancing test with the above mentioned factors. More importantly, however, it enters into the balancing test with the presumption that the plaintiff's choice of forum should not be overturned except "when the ends of justice require it." With this in mind let us consider the meaning of these factors and their relative weight:

(1) The availability to the plaintiff of another forum. It is black letter law in all jurisdictions that before the court may exercise the doctrine of forum non conveniens to dismiss an action there must be a reasonably suitable alternate forum where the action may be brought.

(2) Place of accrual of the cause of action; residency of the parties. The California Supreme Court has read Missouri law as defining "forum non conveniens as a doctrine that applies when all litigants are non-residents." Elliot uses language (reproduced in Loftus) which suggests that the doctrine requires not only non-residency of the parties but also that the cause of action accrue outside the court's jurisdiction. If this is the rule, and

48. 454 S.W.2d 36, 39 (Mo. En Banc 1970).
49. Id.
50. Loftus v. Lee, 308 S.W.2d 654, 661 (Mo. 1958).
51. Missouri courts have not decided whether they will accept a waiver of the statute of limitations in the more appropriate jurisdiction by the defendant. Likewise, it is not settled if the court will accept the defendant's offer of submission to the jurisdiction of a foreign court where he is otherwise not able to be served with process. See discussion note 4 supra; Restatement (Second) of Conflict of Laws § 84, comment e at 313 (Proposed Official Draft, Part I, 1967).
53. Elliott v. Johnston, 365 Mo. 881, 886, 292 S.W.2d 589, 593 (1956) states:
The parties are all nonresidents, the actions or claims are upon a foreign transitory nonstatutory tort and the court has the inherent discretionary power to retain or to decline jurisdiction of these actions. . . .

This language is reproduced in Loftus v. Lee, 308 S.W.2d 654, 656 (Mo. 1958). See also Sharp v. Sharp, 416 S.W.2d 691 (K.C. Mo. App. 1967), stating that forum non conveniens does not apply in divorce suit when, at the time the suit was brought, both parties were residents.

Rationale. (1) The court may be reluctant to dismiss an action brought by a resident plaintiff on policy grounds analogous to those enunciated in the Mayfield Cases concerning citizens. See text accompanying note 19 supra. But cf. White v. Southern Pac. Co., 386 S.W.2d 6 (Mo. 1965), where a resident plaintiff's suit by
that is not certain, then the doctrine of forum non conveniens has an unusually limited sphere of applicability in Missouri.

(3) Nexus with the place of suit. "Nexus" is a term used almost exclusively in Missouri courts. It is also a term the court has not sought to define. "Nexus" would seem, however, to be some quantum of contact with the forum state, presumably more than being "found" in the state for service of process but less than residency. A finding of "nexus" would seem to weigh substantially in favor of jurisdiction being retained. A strict interpretation of the concept of "nexus" would probably limit even further the usefulness of the doctrine as a practical tool of judicial management.

(4) Convenience to and burden upon the court and the public. This factor has been taken to embrace considerations such as congested court dockets, the added burden of jury duty placed on local residents by transitory actions, and the avoidance of problems arising in conflict of laws. A finding that the public and court are burdened by a suit weighs against the retention of jurisdiction. In Elliott the court apparently decided to dismiss on the basis of the "public factors" involved. This led some writers to conclude that Missouri courts had adopted a "liberal" and unconventional stance in the application of the doctrine. It is submitted that in Elliott the court was concerned with the "public factors" because of the inequitable conduct of the parties. In the absence of inequitable

foreign attachment against foreign corp. was dismissed as an undue burden on commerce. (2) If the defendant is a resident his inconvenience might be viewed as greatly lessened. But see Winsor v. United Airlines, Inc., 52 Del. 161, 194 A.2d 561 (Del. Super. 1958). (3) If the action accrued in the forum state, retention of jurisdiction may be viewed as desirable because local law will govern and usually most witnesses will reside in the state. Restatement (Second) of Conflict of Laws § 84, comment f at 314 (Proposed Official Draft, Part I, 1967).

54. It must be remembered that neither Elliott nor Loftus raised this question on their facts. Riederer might have raised the issue but did not.

55. Presumably the doctrine would not apply in the fact situation where a foreign corporation, doing business in the forum state, is sued by a nonresident in tort (as in Riederer). Ironically this type of litigation makes up the bulk of foreign born causes of action and is often said to be the main target of the doctrine of forum non conveniens.

56. As discussed previously, the court in Elliott used the term "nexus" to distinguish that case on the facts from earlier Missouri cases. Neither party in Elliott was said to have any nexus with the state while in the earlier cases the defendant railroads and insurance companies had nexus and were, therefore, "residents for purpose of suit." Elliott v. Johnston, 365 Mo. 881, 889, 292 S.W.2d 589, 595 (1956). In Loftus the court said that since both parties lived in Kansas City, Kansas, and the defendant attended school in Kansas City, Missouri, "it would seem that a 'nexus' of community integration, such as transportation facilities, etc., would have a bearing upon the question of 'inconvenience'..." Loftus v. Lee, 308 S.W.2d 654, 660 (Mo. 1958).

57. Presumably, nexus is just one factor the court considers. A lack of nexus is not a condition precedent to the maintenance of a motion to dismiss but it is a very significant factor.


conduct by the litigants, it would seem the "public factors" are rather secondary to other factors in the court's formula.\(^{62}\)

(5) Relative convenience to and burden upon the parties. Missouri has generated little case law that indicates what constitutes sufficient inconvenience to the defendant to support a dismissal under *forum non conveniens*.\(^{63}\) *Loftus* uses language, however, that indicates the alleged inconvenience must be of a serious nature.\(^{64}\) *Loftus* also discusses the burden of proof that is required. The inconvenience must be demonstrated to, in fact, exist by a "clear showing."\(^{65}\) A strict application of these requirements would seem to limit even further the area where dismissal would be available. Furthermore, apparently the plaintiff may show why a dismissal would inconvenience him,\(^{66}\) thereby allowing the court to weigh the relative inconveniences.

In the decade and a half since *Elliott* adopted *forum non conveniens* for Missouri, only two cases have risen on appeal concerning the doctrine.\(^{67}\) The reason for this lethargic reception might be, in the light of the above analysis, that the scope of applicability of the doctrine has been so limited that it is of little practical use. Whatever the reasons, it seems clear that so far the doctrine has neither been the disaster its detractors predicted nor the boon to judicial management its supporters hoped.

**Peter C. Baggerman**

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62. *Loftus* v. *Lee*, 308 S.W.2d 654, 659 (Mo. 1958) suggests conduct of plaintiff in part designed to "vex, harass or oppress" may be inequitable, "...[b]ut unless the balance is strongly in favor of the defendant, the... choice of forum should rarely be disturbed."

63. No case has really gotten to this factor. The cases have decided the issue on one of the previous factors.

64. The fact that a trial could be had in Kansas in six months but the parties would have to wait eighteen months in Missouri does not constitute sufficient inconvenience. *Loftus* v. *Lee*, 308 S.W.2d 654, 661 (Mo. 1958). *Loftus* also quotes with approval language from *Bavuso* v. *Angwin*, 166 Kan. 469, 201 P.2d 1057 (1949) indicating that the inconvenience to the defendant must be of an almost disabling nature. *Id.* It should be noted, however, that *Bavuso* deals with enjoining a Kansas citizen from bringing a suit in another jurisdiction. This is conceptually quite different from *forum non conveniens*. *Restatement (Second) of Conflict of Laws* § 84, comment h at 314 (Proposed Official Draft, Part I, 1967).

65. *Loftus* v. *Lee*, 308 S.W.2d 654, 659 (Mo. 1958). The difficulty in requiring a "clear showing of inconvenience" is that it is difficult to show, before the case is tried, just how disadvantaged the defendant actually will be in terms of time, money, availability of foreign witnesses, etc. See State *ex rel.* Pacific Mut. Life Ins. Co. v. *Grimm*, 259 Mo. 135, 143 S.W. 488 (En Banc 1911).

66. In *Elliott* v. *Johnston*, 365 Mo. 881, 292 S.W.2d 589 (1956), the court considered plaintiff's claim that bringing the suit in Missouri would be to his advantage because of the nine-man jury verdict. In this instance, however, the contention was dismissed as of little merit.

67. A similar situation exists in approximately two-thirds of the jurisdictions nominally accepting the doctrine.
EQUAL PROTECTION—A JUDICIAL CEASE FIRE IN THE WAR ON POVERTY?

Dandridge v. Williams1

Appellees, citizens of Maryland and recipients of benefits under the Aid to Families with Dependent Children (AFDC) program,2 brought suit to enjoin the application of the Maryland "maximum grant regulation" whereby an absolute limit of $250 per month was placed on the amount of benefits received by a single AFDG family regardless of need.3 Specifically the appellees alleged that the maximum grant limitation was not compatible with the Social Security Act of 1935,4 and was in conflict with its explicit provisions,5 and moreover that it violated the equal protection clause of the fourteenth amendment to the United States Constitution.6 A three judge District Court held that the Maryland maximum grant regulation violated the equal protection clause.7 On direct appeal, the Supreme Court reversed in a 5-3 decision, holding that the maximum grant regulation was not inconsistent with the Social Security Act and was not violative of the equal protection clause.

Speaking for the majority,8 Mr. Justice Stewart began his statutory

3. The need of each family is determined by standards formulated by the Maryland Department of Social Services. Although families of six or less could receive aid commensurate with their determined need, families of seven and over were limited to $250 per month in certain Maryland counties including Baltimore City where the appellees resided, and $240 in other Maryland counties. Appellee Williams had a computed need for her family of nine of $296.15 and appelletee Gary a computed need of $381.50 for her family of ten. Both, nevertheless, received only $250 per month as provided by Maryland Department of Social Services, Rule 200 § X, B, at 22.
5. § 402(a) (10) of the Social Security Act of 1935 provides that aid shall be furnished "to all eligible individuals." The appellees contended that the maximum grant regulation denied all benefits to children born into a family already receiving the maximum grant. Furthermore, the appellees contended that the regulation encourages the "farming out" of children to relatives not subject to the maximum limitation and thereby contravenes a basic purpose of the AFDC program.
6. U. S. Const. amend. XIV, § 1. The appellees' contention was that the maximum grant limitation operated to create two classes of recipients, i.e., small families who received their calculated subsistence needs and large families similarly situated who did not receive payments commensurate with their subsistence needs and were thereby denied equal treatment.
8. In addition to Mr. Justice Stewart, the majority included Chief Justice Burger, and Justices Black, White, and Harlan. Mr. Justice Douglas dissented in a lengthy opinion which did not deal with the constitutional question. Mr. Justice Brennan joined by Mr. Justice Marshall concurred with Douglas' dissent and further dissented on the constitutional question or what they termed "the Court's emasculation of the equal protection clause."
analysis regarding the alleged conflict between the Maryland regulation and the Social Security Act by asserting that "the federal law gives each state great latitude in dispensing its available funds."9 His interpretation also recognized Congress's "full awareness" of maximum grant limitations.10 These premises, and a reliance on the lack of disapproval of the state regulations by the Department of Health, Education and Welfare,11 led the Court to the conclusion that the Maryland regulation was not prohibited by the Social Security Act.

More significant, however, than the Court's interpretation12 of the Social Security Act13 is the Court's holding on the constitutional question and the basis for that holding. It is the purpose of this note to briefly comment on the recent development of the law in the area of equal protection and to analyze the significance of the Dandridge holding in light of that development.

Elementary principles of constitutional law recognize that states may make statutory classifications which discriminate against certain individuals, if the classifications created include all persons similarly situated and justification for the differential treatment is present.14 The type of justification

10. This "full awareness" is manifested in 42 U.S.C. § 602(a) (1964) to which Congress added subsection 23 in 1967. That subsection called for reflection of changes in costs of living in determining family needs and further provided that "any maximum that the State imposes on the amount of aid paid to families will have been proportionately adjusted." See note 13 infra. In his dissent Mr. Justice Douglas pointed out that "congressional reference to an existing practice does not automatically imply approval of that practice."
11. The majority opinion states that "[t]he Secretary (of HEW) has not disapproved any state plan because of its maximum grant provision." Contrast this language with that of the District Court in Williams v. Dandridge:

In view of the fact, however, that there is no indication from administrative decision, promulgated regulation, or departmental statement that the question of the conformity of maximum grants to the Act has been given considered treatment, we believe that the various actions and inactions on the part of HEW are not entitled to substantial, much less decisive, weight in our consideration of the instant case. 297 F. Supp. 450, 460 (D.C. Md. 1969).

See also 67 COLUM. L. REV. 84, 91 (1967), where the author discusses the inadequacy of the federal administrative forum and HEW reluctance to impose effective sanctions where state welfare plans operate inconsistently with federal law.
13. Dandridge, in conjunction with Rosado v. Wyman, 397 U.S. 397 (1970), decided on the same day, will have an adverse effect on efforts to improve welfare conditions by challenges to the Social Security Act. See May, Supreme Court Approves Maximum Grants; Holds § 402(a)(23) Permits Welfare Cuts, 3 CLEARINGHOUSE REVIEW 321 (1970). In Rosado, the Court in part held that § 402(a)(23) of the Social Security Act, which requires the states to make cost of living adjustments in their determination of standards of need and dollar maximums, does not preclude the states from subsequently "par(ing) down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system." In effect, the holding in Rosado allows the states to offset increases in welfare payments which otherwise would have resulted from compliance with § 402(a)(23).
needed varies depending upon the type of legislation involved. A trichotomy has arisen between the treatment afforded economic, civil rights, and racial classifications. In general, the Court has traditionally given "great latitude" to the state legislatures when applying the equal protection clause to economically related legislation, while remaining "extremely sensitive" when dealing with civil rights. Furthermore, racial classifications are viewed by the Court as "constitutionally suspect."

The abstention of the Court in regard to legislation affecting commercial transactions has been applied with strong conviction. Indeed, the Court has succinctly stated it does not "sit as a super-legislature to weigh the wisdom" of laws that touch economic problems and business affairs. The Court has consistently upheld economic regulatory legislation which merely has some "rational basis" and only rarely has the Court invalidated such legislation over the past thirty years. Thus, the "fundamental standard" in the area of state regulation of business or industry is whether any set of facts may reasonably be conceived as justification for the discrimination. Consequently, a heavy burden rests on the attacking party to overcome the assumption that the classification has some rational basis.

In sharp contrast to the Court's treatment of economic classifications is its activist role in using the equal protection clause in racial discrimination cases. If one were to view the equal protection clause as a spectrum with economic classifications at one extreme, the opposite extreme would consist of racial classifications. Here the Court has applied its most stringent standards and has demanded that racial classifications be subjected to the "most rigid scrutiny." Indeed, racial classifications are viewed as "constitutionally suspect" and have been termed "invidious per

16. See note 27 infra.
23. The Court in Dandridge noted that no contentions were made that the maximum grant limitation was "infected" with a racially discriminatory purpose.
24. This linear treatment is necessary for a simplified analysis. For a more sophisticated approach see Karst, note 20 supra and Cox, The Supreme Court, 1965 term, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 95 (1966).
se.\textsuperscript{28} In effect, a heavy burden of justification is placed upon the state when a statute is drawn according to race, and only some "legitimate overriding purpose" can sustain its validity.\textsuperscript{29}

The above described standards for equal protection analysis, although simplified here,\textsuperscript{30} nevertheless serve as guideposts in setting the stage for a discussion of the "middle ground" cases on the equal protection spectrum wherein the Court has expanded the application of the equal protection doctrine in recent years.\textsuperscript{31}

Leaning toward the stringent racial standard are those classifications involving discrimination against basic civil rights. They have prompted the "new equal protection cases" which are subjected to an "extremely flexible sliding scale for measuring the required degree of intensity of judicial scrutiny of the legislative classification."\textsuperscript{32} In effect, the characterization of a given fact situation as involving a basic right such as procreation,\textsuperscript{33} voting,\textsuperscript{34} reapportionment,\textsuperscript{35} marriage,\textsuperscript{36} interstate travel,\textsuperscript{37} or the rights of illegitimate children\textsuperscript{38} dictated adherence to a constitutional standard far more stringent than the economic standard and nearly as stringent as the racial standard.\textsuperscript{39} Thus, when dealing with human, civil, or individual rights\textsuperscript{40} the Court had, prior to Dandridge, taken an activist role in expanding the application of the equal protection clause. The burden of justifying these classifications rested upon the state and only a "compelling

\textsuperscript{28} McLaughlin v. Florida, 379 U.S. 184, 198 (1964). (Stewart, J., concurring).

\textsuperscript{29} Loving v. Virginia, 388 U.S. 1 (1967). Justices Douglas and Stewart stated in a concurring opinion that they can conceive of no purpose which could justify a racial classification for a criminal offense. McLaughlin v. Florida, 379 U.S. 184, 198 (1964).

\textsuperscript{30} See note 24 supra.

\textsuperscript{31} Note that Tussman and tenBroek, supra note 14 at 381, predicted in 1949 that the equal protection clause was about to enter "the most fruitful and significant period of its career." Prior to Dandridge, their prophecy had indeed shown some validity.

\textsuperscript{32} Karst, supra note 20 at 744.

\textsuperscript{33} Skinner v. Oklahoma, 316 U.S. 535 (1942). The Court there termed procreation a "fundamental" right.


\textsuperscript{36} Loving v. Virginia, 388 U.S. 1 (1967). Note that this case also involved racial discrimination. In regard to marriage, the Court termed it "one of the basic civil rights of man, fundamental to our very existence and survival."

\textsuperscript{37} Shapiro v. Thompson, 394 U.S. 618 (1969). See also U.S. v. Guest, 383 U.S. 745 (1966) where the Court declared the right to travel interstate as "fundamental to the concept of our Federal Union." (emphasis added).

\textsuperscript{38} Levy v. Louisiana, 391 U.S. 68 (1968).

\textsuperscript{39} Generally speaking, it should be noted that in applying a more stringent constitutional standard in non-racial cases the Court did not differentiate constitutionally based rights such as interstate travel, and those rights of a fundamental nature such as procreation. Thus, if the Court considered a right "fundamental," it was elevated to the status of a constitutionally based right and a similar standard was applied in either case. Following Dandridge the distinction between fundamental rights and constitutionally based rights will probably become more significant. See text accompanying note 69 infra.

\textsuperscript{40} Tussman and tenBroek, supra, note 14. See also 39 N.Y.U.L. REV. 264, 270-78 (1964) and 82 HARV. L. REV. 1065, 1128-29 (1969).
interest”\(^\text{41}\) of the state could overcome the Court's willingness to strike down the legislation.

Thus, prior to \textit{Dandridge} one could generally segregate equal protection cases into the three rather distinct categories of economic regulation, civil rights, and racial discrimination and the characterization of the facts before the Court would to a large extent dictate the standard applied and the Court's ultimate decision. Such categorization inevitably resulted in some inconsistencies and criticism,\(^\text{42}\) but it enabled the Court to approach pragmatically the constitutional questions involved. In effect, the Court had the judicial tools to develop and protect individual rights in a manner consistent with the changing attitudes and values of society. Such development in relation to the welfare rights of the poor entered a new frontier in \textit{Shapiro v. Thompson},\(^\text{43}\) decided by the Court one year prior to \textit{Dandridge}.

In \textit{Shapiro}, the Court declared the Connecticut one year residency requirement for welfare recipients unconstitutional. The asserted basis for the Court's holding was infringement of the constitutional right to interstate travel.\(^\text{44}\) The existence of a basic civil right in \textit{Shapiro} invoked the stringent equal protection standard of the states' showing of a “compelling” governmental interest justifying a classification curtailing the exercise of that right.\(^\text{45}\) Failure by the state to sustain this burden resulted in the Court's conclusion that the classification constituted invidious discrimination and a denial of equal protection of the laws.

However, beyond the Court's protection of the right to interstate travel in \textit{Shapiro} lies the “\textit{crux}” of the decision,\(^\text{46}\) namely, that food, clothing, and shelter are fundamental human needs.\(^\text{47}\) As stated in the majority opinion of Mr. Justice Brennan:

\begin{quote}
\textit{Id}. at 629. \textit{See also note 37 supra.}
\textit{Id}. at 634.
\textit{Id}. at 629. \textit{See also note 37 supra.}
\textit{Id}. at 634. \textit{See also note 37 supra.}
\end{quote}


\(^{42}\) Consider, for example, Goesaert v. Cleary, 335 U.S. 464 (1948), where the Court upheld a Michigan statute which denied bartender licenses to females unless they were the daughter or wife of the tavern owner. The Court considered the problem as purely economic although sex discrimination is surely susceptible to characterization as a problem involving basic civil rights. Contrasting criticism has been lodged at the Court's willingness to expand the doctrine of basic civil rights or fundamental interests. See in this regard the dissenting opinion of Mr. Justice Harlan in \textit{Shapiro v. Thompson}, 394 U.S. 618, 662 (1969), where he says "I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental" and give them added protection under an unusually stringent equal protection test." \textit{See also} 82 Harv. L. Rev. 1065, 1132 (1969). \textit{But cf. P. Freund, Of Law and Justice} 35 (1968).


\(^{44}\) \textit{Id}. at 629. \textit{See also note 37 supra.}

\(^{45}\) \textit{Id}. at 634.


On the basis of this sole difference\(^{48}\) the . . . class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life . . . .\(^{48}\)

Thus, Shapiro could have been a "way station" leading to an ultimate conclusion that welfare assistance is a right.\(^{50}\)

However, the approach of the Dandridge Court clearly avoided confronting the issue for which Shapiro laid the apparent groundwork. Even though the maximum grant limitation has the effect of denying any welfare assistance to a child born into a family already receiving maximum benefit,\(^{51}\) and the Court conceded that "welfare assistance . . . involves the most basic economic needs of impoverished human beings,"\(^{52}\) the Court chose to apply the equal protection standard normally reserved for economic classifications. In so doing the Court recognized the "dramatically real factual differences between the cited cases and this one."\(^{53}\) This admission in and of itself, serves as a "candid recognition" that the Court's decision was wholly without precedent and an "emasculating" of the equal protection doctrine.\(^{54}\)

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48. The difference being the absence or presence of one year of residency.

51. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.
A comparison of Dandridge with previous equal protection cases illustrates that the majority departs from established precedent. In Skinner v. Oklahoma55 the Court recognized that procreation is a fundamental right as it struck down a state statute which interfered with that right. Arguably, a similar fundamental interest was at stake in Dandridge in that the maximum grant limitation discouraged reproduction by families already receiving their maximum grant and thereby infringed upon their right to procreate.56 More directly in point is the analogy between Levy v. Louisiana57 and Dandridge. In Levy, the Court recognized the right of illegitimate children to sue for the wrongful death of their parents,58 stating that "the rights asserted here involve the intimate familial relationship between a child and his mother."59 Obviously, Dandridge could be characterized as involving identical rights in that the AFDC program is specifically directed toward assisting welfare mothers in caring for their children. Nevertheless, the majority overtly failed to recognize the similarity in circumstances.

Shapiro v. Thompson60 provides an additional basis for questioning the Dandridge reasoning. The District Court in Williams v. Dandridge61 emphatically stated that:

... the evidence before us at the original trial was crystal-clear that the only reason why the maximum grant regulation was continued was financial, i.e., that ... Maryland had failed to appropriate sufficient funds to finance the cost of AFDC, absent the operative effect of the maximum grant regulation in reducing expenditures.62

56. Appellees did argue that the right to procreate was infringed upon by the maximum grant limitation, but the majority made no mention of this contention.
62. Id. at 467. The eventual reasons Maryland advanced to justify the maximum grant regulation were:
(1) encouraging gainful employment;
(2) maintaining an equitable balance in economic status between welfare families and those supported by a wage-earner;
(3) providing incentives for family planning;
(4) and allocating funds to meet the needs of more families. 397 U.S. 471, 483-484 (1970).

The Supreme Court dealt only with the first two grounds and recognized their inherent weaknesses. Regarding the first, the Court stated: "[I]t is true that in some AFDC families there may be no person who is employable". Id. at 486. Furthermore, in regard to (2) above, that "[I]t is also true that with respect to AFDC families whose determined standard of need is below the regulatory maximum, and who therefore receive grants equal to the determined standard, the employment incentive is absent." Id. The validity of these "justifications" becomes more questionable when one also considers that all of them were absent at the original trial. Nevertheless, they were sufficient in the Court's eyes to be entertained as "legitimate state interests." Id. at 483. See also 3 CLEARINGHOUSE REVIEW 12, at 346-47 (1970).
The Supreme Court in Shapiro, however, refused to recognize the saving of welfare costs as a valid justification for an otherwise invidious classification. When these facts are added to the observation that nutrition and subsistence are susceptible to characterization as rights certainly as fundamental as the right to procreate or marry it is apparent that the holding in Dandridge might represent a new attitude by the Supreme Court in dealing with future fundamental interest "middle ground" cases on the equal protection spectrum.

Possibly the best vehicles for initially examining this new attitude are the opinions of Mr. Justice Harlan, whose dissent in Shapiro appears to have laid the immediate foundation for the Dandridge holding. He expressed displeasure with the Court's practice of choosing particular human activities, labeling them fundamental rights, and consequently giving them the added protection of a stringent equal protection test. Harlan would apply the same equal protection standard to all cases without regard to "the nature of the classification or (the) interest involved." In effect, he advocates the application of the traditional economic standard of "some rational basis" to all classifications except racial ones, for which historical factors dictate a stricter standard. Although this type of analysis offers the courts a more predictable and clearcut standard for dealing with equal protection cases, it does not allow for a weighing of the validity of the factors involved in legislative classifications touching on individual rights or fundamental interests. Nevertheless, the majority in Dandridge has at least partially adopted the views of Mr. Justice Harlan. The question then becomes—how far will this new line of reasoning extend on the equal protection spectrum?

Due to the imprecise and unexpounded nature of the majority opinion, one may only speculate as to the interests which will hereafter be subjected to the inherently restrained traditional equal protection standard formerly reserved for economic classifications. Nonetheless, it is generally clear that the heavy burden previously placed upon the states in justifying classifications dealing with individual rights and fundamental interests has been lifted unless the discrimination involved is racial. Although the Court may continue to utilize the equal protection clause in protecting certain constitutionally based rights such as voting criminal prosecution pro-

63. See note 33 supra.
64. See note 36 supra.
65. It is probable that the Court will continue to apply a stringent standard to "middle ground" equal protection cases if a constitutionally based right such as interstate travel is at issue. See note 69 infra. See also note 37 supra.
68. See note 23 supra.
69. The language of the majority in Dandridge which indicates future use of the equal protection clause to protect constitutionally based rights is as follows: "For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, . . ." Dandridge v. Williams, 397 U.S. 471, 484, (1970) (emphasis added).
70. See note 34 supra.
cures,\textsuperscript{71} and interstate travel,\textsuperscript{72} it is probable that rights previously viewed as fundamental, such as marriage\textsuperscript{73} and procreation,\textsuperscript{74} will now move to the economic and social end of the equal protection spectrum and consequently fail to qualify as basic civil rights worthy of a more stringent equal protection standard. Thus, the Court indicates that all classifications, unless racial or involving freedoms guaranteed by the Bill of Rights,\textsuperscript{75} will not be set aside if any state of facts reasonably may be conceived to justify it.\textsuperscript{76}

For example, although \textit{Levy v. Louisiana}\textsuperscript{77} recognized wrongful death interests of illegitimates as being a civil right, it is now possible that similar rights in regard to intestate succession\textsuperscript{78} and child support will be categorized merely as social conditions. Similar treatment is likely to be directed toward educational classifications of a non-racial nature.\textsuperscript{79} Thus, although education is commonly considered an interest of a fundamental nature in our society, any corresponding Supreme Court development along these lines is presently improbable in light of \textit{Dandridge} and the lack of explicit constitutional language protecting educational opportunities.

Thus, the immediate effect of \textit{Dandridge} on welfare rights may be indicative of a far-reaching negative effect and judicially restrained approach in areas where the equal protection clause formerly provided flexibility in developing "new frontiers in equality."\textsuperscript{80} Indeed, \textit{Dandridge v. Williams} may bring renewed validity to the remark of Mr. Justice Holmes that the equal protection clause is "the . . . last resort of constitutional arguments."\textsuperscript{81} Certainly it is safe to say that the economic standard has been expanded to include "social welfare"\textsuperscript{82} legislation, thus widening the applicability of a "hands-off" approach in regard to welfare litigation.\textsuperscript{83}

\begin{itemize}
  \item \textsuperscript{71} See \textit{e.g.}, \textit{Griffin v. Illinois}, \textit{351 U.S. 12} (1956).
  \item \textsuperscript{72} See \textit{note 37 supra.}
  \item \textsuperscript{73} \textit{Loving v. Virginia}, \textit{388 U.S. 1} (1967).
  \item \textsuperscript{74} \textit{Skinner v. Oklahoma, ex. rel. Williamson} \textit{316 U.S. 535} (1942).
  \item \textsuperscript{75} See \textit{note 69 supra.}
  \item \textsuperscript{76} \textit{Dandridge v. Williams}, \textit{397 U.S. 471, 485} (1970). This language is indicative of the traditionally restrained treatment afforded economic classifications. \textit{See also} \textit{note 18 supra.}
  \item \textsuperscript{77} \textit{391 U.S. 68} (1968).
  \item \textsuperscript{78} \textit{See \textit{Douglas}, \textit{supra} note 14.}
  \item \textsuperscript{80} \textit{82 Harv. L. Rev.}, \textit{1065, 1192} (1969).
  \item \textsuperscript{81} \textit{Buck v. Bell}, \textit{274 U.S. 200, 208} (1927).
  \item \textsuperscript{82} \textit{Dandridge v. Williams}, \textit{397 U.S. 471, 485} (1970). The majority referred to "the area of economics and social welfare. . . ." It appears that \textit{Dandridge} was the first case wherein the Court classified social welfare in the same category as economics, although the Court had previously used the phrase "social and economic legislation." \textit{See, \textit{e.g.}, \textit{Levy v. Louisiana}, 391 U.S. 68, 71} (1967).
  \item \textsuperscript{83} The apparent "hands-off" attitude in regard to welfare litigation is indicated by the recent opinions of several Supreme Court Justices. For example, in \textit{Goldberg v. Kelly}, \textit{397 U.S. 254, 284} (1970), Chief Justice Burger states in his dissent:

\begin{quote}
I would not suggest that the procedures of administering the Nation's complex welfare programs are beyond the reach of courts, but \textit{I would wait until more is known about the problems} before fashioning solutions in the rigidity of a constitutional holding (emphasis added).
\end{quote}

A similar attitude is indicated in \textit{Dandridge} when the Court states, \textit{397 U.S.}
This apparent retrenching by the Court will have an unfortunate effect on recent efforts toward development of the rights of the poor.\textsuperscript{84} This is particularly significant in relation to the predictions of various writers that welfare assistance in and of itself could emerge as a right.\textsuperscript{85} In addition, although the facts in \textit{Dandridge} were susceptible to the recognition of subsistence as a right,\textsuperscript{86} the Court's holding apparently rejects any present development along these lines. Instead the Court has, in regard to the equal protection clause, chosen to cast the fate of the poor in the same light as the interests of "a gas company or an optical dispenser."\textsuperscript{87} In sum, one can only conclude that regardless of its previous participation in the war on poverty, the Supreme Court has declared a judicial cease fire in the utilization of the equal protection clause as a weapon of the poor.

\textbf{Burton W. Newman}
EXPERT TESTIMONY ON CAUSATION IN A WRONGFUL DEATH CASE: SHOULD "REASONABLE MEDICAL CERTainty" BE NECESSARY TO MAKE A SUBMISSIBLE CASE?

*Bailey v. Kershner*¹

Plaintiff, Alma Bailey, instituted a wrongful death action for the death of her 70-year-old husband, Harold, against defendants Karl Kershner and LeClaire Brothers Transfer, Inc. The action was based on a car-truck collision wherein plaintiff’s deceased was riding in defendant Kershner’s car. Kershner had slowed the car to make a left turn when it was struck from behind by the defendant corporation's truck. Kershner, fearing that a quick stop would injure him and Bailey, did not apply the brakes, but instead allowed the auto to continue in a circular path off the road. This action caused Bailey to be thrown from the car onto a lawn. Bailey was taken to a hospital where he was examined by Dr. Butts, who had previously treated Bailey for high blood pressure, arteriosclerosis, and heart trouble.

Dr. Butts found that Bailey had extremely high blood pressure, bruises and abrasions of the back, hip and forehead. The patient was placed on medication to reduce pain and blood pressure. Bailey's condition improved during the following week, but on the eighth day his condition began to deteriorate and he finally died of a "cerebro-vascular accident," eleven days after the collision.

The causal connection between the obvious injuries and the subsequent death was the major issue at trial. Dr. Butts, the only medical witness, testified that in his opinion the injuries directly contributed to the cerebral vascular accident,² but he would not state with “reasonable medical certainty” that the injuries were the cause of death.³ He would only say that he felt at the time, that the injuries sustained in the accident were the cause of death. Defendants moved for a directed verdict on the causation question, but the trial court overruled this motion and plaintiff obtained a jury verdict.

On appeal the defendants contended that plaintiff had not sustained her burden of proving that the defendant's act was a cause of the deceased's death. The Springfield Court of Appeals agreed with the defendants and declared that expert testimony was essential because of the pre-existing high blood pressure, arteriosclerotic hypertension and cardiac conditions and the minor nature of the injuries sustained in the accident.⁴ The court also held that "reasonable certainty" is necessary to make a submissible case and, as a corollary to this, mere evidence that a causal connection alone is "possible" would be insufficient.⁵ Since the doctor only had a feeling that the accident was the cause, and refused to state that his belief was based on "reasonable medical certainty," the court held that the verdict must be

¹ 444 S.W.2d 10 (Spr. Mo. App. 1969).
² Id. at 14.
³ Id.
⁴ Id.
⁵ Id. at 15.
disregarded and the judgment reversed. Although the basis of the court's holding was not unusual and added nothing to existing case law, the application of the so-called "reasonable medical certainty" test in this factual situation points up the problems and deficiencies inherent in the test. The result was a reversal by the Springfield Court of Appeals on a question of fact rather than law. This note will discuss these problems and propose means of avoiding them.

Proof of causation is often a problem to both judges and attorneys. But what must the plaintiff prove? Plaintiff, of course, has the burden of proof on this question. In Missouri, the causal connection requirement is expressed by the phrase "direct result." One test used to determine if the injuries were the direct result of defendant's negligence is "whether the facts show that absent the charged negligence, the injury would not have been sustained." This is commonly known as the "but-for" test and seems to be widely accepted in most jurisdictions including Missouri. However the "but-for" test, while appropriate for the purpose of establishing a causal connection, is never, strictly speaking, appropriate for determining whether the injury or circumstance was a "direct" result, because the latter requires more than a mere causal connection. The question of causation is always for the jury provided, of course, that judges agree that there is substantial evidence to support a jury verdict on the point.

Exactly what constitutes substantial evidence is not clear. Some authors have stated that it is an indefinable term. Despite this, it is clear that the substantiality of the evidence necessary to make a submissible case depends upon the fact situation and, in this respect, the Missouri courts have implicitly recognized three different types of factual situations.

The first situation occurs where common knowledge of the likely effect of an act is so widely held that a submissible case can be made without any direct evidence on the issue. Thus, circumstantial evidence alone may be sufficient where deceased's head was crushed in an auto accident or where plaintiff suffered stomach pain from swallowing broken glass. Obviously, expert testimony is not needed in these instances.

In the second situation there are facts which tend to establish causation but which alone are insufficient for that purpose. In this second situation, if plaintiff can corroborate these facts with expert testimony as to possibility of causation, the substantial evidence requirement is satisfied. The facts in these cases often support a post hoc, ergo propter hoc theory.
of causation, i.e., plaintiff was in good health before the alleged negligence, and in bad health afterwards. This evidence may nevertheless be sufficient, if an expert testifies that the injury was possibly caused by the negligence. 16

The third situation encompasses those cases where there is no obvious causal connection so that expert testimony is essential if the burden of proof is to be sustained. 17 The technical nature of the issue may be so far outside the jury’s knowledge and experience that no basis exists for inferring the causal connection. For this reason expert testimony is indispensable. 18 In this third area, therefore, it is frequently said that substantial evidence must be based on reasonable certainty, 19 and that “possibility” 20 or even “probability” 21 by itself is insufficient. The Missouri Supreme Court has said that “[a]ssurance of possibility is not of itself, however, sufficient to make a submissible case, upon the issue of cause and effect, for a plaintiff who has the burden of proof upon that issue.” 22 This rule is premised on the belief that liability should not be based on guesswork, speculation or conjecture and if the expert is unable to state that the alleged negligence was a cause in fact of the injury, then the jury should not be allowed to infer such causal connection. A corollary to this is

when evidence goes only to the extent of showing that a certain condition might or could have been caused by one of two causes for only one of which defendant is liable, such is not a substantial showing of which of the causes produced the condition and furnishes no basis from which a jury may reasonably find the cause. 23

Therefore, if the expert states that the injury could, would, or might have been caused by the negligence, the evidence is insufficient, since the expert has only testified as to possibility. 24

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20. Ficken v. Hopkins, 389 S.W.2d 193, 202 (Mo. 1965), and cases cited therein.
21. Kiger v. Terminal R.R. Assoc. of St. Louis, 311 S.W.2d 5 (Mo. 1958); Bertram v. Wunning, 385 S.W.2d 803 (St. L. Mo. App. 1965). But see, Greer v. Missouri State Highway Dept., 362 S.W.2d 773 (Spr. Mo. App. 1962), a workmen’s compensation case. Despite the similarity between causation questions in tort and workmen’s compensation cases, the latter require only reasonable probability to sustain the commission’s finding.
22. Kimmie v. Terminal R.R. Ass’n of St. Louis, 334 Mo. 596, 600, 66 S.W.2d 561, 566 (1933); Lands v. Boyster, 417 S.W.2d 942 (Mo. 1967).
24. Ficken v. Hopkins, 389 S.W.2d 193 (Mo. 1965); Ketcham v. Thomas, 283 S.W.2d 642 (Mo. 1955); DeMoulin v. Kisss, 446 S.W.2d 162 (St. L. Mo. App. 1969).
Other than saying that absolute certainty is not required and that possibility is not sufficient, the courts have been satisfied to let further definition of reasonable certainty be done on a case by case basis. The rule itself is reasonable but the courts have tended to apply it strictly, and the unfairness that can result has given rise to several exceptions. One is that where "it may be determined from the testimony that the doctor was expressing his expert opinion as to the cause of a condition, the form of language used will not deprive the statement of its evidentiary value." Thus, in Smith v. St. Louis Public Service Co. the plaintiff's expert testimony as in Bailey that he felt that the negligence caused the injury and used such words as would, could, might and may, but the St. Louis Court of Appeals upheld the verdict based on this exception. There are other cases in accord with Smith where the court has not required the words "reasonable medical certainty" to uphold the jury verdict. In some of these cases, particularly Rogers v. Spain, the court seems to be paying lip service to reasonable certainty, while actually requiring something less. Another exception, contrary to the previous one, is that a witness may qualify his testimony in such a way as to render it of no probative value. Thus, this exception is applicable when on cross-examination, the witness makes statements inconsistent with his direct testimony.

While not calling it an exception, the courts have held a case submissible where only "possibility" was shown where there were "other facts" which tended to support the conclusion that the result was caused by the challenged act. For example, in Ketcham v. Thomas all of plaintiff's experts testified that an auto accident "could" cause increased menstrual bleeding. The court said that the substantial evidence of the non-existence of the condition before the accident and of its existence afterwards, along with the "possibility" testimony, was sufficient. It is hard to reconcile this case with the requirement of "reasonable medical certainty" because in many cases there are "other facts" similar to those in Ketcham that would support the inference of causation making possibility testimony sufficient. Though this reasoning is arguably more fair, the courts have not seen fit to apply it, as evidenced by the decision in Bailey.

27. 285 S.W.2d 102 (St. L. Mo. App. 1950).
29. 388 S.W.2d 518 (St. L. Mo. App. 1965), where the court interpreted statements by the doctor as to probability and likelihood as a reasonable degree of medical certainty.
32. 283 S.W.2d 642 (Mo. 1955).
33. Id. at 649-50.
These above noted exceptions give the courts more discretion in applying the requirement of "reasonable medical certainty," thereby avoiding unjust results. But the court in Bailey preferred to strictly apply the requirement of "reasonable medical certainty." The court held that in this case expert testimony of reasonable certainty was essential despite "other facts" that in conjunction with the "possibility" testimony would have been sufficient to make a submissible case. The "other facts" in Bailey were the deceased's injuries, the necessity of and continual hospitalization, and the decline of condition until the date of death. Secondly, the expert testified that in his opinion the injuries received directly contributed to cause death.\textsuperscript{34} The Springfield Court of Appeals disregarded this on the basis of other testimony and, in considering the record "as a whole," even considered stricken testimony.\textsuperscript{35} Such an approach is contrary to the rule for directing verdicts,\textsuperscript{36} which declares that the court must accept as true all evidence favorable to plaintiff's right to recover, and must draw all reasonable and favorable inferences therefrom.\textsuperscript{37} A stronger statement of the rule is that "a verdict should be directed against a plaintiff only when the facts in evidence and the legitimate inferences to be drawn from them are so strongly against the plaintiff as to leave no grounds for reasonable minds to differ."\textsuperscript{38} Viewed in this light the decision apparently rests on the absence from the witness' testimony of the magic words "reasonable medical certainty," rather than the absence of facts or expert opinions from which legitimate inferences of causation might have been drawn. In this respect, the Bailey decision may be subject to some criticism.

The problem with the court's requirement of "reasonable medical certainty" arises out of the nature of the witness and his profession. A medical doctor is unfamiliar with the working of the legal system and his views of "cause" are more exacting than the requirements of "legal cause."\textsuperscript{39} Apart from a natural reluctance to testify as to certainty,\textsuperscript{40} "[t]here is a serious misunderstanding between the medical and legal professions, with reference to the terminology used in accident cases in connection with the subject of causation . . . ."\textsuperscript{41} Interestingly, the Springfield Court of Appeals recognized this problem in Greer v. Missouri State Highway Department\textsuperscript{42} where the court said:

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\item [34] 444 S.W.2d 10, 14 (Spr. Mo. App. 1969).
\item [35] Id. at 13.
\item [36] Gaffner v. Alexander, 331 S.W.2d 622 (Mo. 1960), stating that the directed verdict rule is applicable to proximate cause questions.
\item [38] Mulliken v. Presley, 442 S.W.2d 153 (St. L. Mo. App. 1969); Schneider v. Dannegger, 435 S.W.2d 413 (St. L. Mo. App. 1968).
\item [41] Id. at 228.
\item [42] 362 S.W.2d 773 (Spr. Mo. App. 1967).
\end{enumerate}
All we get from these treatises is that medicine is not an exact science, that doctors do disagree, and that we should stick to our own last [sic] and leave questions of medicine and medical theory to the doctors . . . .

Requiring reasonable certainty of cause amplifies this misunderstanding that medical cause is not necessarily legal cause, and predicking one upon the other can only lead to unjust results. This becomes evident in areas such as cancer where the medical cause is not known but a legal cause is found.

Though it is unlikely that this test requiring reasonable certainty will be relaxed, the personal injury attorney can avoid most of the problems in this area by proper preparation of witnesses. First of all he should carefully explain the differences between legal and medical cause and he should explain the legal theory of causation in his particular case. Secondly, if the witness is disinclined to testify that his opinion is based on "reasonable medical certainty," he should be asked how he would testify when asked whether his opinion is based on guesswork, speculation or conjecture. A negative answer to this question will satisfy the causation requirement. Another approach is to permit the witness to state other possible causes and to eliminate them as possibilities. This achieves reasonable certainty by the process of elimination. Finally, if the treating physician will only testify as to possibility of causation, the attorney should still use such testimony, but in conjunction with the testimony of a non-treating expert medical witness. If this one expert can testify with "reasonable medical certainty" on causation in response to a proper hypothetical question, a submissible case is made. Naturally, the attorney should attempt to find an expert who is particularly familiar with this legal-medical problem of causation. If the attorney is properly prepared the stumbling block of "reasonable medical certainty" will seldom keep a case from the jury.

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43. Id. at 780.
45. Dorsey v. Muilenburg, 345 S.W.2d 134 (Mo. 1961), where the facts were similar to those in Bailey but the result was different.
46. Id.
47. For further help in this area see Dooley, How to Try a Personal Injury Case, 15 CLEV.-MAR. L. REV. 433, 446-451 (1966).
CAUSATION-ATTORNEYS' FEES AND SECTION 14(a) OF THE SECURITIES EXCHANGE ACT OF 1934

Mills v. Electric Auto-Lite

Petitioners, shareholders of Electric Auto-Lite Company, filed suit against that company seeking to enjoin management from voting proxies obtained through the use of an allegedly misleading proxy solicitation. The vote, concerning a proposed merger between Auto-Lite and Mergenthaler Linotype Company, was taken the following day and the merger was consummated. An amended complaint was filed by petitioners alleging violations of section 14 (a) of the Securities and Exchange Act of 1934 and SEC Rule 14a-9 in that "the proxy statement failed to reveal, in soliciting a two-thirds stockholders' vote for the merger, that the directors of both Mergenthaler and Auto-Lite were controlled by a third company, American Manufacturing Company," The district court, granting summary judgment, ruled that as a matter of law the omission was material and concluded that the necessary causal link between the deceptive proxy solicitation and merger was present where some of the minority shareholders' proxy votes were essential to approve the merger. Relying on the Supreme Court's decision in J. I. Case Company v. Borak the court concluded that the "lower Federal Courts have been given the mandate to further develop a Federal Common Law of Corporations" and that the question of causal relationship was one question that should be resolved at the trial level. The case was then referred to a master to consider what relief was appropriate. The district court made the certification required by 28 U.S.C. Section 1292 (b), and defendants took an interlocutory appeal to the Court of Appeals for the Seventh Circuit.

2. 15 U.S.C. § 78n (a) (1964). This section reads as follows:
   It shall be unlawful for any person, by use of the mails or by any means or
   instrumentality of interstate commerce or of any facility of a national
   securities exchange or otherwise, in contravention of such rules and regu-
   lations as the commission may prescribe as necessary or appropriate in the
   public interest or for the protection of investors, to solicit or to permit the
   use of his name to solicit any proxy or consent or authorization in respect
   to any security (other than an exempted security) registered pursuant to
   section 78 (l) of this title.
   No solicitation subject to this regulation shall be made by means of any
   proxy statement, form of proxy, notice of meeting of other communication,
   written or oral, containing any statement which, at the time and in the
   light of the circumstances under which it is made, is false or misleading
   with respect to any material fact, or which omits to state any material
   fact necessary in order to make the statements therein not false or mis-
   leading or necessary to correct any statement in any earlier communica-
   tion with respect to the solicitation of a proxy for the same meeting or
   subject matter which has become false or misleading.
5. Id. at 831.
7. 281 F. Supp. at 829.
The court of appeals held that the proxy statement was as a matter of law materially deficient and in violation of section 14(a), but reversed on the issue of causation on the theory that plaintiffs, as a prerequisite to establishing liability, had to show that the misleading statement and omission caused the submission of sufficient proxies to affect the outcome of the vote.\(^8\) The court held that if "by a preponderance of probabilities the merger would have received a sufficient vote even if the proxy statement had not been misleading. . ."\(^9\) the defendants would be entitled to a decision in their favor. The court held that since showing reliance by thousands of individuals is impractical, if defendants could establish that the merger was fair to the minority shareholders, this would support a conclusion that enough shareholders would have voted for the merger notwithstanding the deceptive proxy statement; therefore, there should be no liability on the part of defendants.

The Supreme Court granted certiorari and reinstated the decision of the district court, holding that there was a violation of section 14(a) and rule 14a-9 as a matter of law because the proxy statement was materially misleading. The Court held that under Borak causation was adequately shown where it is proven that the proxy statement was materially misleading and the solicitation was an essential link to the consummation of the merger.\(^10\) The Court indicated that the essential link is present where some of the minority shareholders' votes are necessary. Refusing to allow the issue of liability to be foreclosed, as the appellate court had permitted by a judicial determination of fairness, the Court said such "[a] judicial appraisal to the merger’s merits could be substituted for the actual and informed vote of the stockholders."\(^11\) The remedy which is to be determined in the first instance by the district court was not expressly set out. Two possible kinds of relief were enumerated. First, the merger could be set aside, or second, monetary relief could be given but "damages would be recoverable only to the extent that they can be shown."\(^12\) The Court read section 27(b) of the 1934 Act\(^13\) which makes contracts made in violation of the act "void" to mean that such contracts were "voidable" at the instance of the injured party. Therefore the act does not require the court to "unscurramble a corporate transaction merely because a violation occurred."\(^14\) Considering the issue of attorneys' fees, the Court agreed with the argument that "petitioners, who have established a violation of the

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9. Id. at 436.
11. Id. at 381.
12. Id. at 389.
13. 15 U.S.C. § 78cc(b) (1964) provides in pertinent part:
Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder . . . shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation. . . .
14. 396 U.S. at 386.
securities laws by the corporation and its officials, should be reimbursed by the corporation or its successor for the costs of establishing the violation."¹⁵ This conclusion was reached although there was as of yet no definite remedy or common fund recovered by the plaintiff's effort. The Court held that the express provision for attorneys' fees in section 9 (c)¹⁶ and section 18 (a)¹⁷ of the 1934 Act "should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act. . . ."¹⁸

J. I. Case v. Borak¹⁹ held, in sweeping language, that there is an implied civil action to redress a corporation and its officers for violations of section 14 (a). "The purpose of section 14 (a) is to prevent management or others from obtaining authorization for corporate actions by . . . deceptive or inadequate disclosure in proxy solicitation."²⁰ The Borak language implied that some element of causation was essential to the cause of action but was vague and unclear as to the nature of the causal element. Causation has been the subject of various decisions in lower federal courts, and prior to the Mills decision much confusion and conflict was present. For example, in Barnett v. Anaconda,²¹ the requirement of causation was construed narrowly and relief was denied. In that case the plaintiff, a minority stockholder in Anaconda Wire and Cable Company, brought suit against defendant Anaconda Company, the majority stockholder of Anaconda Wire and Cable Company, for violation of section 14 (a). The plaintiff alleged that he sustained damages due to the dissolution of Anaconda Wire and Cable Company and the exchange of its stock for that of defendant Anaconda Company. Anaconda owned 73% of the stock of the dissolved company which thereby assured the success of any proposed sale and dissolution vote. The United States District Court for the Southern District of New York dismissed the complaint saying, "In the case at bar the necessary causal connection between the alleged violation of section 14 (a) and the alleged injury to the minority stockholders is wholly lacking."²² The court reasoned that since the defendant owned enough shares to assure passage of any proposal voted on at a stockholders' meeting there was no possibility that the misleading proxies could have in any way affected the vote or injured the plaintiffs.²³

¹⁵. Id. at 389-90.
¹⁶. 15 U.S.C. § 78i (1964) provides:
Any person who willfully participates in any act . . . in violation . . . of this section, shall be liable . . . for the payment of the costs of such suit, and . . . reasonable costs, including attorneys' fees, against either party litigant. . . .
¹⁷. 15 U.S.C. § 78r (1964) provides:
Any person who shall make or cause to be made any statement . . . [in certain documents filed with the SEC] which [is] false or misleading with respect to any material fact, shall be liable . . . for the payment of the costs of such suit . . . including reasonable attorneys' fees. . . .
¹⁸. 396 U.S. at 390-91.
²⁰. Id. at 431.
²². Id. at 773.
²³. Id. at 773-74. See Note, 51 IOWA L. REV. 515 (1966). See also Richland v. Crandall, 262 F. Supp. 538 (S.D.N.Y. 1967). There the court took a strict "but for"
Laurenzano v. Einbender, 24 decided by the United States District Court for the Eastern District of New York, involved facts similar to the Barnett case. Defendants controlled 65% of the voting stock of the corporation, thus insuring that any vote taken at a stockholders' meeting would be decided by them. Plaintiff, a minority stockholder, brought suit based on section 14(a) alleging that false and misleading proxy statements had been issued pursuant to the stockholders' meeting. Defendant objected to jurisdiction, claiming the proxy statements were needless and were not the legal cause of the complained injuries. The court in overruling defendant's motion to dismiss said, "The meeting does not become nugatory and dispensable because one stockholder owns enough shares to carry any resolution. . . ." 25 The court went on to state, "The meeting must be held; the stockholders must receive a truthful proxy statement . . . [and] if proxies are solicited, the stockholders have a statutory right to a truthful proxy statement." 26 Thus, the court felt that causation as a matter of law was proven by establishing that there was a material omission in the proxy statement.

In the Mills case the defendant owned 54% of the outstanding shares of the corporation and therefore could not have assured authorization of the merger without a substantial number of minority stockholders voting in favor of the merger. 27 The Supreme Court, speaking through Justice Harlan, concluded that the causal relationship had been established as a matter of law where "a shareholder . . . proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." 28 This decision, however, does not resolve the conflict between the district courts where management controls enough votes to approve the transaction without any minority votes. 29 While the court recognized the Laurenzano case, they expressly refrained from either approving or disapproving that decision. 30 Perhaps the court wishes to imply that even where the proxy statement is materially misleading there still must be some proxy votes necessary for the approval of the action being taken. Conversely, if none of the proxy votes are necessary then the causal element would be missing and the court would reach a result opposite the Laurenzano decision. Strong argument, however, can be espoused in favor of a holding consistent with Laurenzano. As stated in Mills, "Use of a solicitation which is materially misleading is of itself a violation of the law . . . [and] injunctive relief . . . [will] be available to remedy such a defect if sought prior to the stock-

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stance and decided as a matter of law that misleading proxy material cannot be held responsible for the outcome of a vote when the solicitors have self sufficient voting power to achieve the desired result.

25. Id. at 362.
26. Id.
27. Thirteen percent of the minority shareholders were required to vote in favor of the proposal for the merger to be authorized, since two-thirds was the statutory requirement.
29. Id. at 385 n.7.
30. Id.
holders' meeting."

Therefore, there seems to be no rational reason why subsequent relief should not also be available to a minority stockholder who has been injured. Since the Mills court does not say what their result would be in the Laurenzano situation, their decision can go either way in a later case.

The second issue which the court decided involved the award of interim costs and attorneys' fees. Private enforcement of the Securities Act, especially section 14 (a) and section 10 (b), is extremely important as a deterrent to unlawful action by corporate management. Although no express statutory basis can be found for awarding interim expenses and attorneys' fees the Court agreed with the United States as amicus curiae "that petitioners, who have established a violation of the securities laws by their corporation and its officials, should be reimbursed by the corporation or its survivor for the costs of establishing the violation."

The rule has long been established that a trustee or person acting as trustee will be reimbursed for successful litigation where a common interest among the security holders is involved. The leading case applying that principle is Trustees v. Greenough decided by the Supreme Court of the United States in 1881. Today counsel fees are usually awarded where the shareholder's suit results in pecuniary benefit to the corporation or the shareholders in the form of a common fund. In the instant case no common fund has been produced for the benefit of the group as a result of petitioner's efforts. The Court said, however, "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale."

Agreeing with a decision of the Second Circuit involving section 16 (b) of the 1934 Act the Court concluded that section 9 (e) and section 18 (a) which specifically allow for attorneys' fees should not be read as deny-

31. Id. at 383.
33. It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange . . . (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commissioner may prescribe as necessary or appropriate in the public interest or for the protection of investors.
34. The remedies available to persons injured by violations of either § 10 (b) or § 14 (a) are the same in that both sections can serve as a basis for rescission, damages, or equitable relief in the nature of an injunction. However, § 28 limits recovery under the Act to actual damages. See 3 L. Loss, SECURITIES REGULATION 1792 (2d ed. 1961).
36. 105 U.S. 527 (1881).
37. See H. Ballantine, CORPORATIONS § 156 (rev. ed. 1946).
38. 396 U.S. at 392.
40. 15 U.S.C. § 78 (p) This section involves the recovery of short swing profits which insiders have made by dealing in their own corporation's securities within a prescribed time.
ing the courts the power to award attorneys’ fees under other sections of the act "... when circumstances make such an award appropriate. ..." 40 The Court in order to do equity implies an award of attorneys’ fees and creates an exception to the general American rule that costs do not include attorneys fees. Other court created exceptions to the general rule involve class actions and derivative actions where expenses incurred by one shareholder are spread among all shareholders by requiring the corporation to pay the successful plaintiffs attorneys’ fees. Public policy and the importance that Congress has placed on corporate suffrage require that the plaintiff who establishes a cause of action be awarded attorneys’ fees.

The third issue which the Mills Court considers but does not decide is the remedy to which plaintiff is entitled. Section 29 (b) of the Securities Act 41 makes every contract made in violation of the Act void with respect to the rights of the violator. But even though the violator could not enforce the contract, section 29 (b) does not necessarily require that the merger must be set aside. The relief to be granted "must hinge on whether setting aside the merger would be in the best interests of the shareholders as a whole." 42 Petitioners in this case did not vote their shares in favor of the merger 43 and therefore are not parties to the agreement and do not enjoy a statutory right to rescind. Indicating that the decision as to the proper remedy is in the first instance to be made by the district court, the Court in dicta enumerates only two possible forms of relief. First the merger could be set aside. However, fairness of the terms of the merger, the best interest of other shareholders and the fact that there is no express statutory policy which requires the unscrambling of the corporate transaction are factors to be considered. The second possible form of relief the Court mentions is money damages. The damages recoverable would only be that amount that can be shown. If direct injury is impossible to establish, relief would again have to be based on the "fairness of the terms of the merger at the time it was approved." 44 The Court sets no real guidelines for the district court to follow other than the relief must be fair and equitable.

The courts, under the guise of enforcing the legislative intent of the Securities Exchange Act of 1934, have created a whole new area of court made law. First, they found an implied private right of action in individual shareholders for violation of the Act. 45 This case indicates that they have created another court made remedy by allowing recovery of attorneys’ fees. Mr. Justice Black dissenting in the Mills case with respect to the allowance of attorneys’ fees has this to say: "The courts are interpreters, not creators, of legal rights to recovery and if there is a need for recovery of attorneys’ fees to effectuate the policies of the Act here involved, that need should in my judgment be met by Congress, not by this Court." 46 The allowance of attorneys’ fees will make the bringing of suits more attractive. However,

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40. 396 U.S. at 391.
42. 396 U.S. at 388.
43. 396 U.S. at 388 n.11.
44. 396 U.S. at 389.
46. 396 U.S. at 397.
until some guidelines are laid down regarding the relief which a successful stockholder can expect to receive, it is unlikely that large numbers of stockholders will risk their time and money prosecuting a violation of the proxy rules.

DARYL N. SNADON

A NEW GROUND FOR WITHDRAWAL OF Plea OF GUILTY:
PLEA INVOLUNTARILY INDUCED BY
DEFENDANT'S ATTORNEY

State v. Rose¹

Rose was charged with stealing tires and, represented by counsel of his own choice, pleaded not guilty. Six months later, represented by the same attorney, Rose changed his plea to guilty and was sentenced to two years imprisonment without parole. After his commitment to custody, he filed a pro se motion under Missouri Supreme Court Rule 27.26² to set aside the conviction on the grounds that the plea of guilty was involuntary. At the hearing on the motion, Rose, represented by appointed counsel, testified that his original attorney had repeatedly urged him to change his plea to guilty because he had talked to the judge, the prosecutor, and the parole officer and had made arrangements for probation. Rose was the only witness at the hearing.

On the basis of the record made at the time of the plea,³ the trial court found that the plea of guilty had been entered voluntarily. The court also found:

that no promise had been made to defendant nor could defendant have reasonable believed he would receive any special consideration for parole for entering a plea of guilty to the charge. Certainly there was no evidence of the State making any promise to defendant. We have only the defendant's statement that his counsel made a promise which, if true, could not benefit this defendant at this hearing.⁴

The court accordingly denied the motion on the ground that the defendant had failed to establish that the plea was involuntary.

On appeal to the Missouri Supreme Court appellant challenged the trial court's conclusion of law that promises by appellant's counsel, as distinguished from promises by the state, "could not benefit this defendant at this hearing."⁵ Since no prior Missouri case had dealt with this precise

1. 440 S.W.2d 441 (Mo. 1969).
4. 440 S.W.2d 441, 442-43 (Mo. 1969).
5. Id. at 443.
question, the court reviewed cases from several other jurisdictions, and found a split of authority. The court felt, however, that because "a defendant is particularly susceptible to misleading by his own attorney", the reasoning of the line of cases which permits a defendant to set aside a judgment and guilty plea induced by misrepresentations of his attorney was the sounder. Accordingly the case was remanded to the trial court for an explicit finding on the factual issues raised by the motion and the evidence.

According to some statistics approximately 90 to 95 percent of all persons charged with crimes enter pleas of guilty. Many of these pleas are the result of either plea bargaining with the prosecutor, or are based on the recommendation of counsel to avoid a jury trial in the hope that the judge will give a more lenient sentence. When the expectations of leniency or parole thus created fail to materialize, it is obvious that a great number of defendants will move to withdraw their guilty pleas. As a result of these motions, there have been several developments at both the state and federal levels which establish standards and procedures to be followed by the trial court in accepting the plea of guilty. The remainder of this note will be concerned with a discussion of these, and the effect that Rose will have on the law as it presently stands.

While there is little disagreement that one who pleads guilty involuntarily should not be bound by that plea, there is a great deal of difficulty in determining what constitutes such an involuntary plea. It is obvious, of course, that "involuntariness" can result from either physical or mental coercion; that is, a plea may be just as involuntary if it is the result of false promises of parole as if it results from physical abuse. It is very difficult to determine, however, when the mental coercion rises to such a level.

6. The court cited the following cases rejecting the proposition that the defendant can obtain past conviction relief by proving misrepresentations by counsel: People v. Stillwell, 62 Cal. App. 2d 175, 328 P.2d 21 (1958); People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657 (1944); People v. Martinez, 88 Cal. App. 2d 767, 199 P.2d 375 (1948); Smith v. United States, 324 F.2d 496 (D.C. Cir. 1963); People v. King, 284 App. Div. 1015, 135 N.Y.S.2d 396 (1954); People v. Bofill, 19 Misc. 2d 708, 192 N.Y.S.2d 821 (1959); People v. Brim, 22 Misc. 2d 395, 199 N.Y.S.2d 744 (1960); Davidson v. State, 92 Idaho 104, 437 P.2d 620 (1968). The Missouri Supreme Court noted that:

These cases appear to be based upon the theory that the attorney is the agent of the accused and that the defendant cannot avail himself of even willfully false statements of factual matters by his own attorney. 440 S.W.2d 441, 444 (Mo. 1969).


7. State v. Rose, 440 S.W.2d 441, 445 (Mo. 1969).
11. State v. Cochran, 332 Mo. 742, 60 S.W.2d 1 (1933).
that the guilty plea results from such coercion. This is a problem that the courts have attempted to solve for many years.

Thus, even though most of the developments have taken place relatively recently, it is interesting to note that as early as 1880 the Missouri Supreme Court recognized that the law should not be full of traps to catch the unwary defendant who has pleaded guilty involuntarily. Since this time, the cases have been concerned primarily with developing criteria to determine the voluntariness of a plea. Thus, in the 1920 case of State v. Dale, the court stated:

It is immaterial whether the misleading was intentionally or unconsciously done. The material inquiry is: Was the defendant misled, or under a misapprehension at the time he entered his plea, guilty?

It is interesting to note that even at this time the court was more concerned with the actual, subjective state of mind of the defendant than with the source of the misapprehension. Thirteen years later, the court expanded on the test set out in the Dale case and stated:

If the defendant should be misled or be induced to plead guilty by fraud or mistake, by misapprehension, fear, persuasion, or the holding out of hopes which prove to be false or ill founded, he should be permitted to withdraw his plea. The law favors a trial on the merits.

Combining these two statements, it becomes apparent that to justify the withdrawal of a guilty plea there must be a holding out of false hopes which subjectively misleads the defendant. Therefore, it is not sufficient for a defendant to show that statements holding out false hope were made unless he also shows that there was, in fact, a misapprehension created. The question that this raises is how the court is to determine whether the defendant was suffering from such misapprehension.

Since the determination is one of the defendant's subjective state of mind, some external proof is obviously needed. Normally, of course, the only such evidence available will be the defendant's own statements. Thus, it is not surprising that the courts have required the trial judge to examine the defendant, and assure himself that the guilty plea is voluntarily and intelligently made. This is particularly true in a case where the defendant

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13. 222 Mo. 663, 222 S.W. 763 (1920).
15. State v. Cochran, 332 Mo. 742, 745, 60 S.W.2d 1, 2 (1933).

Interestingly enough, Mo. R. Crim. P. 25.04 might require a contrary result: "If a defendant . . . pleads equivocally . . . the court shall enter a plea of not guilty."
is unrepresented by counsel. In such cases, the United States Supreme Court has stated:

The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of the allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.17

However, while the unrepresented defendant receives a great deal of protection by the courts, this is not to say that the trial court can assume that a defendant represented by counsel has voluntarily entered his guilty plea.18 Thus, Rule 25.04 of the Missouri Rules of Criminal Procedure19 and Rule 11 of the Federal Rules of Criminal Procedure20 require the trial court to determine that the guilty plea is made "voluntarily with understanding of the nature of the charge" before accepting it. This, of course, implies some affirmative action on the part of the trial court in order to ascertain such understanding, and the cases have so held.21 In the recent case of State v. Roach,22 the Missouri Supreme Court explained the requirements of 25.04 in the following manner.

Before accepting a plea of guilty it is the duty of the trial court to ascertain that accused understands the consequences of his plea of guilty, and to satisfy himself that the accused has not been induced to enter the plea on the basis of false hope or ill-founded expectation of lenience. Among other things, it must be made clear to the accused that the court is not bound to accept the recommendations of the prosecuting attorney with reference to the amount of punishment or the matter of probation or parole; that it is within the power of the court to ignore all recommendations and impose whatever lawful punishment the court may deem appropriate, and to grant or withhold lenience, probation or parole as the court in its sole judgment may determine with or without regard to any suggestions, recommendations, promises or prior understandings. . . . This requires an affirmative demonstration on the record. . . . The transcript of the proceedings in the trial court at the time the plea of guilty is accepted should demonstrate a substantial compliance with the requirements of Rule 25.04.23

21. State v. Mountjoy, 420 S.W.2d 316 (Mo. 1967).
22. 447 S.W.2d 553 (Mo. 1969).
23. Id. at 556 (citations omitted).
Interestingly enough, just a few months after this Missouri decision, the United States Supreme Court decided the case of Boykin v. Alabama in which the Court found that a plea of guilty in a state court involves a waiver of several federal constitutional rights: the privilege against compulsory self incrimination, the right to trial by jury, and the right to confront one's accusers. Accordingly, it was stated, "We cannot presume a waiver of these three important federal rights from a silent record." The Court held that it was reversible error for the trial court to accept petitioner's guilty plea without an affirmative showing reflected by the record, that it was intelligent and voluntary. The result, of course, is that the "affirmative showing" required by the Roach case is now required as a matter of federal due process of law, and the question of effective waiver of these federal constitutional rights is governed by federal standards.

But despite the pronouncements of the Missouri and federal courts regarding standards and procedures, prior to Rose there was a void in Missouri law as to what effect, if any, the source of the misapprehension would have. That is, assuming the defendant was under a misapprehension that he would receive parole after pleading guilty, would he be denied the right to withdraw the plea if the source of the misapprehension were someone other than the state? Rose answered this question in the negative, at least in the situation where defense counsel misleads his client. However, the decision raises another question of far reaching importance. Has the Missouri court, by holding that the plea may be withdrawn if the defendant's attorney is the sole source of misapprehension, gone beyond the federal requirements of due process by not requiring any "state action" against the defendant's interest's in this situation?

Basically, Rose seems to stand for the proposition that state action is not required to be the source of a defendant's misapprehension. The court says that "The original statement (findings of the trial court) that no promises were made is limited by the further finding that the state made no promise." Furthermore, an examination of the cases cited by the court in support of its position shows that they were not concerned with any state action limitation; instead the courts were concerned with the injustice of holding a defendant to a guilty plea induced by a mistaken belief. Based upon these facts it could be concluded that the court did in fact dispense with any state action requirement in this situation, thereby going beyond federal due process requirements to do justice.

Nevertheless, there is a very plausible argument that the state action theory was not dispensed with by Rose. Since the subjective federal standard for waiver of constitutional rights requires "an intentional relinquishment or abandonment of a known right or privilege," state courts are required to take affirmative action to insure that the defendant's plea of guilty involves an intentional waiver of federal constitutional rights.

26. State v. Rose, 440 S.W.2d 441, 446 (Mo. 1969).
28. Several United States Supreme Court decisions strongly suggest a subjective federal standard of voluntariness of guilty pleas which applies to the states
Accordingly, if a defendant pleads guilty while under a misapprehension, the court's failure to uncover the involuntary nature of the plea, regardless of the source of the misapprehension, arguably would constitute the requisite state action against the defendant's rights. Therefore, the Rose decision may be based on the dictates of due process of law.

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through the due process clause. The Supreme Court has incorporated the principles of Johnson v. Zerbst into the area of guilty pleas. In Johnson the Court stated that there must be "an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. 458, 464 (1938). Furthermore, in Boykin v. Alabama the Court observed,

Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. 395 U.S. 238, 242 (1969).

The Supreme Court has also said, about Johnson, in a federal case involving Fed. R. Crim. P. 11,

Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. McCarthy v. United States, 394 U.S. 459, 466 (1969). In his dissent in Boykin, Justice Harlan concludes that the decision binds the states to the rigid requirements of Fed. R. Crim. P. 11. Boykin v. Alabama, 395 U.S. 238, 245 (1969). If this approach is followed by the Supreme Court, state court judges will need to make a very extensive inquiry into the question of the voluntariness of a guilty plea, see McCarthy v. United States, 394 U.S. 459 (1969) (judge should have questioned defendant on intent—factual basis for plea).

29. The whole guilty plea process may also be regarded as a creation of the state, and any flaws in the process, including denial of effective assistance of counsel who misrepresents the facts to his client, arguably would constitute a denial of due process.