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Recent Cases

ADMINISTRATIVE LAW: JUDICIAL REVIEW: WEIGHT GIVEN TO CONCLUSIONS OF LAW BY A HEARING EXAMINER

Adduddell v. Bd. of Admin., Public Employees' Retirement System

The petitioner was the widow of a police officer of Oxnard, California. After the death of her husband the petitioner filed an application for surviving spouse benefits with the Public Employees' Retirement System, but the application was denied. The System claimed that the divorce which her first husband had obtained against her had not been valid, that consequently she had never been legally married to the decedent, and that she was therefore ineligible for survivor's benefits. On administrative appeal a hearing was held before a hearing examiner of California's Office of Administrative Procedure. The examiner found that the petitioner was the putative wife of the decedent and as such was entitled to the benefits. The Board of Administration accepted the examiner's finding that the petitioner was the putative wife of the decedent, but rejected his legal conclusion as to her right to benefits. Upon a further hearing the Board denied petitioner's application.

Petitioner thereafter petitioned the superior court for a writ of mandate directing the defendant Board to set aside its decision and pay her the benefits. The trial court agreed with the findings of the Board that the petitioner was ineligible for survivor's benefits even though she had been the decedent's putative spouse. On appeal, the court of appeal held that the trial court had erred in its conclusion of law and remanded the case to the superior court with directions to issue a peremptory writ of mandate requiring the defendant to pay benefits to the petitioner.

Although the Adduddell opinion deals with the substantive issue of the eligibility of the putative wife to receive survivor's benefits, the case indicates the increasing power and authority of the hearing examiner. When public agencies first found the need for separate individuals to conduct the increasing number of hearings at which "circumstantial facts" were at issue, the status of those to whom that duty was delegated was quite low. Since the agencies could not afford to pay attractive salaries, the competence of the original hearing examiners was not altogether satisfactory. As a result, when administrative decisions were reviewed, any conclusions of the hearing examiner were greeted with skepticism. Today the importance of

2. California's writ of mandate is equivalent to Missouri's writ of mandamus.
3. 8 Cal.App.3d at 250, 87 Cal.Rptr. at 272.
5. Id. at 1029-32.
competent hearing examiners is generally acknowledged, and the salaries, while not yet commensurate with the degree of competence desired, are in many cases sufficient to attract persons of reasonable ability. Yet some of the skepticism which had been accorded to the reports of the earliest hearing examiners has survived.

At the federal level, the status of hearing examiners was elevated somewhat in 1946 with the adoption of the Federal Administrative Procedure Act. Hearing examiners had, by that time, become relatively numerous among federal agencies, at least as compared with their state counterparts. The APA made specific reference to hearing examiners and granted them new powers. First, the APA gave the hearing examiner the power to make recommended or initial decisions. In applying this provision, the United States Court of Appeals for the District of Columbia held that the Federal Power Commission was powerless to make a final order until such an intermediate report had been filed. Moreover, two United States Supreme Court decisions made prior to the adoption of the APA indicated that unless a statute or binding procedural rule otherwise requires, an examiner's interim report or other statement of proposed findings is necessary to satisfy due process requirements unless the issues in controversy have been adequately defined elsewhere.

Second, the APA provides that the examiner's decision is to be part of the record on review and that the court must consult the "whole record" on review. Professor Kenneth C. Davis has emphasized the importance of this provision, because of the impact of the examiner's findings on the reviewing court and the fact that if courts give weight to such reports, so must the agencies. Moreover, the APA provides that the examiner's initial decision may become the final decision of the agency if (1) no party appeals; or (2) if the agency does not of its own motion call up the case. Professor Kenneth C. Davis, however, dismisses the importance of this provision and insists that the power of the examiner is still in substance only one of making recommendations.

Other important effects of the APA on the status of the hearing examiner's decisions included the abolition of the absolute requirement of each agency to reach its own conclusions on the evidence and the implicit

6. 2 K. Davis, Administrative Law Treatise § 10.05 (1958).
7. Id.
9. 2 K. Davis, supra note 6, at § 10.01.
10. Administrative Procedure Act §§ 5 (c), 7 (b), 8 (a), 5 U.S.C. §§ 554 (d), 556 (c), 557 (b) (Supp. IV, 1969).
14. Id. at § 7 (c), 5 U.S.C. § 556 (d).
15. 2 K. Davis, supra note 6, at § 10.03.
17. 2 K. Davis, supra note 6, at § 10.06.
requirement that the examiner's recommended decision be furnished to the parties prior to any further decision or modification by the agency or a review board. Despite these developments, it must be remembered that the examiner's decisions are still limited by the provision that "the agency shall . . . have all the powers which it would have in making the initial decision," meaning that the agency can evaluate the evidence in the record and make its own decision regardless of the recommendation of the examiner.

While the APA gave weight to the examiner's findings, exactly how much weight such findings were to be accorded developed into a major problem, which has been dealt with in different ways by the various appellate circuits. The situation was clarified somewhat by the Supreme Court in *Universal Camera Corporation v. NLRB*. The NLRB had held a hearing to determine whether an employee was wrongfully discharged. Although the hearing examiner was not satisfied that the employer's motive in firing was reprisal for testimony at another hearing, a majority of the Board disagreed and ordered the employee's reinstatement. The Board applied for an enforcement order, which was granted by the Second Circuit Court of Appeals. Speaking for the majority, Judge Learned Hand stated, although the Board would be wrong in totally disregarding his [the hearing examiner's] findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision. This we say because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity.

On appeal the United States Supreme Court, in a 7-2 decision, reversed. Mr. Justice Frankfurter dismissed Judge Hand's argument, stating that, "reviewing courts should . . . give to the examiner's report such probative force as it intrinsically commands." He further explained that "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." He also suggested that the significance

18. *Id.* at § 10.09.
20. Eastern Coal Corp. v. NLRB, 176 F.2d 131 (4th Cir. 1949); NLRB v. LaSalle Steel Co., 178 F.2d 829 (7th Cir. 1949); NLRB v. Minnesota Mining & Mfg. Co., 179 F.2d 323 (8th Cir. 1950); NLRB v. Continental Oil Co., 179 F.2d 552 (10th Cir. 1950); NLRB v. Universal Camera Corp., 179 F.2d 749 (2d Cir. 1950); Pittsburg, S.S. Co. v. NLRB, 180 F.2d 731 (6th Cir. 1950).
22. NLRB v. Universal Camera Corp., 179 F.2d 749, 753 (2d Cir. 1950).
25. *Id.* at 496.
of the examiner's findings should vary directly with the importance of witness credibility. 28

**Universal Camera** failed to settle the question. Confusion developed as soon as the same case was decided on remand. 27 Judge Hand ruled that the Board could reject an examiner's findings based on his evaluation of oral testimony only if the Board could do so through the rational use of the Board's specialized knowledge 28 or upon a finding that the examiner has been unreasonably naive in believing a witness. 29 Judge Frank asserted in his concurring opinion that Hand's interpretation of the Supreme Court's mandate was too restrictive. 30 He opined that the Board was not bound by an examiner's finding of facts about which no witness testified but which the examiner inferred from other believed testimony. 31 In 1954 the District of Columbia Court of Appeals in *Allentown Broadcasting Corp. v. FCC*, 32 relied on Hand's interpretation, holding that an examiner's finding based on witness demeanor should not be overruled by a Board without a "very substantial preponderance in the testimony as recorded." The Supreme Court reversed. 33 Mr. Justice Reed stated that the district court's holding was equivalent to the application of a "clearly erroneous" test, such as that contained in Rule 52(a) of the Federal Rules of Civil Procedure. He asserted that such a rule would give too much latitude to the examiner at the expense of the Commission 34 especially where the facts critical to the disposition of the case are policy or legislative facts as approved by the circumstantial facts typically submitted for jury determination.

Since *Allentown* the courts have accepted the idea that an agency may reverse the examiner even on questions based on witness credibility. 35 At the same time, a reviewing court may adopt the examiner's findings rather than those of the agency. 36 Thus, according to the rule now followed by federal courts, the agency has final factual determination, so long as its findings are based on "substantial evidence in the light of the whole record." 37 The examiner's findings, when based primarily on witness credibility, are a significant part of the record to which the reviewing court looks to find "substantial evidence." Decisions of reviewing courts that administrative findings are not supported by "substantial evidence" often rest in part upon findings of examiners in conflict with the agencies' findings. 38 The state courts, however, place considerably less importance upon

26. Id.
27. NLRB v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951).
28. Id. at 430.
29. Id. at 431.
30. Id. at 432 (concurring opinion).
31. I.e., "Secondary" and "derivative inferences." Id. at 432. 2 K. Davis, *supra* note 6, suggests at § 10.04 that Judge Frank's statement "remains a reliable guide."
32. 222 F.2d 781, 786 (D.C. Cir. 1954).
34. Id. at 364.
35. See cases cited in 2 K. Davis, *supra* note 6, at § 10.04, n. 29.
36. See *In re* United Corp., 249 F.2d 168 (3d Cir. 1957).
37. 4 K. Davis, *supra* note 6, at § 30.05.
38. See Bituminous Material & Supply Co. v. NLRB, 281 F.2d 365 (8th Cir. 1960) and other cases cited in 2 K. Davis, *supra* note 6, at § 10.04 (Supp. 1965).
hearing examiners' findings. The dominant view among state courts is that the primary power to make findings of fact is in agency heads rather than in hearing examiners. In California, the jurisdiction in which Addudell was decided, it has been stated that an agency, if dissatisfied with the examiner's proposed opinion, may grant a new hearing and decide the case anew on record and argument.

The significance of a hearing examiner's findings depends in large measure on the scope of review allowable to the reviewing court. A federal court's scope of review is outlined in the APA. It provides that the reviewing court has the power to review all questions of law, interpret statutory and constitutional provisions, and determine whether factual findings are arbitrary, unconstitutional, outside the agency's jurisdiction, procedurally infirm or unsupported by "substantial evidence." The scope of review of Missouri courts is outlined by the state constitution, statutes, and a rule of the supreme court. The scope of jurisdiction.


42. Id. states:
To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
(I) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

43. Mo. Const. art. V, § 22, which states:
All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.
44. §§ 536.100, .130, .140, RSMo 1969.
45. Mo. R. Civ. P. 100.03, .06, .07. Rule 100 consists of the practice and
dicial review of administrative decisions in Missouri depends, to some extent, on whether the proceeding is a "contested case." Review of administrative rule making, where no "contested case" is involved, is reviewable through a declaratory judgment. Missouri law confines review of factual determinations in a manner similar to that of the APA. Missouri lawmakers departed from the APA approach in providing specifically for judicial review of so-called "mixed questions" of law and fact, and in allowing alternatives as to what constitutes the record. The statute exempts from its provisions those agencies which have their own statutory review proceedings, and is not applicable to agencies not required by statute to hold hearings. The Administrative Hearing Commission's final decisions are subject to these provisions. As one noted scholar has pointed out, statutory language is not necessarily the determinant criteria in the decision as to the proper scope of review. Because statutory and constitutional provisions are so broad and general, their directives are rarely "so narrow as to prevent a court from making the review as broad or as narrow as the court deems proper under the particular circumstances."

Procedure provisions of Chapter 536, RSMo 1969 relating to circuit court and appellate court administrative review. The portions of Chapter 536 which are not included in the rule are the provisions dealing with practice and procedure before the agencies themselves, and section 536.050, dealing with jurisdiction and venue.

46. § 536.100, RSMo 1969; Mo. R. Civ. P. 100.03. "Contested case" is defined as "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by statute to be determined after hearing." § 536.010 (3), RSMo 1969.

47. Mo. Const. art. V, § 22.

48. § 536.050, RSMo 1969, provides:
The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented....

49. § 536.140 (2), RSMo 1969; Mo. R. Civ. P. 100.07 (b) reads as follows: Scope of Judicial Review—judgment—appeals.—The inquiry may extend to a determination of whether the action of the agency
(1) Is in violation of constitutional provisions;
(2) Is in excess of the statutory authority or jurisdiction of the agency;
(3) Is unsupported by competent and substantial evidence upon the whole record;
(4) Is, for any other reason, unauthorized by law;
(5) Is made upon unlawful procedure or without a fair trial;
(6) Is arbitrary, capricious or unreasonable.
(7) Involves an abuse of discretion....

Note, however, that the statute does not allow judicial determination of whether the agency's action was "clearly erroneous." This may be interpreted as a legislative bar to substitution of judgment by the reviewing court.

50. 536.140 (3), RSMo 1969; Mo. R. Civ. P. 100.07 (c).

51. 536.130, RSMo 1969; Mo. R. Civ. P. 100.06.


54. 2 F. Cooper, State Administrative Law 664 (1965).
Considerable importance is attached to the classification of a particular finding as "law" or "fact." There is a large middle ground of so-called "mixed questions" of law and fact, consisting of "inferences of ultimate fact." Application of statutory requirements to particular fact situations, such as occurred in Adduddell, and indeed in most reported administrative law cases typify this broad category. Such questions as "Is A the owner?" "Is W the wife of H?" "Is the book 'obscene'?" "Is the foreman an employee?" are common examples of "mixed questions." If a court designates an administrative finding as "fact," the court will not review it; whereas, if the court designates such a finding as one of "law," it can substitute its own judgment for that of the agency. Thus, a reviewing court's characterization of the question as "law" or "fact" in determining its scope of review has broad implications as to the weight of an examiner's findings. Although an examiner purportedly has no authority to determine with finality a question of law, his conclusions of law involved in resolving "mixed questions" can have great weight to the extent that a reviewing court classifies such "mixed questions" as "questions of fact."

The legal conclusions of hearing examiners in federal agencies have been accorded great influence because federal courts have tended to classify the application of legal concepts to facts as "fact," thereby refusing to review them. The basic approach of the federal courts, as laid out by the United States Supreme Court, is that they should affirm an administrative decision involving the application of statutory terms to undisputed or established facts if the decision has a rational basis. This approach was clarified in NLRB v. Hearst Publications, Inc. in which the court was asked to review an NLRB decision regarding whether newsboys were "employees" within the meaning of the National Labor Relations Act. Mr. Justice Rutledge, speaking for seven members of the Court, stated, "it is not the Court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." He went on to declare that "where the question is one of specific application of a broad statutory term," the Board's decision should "be accepted if it has 'warrant in the record' and a reasonable basis in law." Judge Irving R. Kaufman recently explained this approach employed by the federal courts. After pointing out that Congress has specified that common law rules apply to NLRB determinations as to whether one is an employee or an independent contractor, he states:

The Supreme Court has recognized that such a determination of pure agency law involves no special administrative expertise that a

55. Id. at 708.
56. 4 K. Davis, supra note 6, at § 30.01. For discussions of what motivates a court's treatment of "mixed questions" as either "law" or "fact," see §§ 30.01-14; 2 F. Cooper, supra note 54, at 668 ff.
57. 4 K. Davis, supra note 6, at §§ 30.05, .14.
58. See cases cited in 4 K. Davis, supra note 6, at §§ 30.01, .03.
59. The leading case for this proposition is Gray v. Powell, 314 U.S. 402 (1941).
60. 322 U.S. 111 (1944).
61. Id. at 180.
62. Id. at 151.
64. Id. at 203.
court does not possess. The Court has instructed us, however, that
the N.L.R.B.'s decision that particular persons are employees and
not independent contractors must not be set aside simply because
an appellate court, as an original matter, would decide the case
differently.65

However, even federal courts occasionally abandon judicial restraint
where the decision seems "just plain wrong." In Boyd v. Folson66 the court
of appeals reviewed a claim for benefits which depended on whether the
claimant was "living with" her husband at the time of his death. The court
classified this "mixed question" as one of law and substituted its own judg-
ment. Chief Judge Biggs, speaking for the majority in a 2-1 decision, observed:

[T]his finding by the referee was in the nature of an ultimate
finding of fact, and is nothing more than a legal inference from
other facts. . . . [S]ince ultimate facts must be reached by a process
of legal reasoning based on the legal significance to be afforded
primary evidentiary facts this aspect of administrative fact-finding
has its law-making aspect, and is therefore reviewable.67

State courts, for the most part, have been less willing to adopt the
federal court's philosophy of judicial restraint, and have been more willing
to review the reasonableness of the agencies' inferences of ultimate facts
derived from more basic factual findings.68 Typical of the state approach is
a Pennsylvania decision in which the court overturned an agency determina-
tion which had been sustained by the court below as supported by "sub-
stantial evidence."69 This active tendency of state courts to review adminis-
trative determinations of "mixed questions" reduces the weight given to a
hearing examiner's conclusions of law.70

Guidelines for a similarly sweeping judicial review of administrative
decisions involving "mixed questions" are set forth by a Missouri statute:

Whenever the action of the agency being reviewed does not involve
the exercise by the agency of administrative discretion in the light
of the facts, but involves only the application by the agency of the
law to the facts, the court may weigh the evidence for itself and
determine the facts accordingly. The law applied by the agency as
foresaid may include the agency's own rules. In making such
determination the court shall give due weight to the opportunity of
the agency to observe the witnesses, and to the expertise and
experience of the particular agency.71

65. Id. The decision to which Judge Kaufman referred was NLRB v. United
66. 257 F.2d 778 (3d Cir. 1958).
67. Id. at 781.
68. 2 F. Cooper, supra note 54, at 707, 709.
69. Pennsylvania State Bd. of Medical Educ. and Licensure v. Schireson, 360
70. Professor Cooper's studies have shown that state courts tend to treat as
questions of law such matters as application of statutory conditions for unemploy-
ment compensation or workmen's compensation benefits. See 2 F. Cooper, supra
note 54, at 716-21 and cases cited therein.
71. § 536.140 (3), RSMo 1969; Mo. R. Civ. P. 100.07 (c) is identical.
Some decisions of Missouri courts reviewing agency findings have adopted the spirit of these guidelines.\textsuperscript{72} In many of these decisions, the court simply reviewed the agency's decisions on these "mixed questions" without any ruling or comment regarding the court's power to review them.\textsuperscript{73} This approach illustrates Professor Davis's observation that whenever a court substitutes its own judgment for that of the agency, it merely decides, without stating its reasons for not applying a "rational basis" test.\textsuperscript{74} On the other hand, it appears that a majority of Missouri cases construe the statutory provisions very narrowly, producing a 'hands off' policy closer to the approach of federal courts than that of most state courts. Soon after the adoption of Missouri's statutory appeal procedure, the Missouri Supreme Court, in an en banc decision, ruled that "the reviewing court may not substitute its own judgment on the evidence for that of the administrative tribunal."\textsuperscript{75} Another en banc decision shortly thereafter construed the court's function under the statutory scheme to be "to decide whether such tribunal could have reasonably made its findings, and reached its result, upon consideration of all evidence before it."\textsuperscript{76} A 1952 decision stated that the court should view the record "in a light most favorable to the findings of the Commission."\textsuperscript{77} \textit{Iron County v. State Tax Commission}\textsuperscript{78} is a recent application of this "hands off" approach. The "mixed question" involved was the valuation of property for assessment purposes. The only basis for the Commission's finding was expert testimony which was inadmissible but not properly objected to. The supreme court found "that this evidence

\textsuperscript{72} Recent decisions in point include West Lake Quarry and Material Co. v. Schaffner, 451 S.W.2d 140 (Mo. 1970), where the supreme court reversed a decision by the director of revenue involving a determination whether certain machinery was subject to state sales tax. In Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 (Mo. 1969) the court determined whether the property in question was exclusively used for purely charitable purposes and therefore exempt from taxation, and agreed with a city board of delinquent tax adjustment that it was not. The St. Louis Court of Appeals followed the same procedure in Burger King, Inc. v. Weisz, 444 S.W.2d 517 (St.L. Mo. App. 1969), determining whether appellant's hamburger stand was a "drive-in" within the meaning of a zoning ordinance. An extreme example of active substitution of a Missouri court's judgment for that of an agency is State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell, 426 S.W. 11 (Mo. 1968), noted in Friedhoff, \textit{Mandamus and Discretionary Acts—A Novel Approach}, 34 Mo. L. Rev. 408 (1969), where the supreme court applied the extraordinary writ of mandamus to upset the determination of the Industrial Commission that a laundry was an "industrial plant" within the meaning of a Missouri statute. It has been suggested that this case stands for the proposition that mandamus may be used as a means of overturning agency decisions clearly within the agency's discretion, but this case rests on doubtful authority. Friedhoff, \textit{Mandamus and Discretionary Acts—A Novel Approach}, 34 Mo. L. Rev. 408-10 (1969).

\textsuperscript{73} See West Lake Quarry and Material Co. v. Schaffner, 451 S.W.2d 140 (Mo. 1970); Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 (Mo. 1969); Burger King, Inc. v. Weisz, 444 S.W.2d 517 (St.L. Mo. App. 1969).

\textsuperscript{74} 4 K. DAVIS, supra note 6, at § 30.07.

\textsuperscript{75} Wood v. Wagner Elec. Corp., 355 Mo. 670, 672, 197 S.W.2d 647, 649 (En Banc 1946).


\textsuperscript{77} Thacker v. Massman Const. Co., 247 S.W.2d 623, 627 (Mo. 1952).

\textsuperscript{78} 437 S.W.2d 665 (Mo. En Banc 1968).
constitutes sufficient and substantial evidence to support the decision of the commission,"79 even though the evidence in this case was required to overcome a presumption of validity of an assessor's valuation approved by the county board of equalization.80

Thus, given the "hands off" tendency of Missouri courts, as compared with the predominant "judicial activism" of most state courts, a Missouri hearing examiner's findings on "mixed questions" have almost as much chance of survival as do federal decisions. However, since Missouri courts have some history of substituting judgment, there is no real assurance as to whether or not a Missouri court will review an administrative determination of a "mixed question."

The question remains [conceding the court's relatively unchecked power to review a given question], what are the formal rules governing the weight to be given to the conclusion of a hearing examiner? The courts have said very little about this problem in their decisions. That a federal court, when it deviates from its normal policy of restraint, will look at the examiner's reasoning is apparent in Boyd v. Folsom.81 The court noted that the referee's conclusion "was either induced by an erroneous view as to the legal standard to be applied to such contributions or if the correct standard were applied is not supportable by the record."82 Some legal writers apparently believe that the role of a federal hearing examiner remains essentially that of recommending.83 On the other hand, it has also been argued that the future potential of the influence of examiners' findings is quite high; that the inevitable acceptance of the examiner as a "man of eminence" will affect judgments about what he should do and how he should do it.84

In the state arena even less has been written on the problem, and the weight given to examiners' legal conclusions remains a matter of speculation. Even Adduddell is mute on the subject. But the Adduddell decision is an example of a state court looking back to the hearing examiner's decision and adopting it over the agency's decision.85 The California court did so even though the agency is generally regarded as having the final administrative word, and is spite of a prior decision allowing an agency to reject the examiner's findings altogether.86

Adduddell has a close parallel in a recent Missouri decision. In Orphant v. St. Louis State Hospital, Division of Mental Diseases87 an injured volunteer worker's claim for workmen's compensation benefits depended on whether she was an employee within the meaning of the statute. At the hearing, the referee ruled that the plaintiff was an employee and awarded her $2598.75. The award was reversed by the Industrial Commission on the

79. Id. at 673.
80. See also Tom Boy, Inc. v. Quinn, 431 S.W.2d 221, 225 (Mo. En Banc 1968); McGrath v. Railway Express Agency, Inc., 411 S.W.2d 260, 262 (St.L. Mo. App. 1967).
81. 297 F.2d 778 (3d. Cir. 1958).
82. Id. at 782.
83. 2 K. DAVIS, supra note 6, at § 10.04.
84. W. GELLHORN and C. BYSE, supra note 4, at 1030.
87. 441 S.W.2d 355 (Mo. 1969).
ground that the evidence failed to show the plaintiff to be an employee. On appeal, the circuit court reversed and reinstated the finding of the referee. The supreme court affirmed the circuit court's decision. In Orphant, as subsequently in Adduddell, the reviewing court overturned the legal conclusions of the agency in favor of those of the hearing examiner. Adduddell, however, goes somewhat beyond Orphant. In the latter decision, the original reviewing court determined that the referee's conclusion was correct and the agency's erroneous, with the Missouri Supreme Court merely affirming the circuit court;88 the California court of appeals rejected not only the findings of the agency, but also those of the lower court in reinstating the decision of the hearing examiner.89

It is possible that these two decisions mark a new trend among state courts to give greater weight to a hearing examiner's conclusions of law. If Orphant can be viewed as standing for the proposition that a reviewing court in Missouri may accept the legal conclusions of a hearing examiner over those of the agency, perhaps California's action in Adduddell will herald a similar extension in Missouri. With the rapidly increasing case load resulting from administrative appeals, giving more authority to experienced, competent hearing examiners would certainly be a welcome development. On the other hand, it is equally arguable that the courts in these decisions were merely exercising their own independent judgment on the legal issues, and that their agreement with the conclusions of the hearing examiner was merely coincidental. The courts' failure to discuss any ramifications concerning increased power or influence of hearing examiners provides tacit support for this view. In either case, the courts would do well to discuss this issue and provide guidelines for future reference. Until such an opinion is rendered, the status of the legal conclusions of state hearing examiners will remain nebulous.

TIMOTHY V. BARNHART

88. Id.
ATTRACTION NUISANCE—THE INCREASING BURDEN OF
LAND OWNERSHIP

Salanski v. Enright

Plaintiff, a 10 year old boy, filed suit seeking $100,000 in damages alleging that defendants failed to exercise proper care in keeping their premises safe. It was further alleged that defendants allowed and maintained dangerous treehouses on their property which were built high above the ground, well knowing that children regularly played on them. Finally, it was asserted that defendants failed to warn plaintiff that it was dangerous to climb in the trees and play upon the tree houses, and that they induced, encouraged, allured and invited plaintiff to their premises to play in the tree houses well knowing that a child could easily fall and be injured. The trial court dismissed plaintiff's suit on the grounds that he had failed to state a cause of action, whereupon plaintiff appealed to the Supreme Court of Missouri. In reversing and remanding the cause for trial the court held that while the petition may be subject to being made more definite, its allegations hypothesize facts that would allow a recovery under section 339 of the Restatement (First) of Torts, which the court thus adopted as the law of Missouri.

This decision revives interest in the attractive nuisance doctrine as a basis for overcoming the defenses of a landowner against an infant entrant in an action to recover for personal injury or death. Salanski is the first Missouri case since 1939 wherein a plaintiff has been given a chance for recovery under the attractive nuisance doctrine. A change in the law was forecast in 1967 but until now it was impossible to predict what form the change would take.

Traditionally, the Missouri courts have required plaintiffs to satisfy two requirements before allowing recovery under the attractive nuisance doctrine. First, there must be "allurement" resulting from the attractiveness of the injury-producing instrumentality or condition. Second, the injury-producing instrumentality or condition must have been "inherently dangerous" rather than a condition made dangerous by the collateral or casual negligence of the defendant under the particular circumstances.

The most widely cited Missouri case restating these requirements is

1. 452 S.W.2d 148 (Mo. 1970).
2. Thieret v. Hoel, 412 S.W.2d 127, 130 (Mo. 1967). The court said: "[I]t may well be that this jurisdiction should reexamine its prior decisions in this entire field of the law and reconsider the suggestions and criticisms of the experts."
3. The attractive nuisance doctrine, from its first recognition in Koons v. St. Louis & Iron Mt. R.R., 65 Mo. 592 (1877) until the last time it was approved as a basis for recovery in Hull v. Gillioz, 344 Mo. 1227, 130 S.W.2d 623 (1939), is the subject of excellent comment in a prior edition of the Missouri Law Review. Prewitt, The Attractive Nuisance Doctrine in Missouri, 29 Mo. L. Rev. 24 (1964). The Missouri Supreme Court in Arbogast v. Terminal R.R. Ass'n of St. L., 452 S.W.2d 81 (Mo. 1970) said at 84: "Now that § 342 of Restatement of the Law, Torts, has been adopted in this state it would seem that § 339, 2 Restatement of the Law, Torts, First (1934) should also apply. . . ."
5. Id.
Hull v. Gillioz,\(^6\) in which the court allowed recovery to an eight year old plaintiff who lost a leg when it was crushed by a steel I-beam. There plaintiff presented evidence that defendant stacked I-beams on an unfenced, unguarded lot and that defendant had knowledge that children habitually played with these beams, banging them together to produce a loud "twang". Although the court affirmed a recovery for the plaintiff, it went out of its way to specifically reject section 339 of the Restatement (First) of Torts as a basis for recovery. The court emphasized that the Restatement conflicted with settled Missouri law in two respects, namely, the two traditional Missouri requirements mentioned above—"allurement" and "inherently dangerous conditions."\(^7\)

On a motion for rehearing the court in Hull more fully explained its position regarding the meaning of the "inherently dangerous" requirement. The court said that an object might be inherently dangerous either because of danger inhering in the instrumentality itself or inhering in the condition in which it was permitted to exist.\(^8\) This explanation indicated that either the object itself or its circumstantial position might be "inherently dangerous" and that if either or both tests were satisfied this requirement ("inherently dangerous") would be met. Despite this lucid description of "inherently dangerous" set forth in Hull, two years later in Emery v. Thompson\(^9\) the court denied recovery to a plaintiff whose minor son had been killed by a falling railroad tie. Plaintiff had offered evidence that children habitually played on the stack of railroad ties and that defendant had knowledge of the children's presence. Even though the case was factually indistinguishable from Hull, the court held that railroad ties were not "inherently dangerous" because the danger, if any, was in the negligent manner in which they were piled.\(^10\) For this reason, the court said, the danger existed only because of mere casual or collateral negligence of others in piling the ties.\(^11\) Thus, whatever encouragement an attractive nuisance

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6. Id.
7. By expressly adopting section 339 Salanski rejects the traditional view espoused by Hull. Salanski must, therefore, be considered as having overruled Hull.
9. 347 Mo. 494, 148 S.W.2d 479 (1941).
10. Id. The court indicated it was foreclosed from deciding if railroad ties are "inherently dangerous" by Kelly v. Benas, 217 Mo. 1, 116 S.W. 557 (1909). The court said that Kelly stands for the proposition that lumber, however piled, does not come under the attractive nuisance doctrine. Kelly involved a nine year old boy who was killed while playing on a pile of lumber at defendant's box factory. Id. at 498, 148 S.W.2d at 480. The boards were 16 feet long, 2 inches thick, and 2 feet wide. It is hard to understand how the court could place railroad ties under the blanket classification of lumber and exempt them from the attractive nuisance doctrine. Size 2" x 24" boards are hardly synonymous with railroad ties.
11. The term casual or collateral negligence first appears in Hull at 628. The cases cited in Hull as authority for the proposition that casual or collateral negligence is some sort of exception to the inherently dangerous requirement deal mainly with the respective liability of a principal and independent contractors; if the dangerous condition is created by an independent contractor he is liable, not the principal. This would be a defense to be set up by the defendant and in Emory there is no mention that an independent contractor is involved. It seems rather unreasonable that the company would not be liable for the negligence of their own employees.
plaintiff might have received from the holding in Hull was seriously reduced by the Emery decision, which seemed to impose a third requirement, namely "non-collateral negligence."

The attractive nuisance doctrine was brought before the court again in 1941 by parents of a nine year old boy who, while playing in defendant's rock quarry, was killed when struck by the handle of a coopers bucket. Plaintiffs presented evidence that defendant knew that children frequently played around the buckets and that if these bucket handles were left in an upright position without the fastening ring in place they could be very dangerous. The court, in denying recovery, said that leaving the buckets standing without the ring attached was no more than mere casual negligence and there was not evidence sufficient to establish that defendant maintained an attractive nuisance. The court seemed to add a fourth requirement to those already established ("allurement," "inherently dangerous," and "non-collateral negligence") when it declared that there can be no nuisance, attractive or otherwise, except from a condition maintained over an "unreasonable period of time." The Missouri Supreme Court quashed the opinion of the St. Louis Court of Appeals on the theory that the opinion contradicted the law of the attractive nuisance doctrine laid down in Hull even though Hull never mentioned the "unreasonable period of time" requirement. Thus, by 1941 if an infant plaintiff was to recover under the Missouri attractive nuisance doctrine he was required to show: (1) that he had been lured onto the land by the dangerous condition or instrumentality; (2) that the instrumentality or condition was inherently dangerous; (3) that the condition was not created by the negligence of some other person; and (4) that the defendant had allowed the condition to exist for an unreasonable period of time.

Between 1941 and 1970, with one possible exception, every plaintiff who invoked the attractive nuisance doctrine in order to overcome the defendant's "no duty" defense was denied recovery. Thus, plaintiffs were

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13. A coopers bucket is a large steel bucket used in rock quarries to lift gravel or crushed rock.
14. 348 Mo. 1209, 1215, 159 S.W.2d 251, 254.
15. See note 11 supra.
17. Id. at 1215, 159 S.W.2d at 254.
20. Id.
22. Emery v. Thompson, 347 Mo. 494, 498, 148 S.W.2d 479, 480 (1941).
23. Cooper v. Finke, 376 S.W.2d 225 (Mo. 1964). This case involved a 14 year old boy who was injured while rocking back and forth on a graveyard marker when it fell and he was injured. Defendant was granted a summary judgment at the trial. The court did not decide if plaintiff made a case under the attractive nuisance doctrine but hinted that he did not. The court said that the record did not establish the contributory negligence of the plaintiff or the freedom from negligence of the defendant so the cause should be remanded for trial.
denied recovery where defendant left a trash fire burning and a three year old child was injured; 24 where a five year old boy drowned in a water filled excavation in front of a shiny aluminum tank; 26 where a five year old boy fell from a bridge of overlapping boards over an excavation; 28 where a five year old boy was cut on a jagged piece of marble on defendant's property; 27 where a four year old drowned in a pond on defendant's property; 28 where a fourteen year old boy was impaled on a reinforcing rod when the dirt around the edge of an excavation caved in. 29 By 1987 it was clear that the attractive nuisance doctrine was not much help to the attorney representing an infant land entrant in Missouri.

Thus in 1969, the parents of a five year old who drowned in an old well on defendant's property eschewed "attractive nuisance" and sought to establish liability on the theory that the boy was a "licensee" killed by a trap of which the landowner had actual knowledge. 30 Since children frequently played on defendant's property with defendant's knowledge and without objection, the plaintiffs argued that their son was a "licensee." The court upheld a $10,000 verdict for the parents because a landowner in Missouri was liable to a "licensee" for damages resulting from injuries due to an ultrahazardous condition or hidden peril of which the owner had knowledge but of which the "licensee" was ignorant. 31 The court equated ultrahazardous condition or hidden peril with the term "inherently dangerous" as used in the attractive nuisance cases. 32 Following Bichsel v. Blumhost, 33 if the child could be classified as a "licensee" the attractive nuisance doctrine offered no additional advantage to the plaintiff and had the marked disadvantages of the "allurement" and "unreasonable period of time" requirements. Because of the state of the law at that time, however, plaintiff was still faced with what amounted to an "inherently dangerous" requirement, (hidden danger, trap, snare, pitfall and the like).

In 1969, however, the Missouri Supreme Court adopted section 342 of the Restatement (First) of Torts, 34 which, in effect, removed the "inherently dangerous" requirement as a component of the infant licensee's prima facie case. Under section 342 the landowner is required to warn of or cure those defects, both natural and artificial, located on his land of which he has knowledge and which he realizes the "licensee" will not discover or realize the risk. 35 This requirement made a child's case considerably less difficult if the child could be classified as a "licensee."

27. Cox v. Gros, 360 S.W.2d 691 (Mo. 1962).
31. Id. at 306.
32. Id.
33. Id. at 301.
34. Wells v. Goforth, 443 S.W.2d 155 (Mo. En Banc 1969), noted in Pennington, Missouri Abrogates The "No Duty" Rule As To Social Guest: Restatement (First) Adopted 35 Mo. L. Rev. 252 (1970).
35. 2 Restatement (First) of Torts § 342 (1954).
Following the court's adoption of section 342 in Wells, the attorney representing the infant land entrant had an escape from the shackles of Missouri attractive nuisance law, which was fashioned by classifying the child as a "licensee." After Salanski the attorney representing the child trespasser or bare "licensee" should realize that the attractive nuisance doctrine may offer the better chance of recovery. Today, however, "attractive nuisance" is no longer as restrictive as formerly. The Restatement (First) of Torts section 339 states:

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.36

The most obvious change presented by section 339 is the abandonment of the allurement requirement.37 The inherently dangerous requirement has been replaced by an "unreasonable risk of death or serious bodily injury" requirement.38 The land owner is responsible for conditions of which he knows or should know.39 It should be noted that this is a stricter requirement than the actual knowledge required by section 342 of the Restatement (First) of Torts regarding the landowner's duty to the "licensee".40 However, it should also be noted that section 339 only applies to artificial conditions and not to natural conditions which are covered by section 342 of the Restatement (First).41

It is significant, moreover, that the court did not adopt section 339 Restatement (Second) of Torts but implicitly adopted the Restatement (First).42 The Restatement (Second) actually affords the landowner more  

36. Id. at 339. The court in Salinski sets out § 339 in footnote 1, 452 S.W.2d at 144.
37. 2 Restatement (First) of Torts § 339 (1934), comment on clause (a). See W. Prosser, Law of Torts 375 (3d ed. 1964).
38. 2 Restatement (First) of Torts § 339 (1934), comment on clause (b). This change is the most beneficial to the plaintiff. Now the danger does not have to lie in the character of the condition but rather in the careless or inattentive nature of the child trespasser. The emphasis is shifted from the nature of the condition to the nature of the child.
39. 2 Restatement (First) of Torts § 339 (1934).
40. Id. at § 342.
41. Id. at § 339.
42. Id. at § 342.
43. Arbogast v. Terminal R.R. Ass'n of St.L., 452 S.W.2d 81, 84-85 (Mo. 1970). This case involved a 12 year old girl who fell from a railroad trestle. The court
protection than the Missouri-adopted Restatement (First) in that under the Restatement (Second) the landowner is liable for conditions of which he knows or has reason to know.\textsuperscript{44} This requirement imposes no duty upon the landowner\textsuperscript{45} to acquire knowledge whereas the "should know" requirement of the Restatement (First) (which is now the law in Missouri) does impose such a duty upon the landowner.\textsuperscript{46}

In adopting section 339 of the Restatement (First) the court recognized that although section 339 would not normally apply to conditions of height, certain exceptions (including something which may be called the "distracting influence exception") must be made.\textsuperscript{47} The idea that a "distracting influence exception" is to be made part of the Missouri law is further shown by the court's approval of Cargill, Inc. v. Zimmer.\textsuperscript{48} The idea of a distracting influence lessening the normally strict contributory fault test put on the plaintiff land entrant has been recognized before in Missouri regarding an "adult invitee."\textsuperscript{49}

Now that Missouri has adopted the Restatement (First) positions concerning the invitee, licensee and child trespasser, the following chart may be helpful in relating these positions to the knowledge required of the landowner and the type of condition for which he will be held responsible.

\begin{center}
\begin{tabular}{|c|c|c|}
\hline
\textbf{actual knowledge} & \textbf{should know of} & \textbf{must know of} \\
\hline
\textit{Natural Conditions} & \textit{Artificial Conditions} & \\
\hline
§ 342 licensee (Wells v. Goforth) & § 343—invitee (Harbourn v. Katz Drug Co.) & § 343—invitee (possibly) \\
§ 343—invitee (Harbourn v. Katz Drug Co.) & § 339—child trespasser (Salanski v. Enright) & § 343—invitee (possibly) \\
§ 339—child trespasser (Salanski v. Enright) & § 342—licensee (Wells v. Goforth) & \\
§ 342—licensee (Wells v. Goforth) & § 343—invitee (Harbourn v. Katz Drug Co.) & \\
§ 343—invitee (Harbourn v. Katz Drug Co.) & & \\
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decided the case under § 339 but denied the plaintiff recovery because there was no evidence that the obvious danger of falling from the trestle was hidden from the child in any way.

\textsuperscript{44} Restatement (Second) of Torts § 339 (1965).
\textsuperscript{45} Id. at § 12.
\textsuperscript{46} Id.
\textsuperscript{47} Salanski v. Enright, 452 S.W.2d 143, 145 (Mo. 1970).
\textsuperscript{48} 374 F.2d 924 (8th Cir. 1967). This case dealt with a 12 year old boy who was killed when he fell from a 72 foot silo located on defendant's property. The court recognized that while the allurement requirement is not necessary under 339, it is of evidential importance in determining whether the child fully appreciated the danger. The court upheld a recovery under § 339 of the Restatement (Second) where the danger was obvious (height) because the pigeons had roosted in the top of the silo and diverted the child's attention from climbing. 32 Atl. L. J. 369, 778 (1968).
\textsuperscript{49} Harbourn v. Katz Drug Co., 318 S.W.2d 226 (Mo. 1958).
While *Salanski* represents a sharp break from the prior direction of the Missouri attractive nuisance doctrine, the court now must decide how it will interpret the requirements of the section 339. Missouri's prior case law would suggest a narrow interpretation, but the court's approval of *Cargill* hints at a more liberal interpretation. Missouri now belongs to the growing majority of jurisdictions which hold that a child's right to safety outweighs the landowner's prerogative to do whatever he wishes with his land.

LARRY M. BURDITT

**EXCLUSIONARY ZONING IN METROPOLITAN AREAS**

*McDermott v. Village of Calverton Park*¹

On January 15, 1958, the Board of Trustees of Calverton Park² adopted a zoning ordinance which, aside from providing for public buildings, parks, and golf courses, divided the city into four zoning districts. Each district restricted lot usage to one-family dwellings, the differences in the districts being in the amount of area covered by the lots.³ Beginning in 1946 and continuing for a period of several years, the McDermotts purchased adjoining lots in Calverton Park until they had acquired approximately two and one-half acres of land fronting on North Florissant Road. By 1958, Florissant Road had become a heavily traveled four-lane highway, and the McDermotts, displeased with the increased traffic, placed their property up for sale.⁴ In January, 1963 they entered into a contract to sell their property to Larry Witzer for $58,500 on condition that the McDermotts have the property rezoned so that a shopping center could be constructed thereon. The McDermotts' application for rezoning for commercial use and a later request for a permit to build a shopping center on their property were denied, and they filed suit to challenge the validity of the Calverton Park zoning ordinance.⁵

Two issues were presented to the court. The first issue was whether the earlier case of *Moline Acres v. Heidbreder*,⁶ should be overruled.⁷ There the Missouri Supreme Court held that a zoning ordinance limiting property usage in an entire community to one-family dwellings was not in accordance with a comprehensive plan as required by section 89.040, RSMo

1. 454 S.W.2d 577 (Mo. En Banc 1970).
2. Calverton Park is a small community with a population of around 1,700 located in the outlying area near St. Louis.
3. 454 S.W.2d 577, 579 (Mo. En Banc 1970).
4. *Id.*
5. *Id.* at 580.
6. 367 S.W.2d 568 (Mo. 1963).
7. 454 S.W.2d 577, 581 (Mo. En Banc 1970).
1959. Secondly, the court was presented with the issue of whether the McDermotts' rights under the fifth and fourteenth amendments of the Constitution of the United States and sections 10 and 28 of Article I of the Missouri Constitution were violated in that the ordinance was arbitrary and unreasonable. The McDermotts produced two real estate brokers who testified that the highest and best use of the property was commercial. The testimony indicated that the property had a value of $66,500 for commercial purposes and no more than $17,000 for residential purposes. The defendant introduced evidence to show that the residents of Calverton Park had easy access to at least four commercial shopping facilities within a short distance of the Village boundary line. Defendant also produced a city planning expert who testified that, in his opinion, the Village was properly zoned and that there were over ninety homes on Florissant Road, each of which was well maintained and desirable as residential property.

The court decided to overrule Moline Acres. That a comprehensive plan would, in most instances, require commercial districts was conceded. However, the court stated that St. Louis County is a unique situation wherein there are large numbers of people working in the City of St. Louis while living in the county in cities and villages designed primarily for residential purposes. The court also stated that the comprehensive

8. § 89.040, RSMo (1959) [now cited as RSMo 1969] states: "Such regulation shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of the land throughout such municipality.


10. U.S. Const. amend. XIV, § 1 states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

11. Mo. Const. art. I, § 10 states: "That no person shall be deprived of life, liberty or property without due process of law."

12. Mo. Const. art. I, § 28 states:
That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

13. 454 S.W.2d 577, 582 (Mo. En Banc 1970).

14. Id. at 580.

15. Id.

16. Id. at 581.

17. Id.
plan requirements of section 89.04018 could be met by a one-use ordinance such as the one in McDermott.19

In deciding the constitutional issue the court adopted a balancing approach. It balanced the financial loss to the McDermotts, if the ordinance were allowed to stand, against the loss in property values throughout the neighborhood and increased traffic problems that would result if a shopping center should be constructed. The court concluded that the loss in property values to the community, together with the increased traffic problems, outweighed the financial loss to the McDermotts and that the ordinance, therefore, was not arbitrary and unreasonable.20

The purpose of this note is to view McDermott in light of the conventional standards that courts apply to determine the validity of zoning ordinances and in light of what may be a new trend in zoning law—determination of a zoning ordinance's validity on the basis of the discrimination caused by the ordinance. To be valid, a zoning ordinance must be reasonable, not arbitrary, and must bear a substantial relationship to public health, safety, morals, and general welfare.21 Whether or not this test is met has traditionally been determined on the basis of several well-established standards. First, does the ordinance help control population density, lessen traffic congestion, lessen danger of fire, or reduce obstruction of light and air?22 Second, is the public interest and welfare promoted by the ordinance greater than the loss, in terms of property value, to the complaint?23 Finally, how do the uses allowed by the ordinance compare with the usage of surrounding property?24 The discriminatory aspect of zoning was recently rec-

18. See note 8 supra.
19. 454 S.W.2d 577, 582 (Mo. En Banc 1970).
20. Id. at 584.
24. Cromwell-Franklin Oil Co. v. Oklahoma City, 14 F.Supp. 370, 379 (W.D. Okla 1930); Robinson v. City of Los Angeles, 146 Cal. App. 2d 810, 816, 304 P.2d 814, 817 (1956); City of Littleton v. Quelland, 387 P.2d 814, 817 (Colo. 1963); Huttig v. City of Richmond Heights, 372 S.W.2d 833, 899-40 (Mo. 1969); Flora Realty
ognized by the U.S. Commission on Urban Problems and was described in the Commission's report as follows:

The abuses that such a multiplicity of government works on a metropolitan area are many, and we need not list them all here. One is discriminatory zoning that suburban towns adopt. Zoning, which is barely a body of law, very effectively keeps the poor and those with low incomes out of suburban areas by stipulating lot sizes way beyond their economic reach. Many suburbs prohibit or severely limit the construction of apartments, town houses, or planned unit developments which could accommodate more people in less space at potential savings in housing costs. Even where apartments are allowed, they are often limited in size of dwelling unit, effectively keeping out families with children who would presumably place a burden on school budgets. Zoning is also used by most suburban areas to keep out blue-collar industry which could go a long way in providing the types of jobs low-income people could take if they could afford to live in the suburbs.25

The multiplicity of governments mentioned in the Commission report is the result of an influx of low-income families to the central metropolitan areas and an equally heavy flow of middle and upper-income-families from central metropolitan areas into the suburbs.26 As a result of these population shifts many new political units have been created to serve the needs of the people. For example, in the Chicago metropolitan area there are 1,113 local governmental units; in Pittsburgh, 704; and in New York, 551.27 Zoning laws are passed by these individual governmental units without regard for the outside world28 with little thought given to providing a balanced community for all economic levels.29

Discrimination of the type mentioned in the Commission report can result from the exercise of such exclusionary zoning practices as large lot zoning; zoning excluding certain uses such as apartment buildings, mobile home parks, or commercial establishments; ordinances fixing minimum house size requirements; and ordinances requiring contractors to meet high subdivision requirements.30 There is increasing recognition of the problems created by exclusionary zoning. The Supreme Court of Pennsylvania recently held that a zoning ordinance which did not make any provision for apartment buildings was unreasonable and unconstitutional.31 The court reasoned that the ordinance excluded people from the community who

26. Id. at 7.
27. Id.
30. Id. at 211-17.
would otherwise be able to live there if apartments were available.\textsuperscript{32} The U.S. National Commission on Urban Problems and the Presidents Committee on Urban Housing both refer to discrimination resulting from exclusionary zoning.\textsuperscript{33} The Illinois Supreme Court has held unreasonable the refusal of a community zoning board to allow construction of a mobile home development.\textsuperscript{34} One factor considered by the Illinois court was the need for low cost housing in the community.\textsuperscript{35} The problem has also been given recognition in recent law review articles.\textsuperscript{36}

On the other hand, a recognized objective of zoning is preservation of the character of the neighborhood and community.\textsuperscript{37} Also, ordinances similar to the one in \textit{McDermott} have been upheld in a number of other jurisdictions.\textsuperscript{38} In \textit{Valley View Village v. Proffett}\textsuperscript{39} a federal court of appeals held that a one-use ordinance is not necessarily per se arbitrary and unreasonable, but is to be judged by its impact upon property within the community.\textsuperscript{40} In \textit{Connor v. Township of Chanhassen}\textsuperscript{41} the Minnesota Supreme Court held that a community of 1,795 could maintain its rural character against an expanding metropolitan area by zoning its entire area farm-residential.\textsuperscript{42} In a case very similar to \textit{McDermott}, the Florida Supreme Court upheld a zoning ordinance restricting property usage in a municipality near Palm Beach to single family residences.\textsuperscript{43} The Florida court relied on the fact that commercial facilities were conveniently located near the municipality and that adjoining property values would be adversely affected by commercial use of municipality property.\textsuperscript{44}

Few courts have been willing to find that a zoning ordinance is invalid because it is discriminatory in the sense that it keeps people out of

\textsuperscript{32} \textit{Id.} at 397, where the court stated:
[A]ppellee has in effect decided to zone out the people who would be able to live in the Township if apartments were available. The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid.

\textsuperscript{33} \textit{Douglas Report at 7-8; Presidents Committee on Urban Housing, Building A Decent Home, Final Report of Presidents Committee on Urban Housing 140 (1969).}

\textsuperscript{34} \textit{Lakeland Bluff, Inc. v. County of Will, 114 Ill. App.2d 267, 252 N.E.2d 765 (1969).}

\textsuperscript{35} \textit{Id.} at 279, 252 N.E.2d at 770.

\textsuperscript{36} Williams and Wacks, \textit{Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited, 1969 Wis. L. Rev. 827; 45 Notre Dame Lawyer 123 (1969).}

\textsuperscript{37} 101 C.J.S. Zoning § 2 (1958).

\textsuperscript{38} \textit{Valley View Village v. Proffett, 221 F.2d 412 (6th Cir. 1955); Blank v. Town of Lake Clarke Shores, 161 So.2d 683 (Fla. 1964); Connor v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789 (1957).}

\textsuperscript{39} 221 F.2d 412 (6th Cir. 1955).

\textsuperscript{40} \textit{Id.} at 418.

\textsuperscript{41} \textit{Connor v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789 (1957).}

\textsuperscript{42} \textit{Id.} at 794-95.

\textsuperscript{43} Blank v. Town of Lake Clarke Shores, 161 So.2d 683 (Fla. 1964).

\textsuperscript{44} \textit{Id.} at 685.
the community. The Supreme Court of Pennsylvania is the exception.\textsuperscript{45} Missouri courts have not yet discussed this discriminatory aspect of zoning. On the contrary, \textit{McDermott}, in upholding a single-use zoning ordinance,\textsuperscript{46} recognized a type of exclusionary zoning that Missouri courts, theretofore, had not recognized. It is submitted that when Missouri courts are presented with the proper situation, discriminatory effects as well as traditional standards should be considered before approving one-use exclusionary zoning.

Several points, therefore, can be made in conclusion. First, under proper circumstances, as existed in \textit{McDermott}, a Missouri community can zone its entire area single-family dwelling and still meet the statutory requirement that zoning ordinances be based upon a comprehensive plan. The court in \textit{McDermott} seems to indicate that the proper circumstances may exist only in St. Louis and Kansas City. The court points out that a comprehensive plan will normally require a commercial district, but that St. Louis County is a unique situation wherein large numbers of people work in the city but live in the county in villages designed primarily for residential purposes.\textsuperscript{47} Second, the Missouri Supreme Court has chosen to judge the constitutionality of zoning ordinances by conventional standards.\textsuperscript{48} The court chose to weigh the increased traffic that would result and the loss in community property values against the loss in property value to the McDermotts.\textsuperscript{49} Third, exclusionary zoning ordinances can result in discrimination by making it economically impossible for low income families to live in a community. Although there is an increasing awareness as to this aspect of zoning, the majority of courts passing on the validity of zoning ordinances, including those in Missouri, rely on more conventional standards such as the effect on population density, traffic congestion, and property values.

\textsc{Donald G. Cheever}

\textsuperscript{46} 454 S.W.2d 577, 581 (Mo. En Banc 1970).
\textsuperscript{47} \textit{Id.} at 581.
\textsuperscript{48} \textit{Id.} at 581.
\textsuperscript{49} \textit{Id.} at 581.
CONSCIENTIOUS OBJECTION ON “DEEPLY HELD” MORAL AND ETHICAL GROUNDS

Welsh v. United States

Petitioner, Elliot Ashton Welsh II, applied to his local selective service board for conscientious objector exemption from military service under section 6 (j) of the Universal Military Training and Service Act of 1948. The section required that an applicant show that his objection to military service is based on his “religious training and belief.” The statute defined “religious training and belief” as:

an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

In completing the exemption application, Welsh altered the statement on the Selective Service form which read, “I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form,” by striking out the words “religious training and.” He also answered the question of whether he believed in a Supreme Being in the negative. Welsh’s draft board classified him exempted from combatant training and service, but refused to exempt him from non-combatant training and service. Claiming exemption from all military duty, Welsh appealed the local board’s ruling.

In communications with the appeals board, Welsh characterized his beliefs as “religious”, but only in the ethical sense, as they stemmed from sociological, economic, historical and philosophical considerations.

   Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of national health, safety, or interest as the local board may deem appropriate.
3. The text of the 1967 amendment of § 6 (j) of the 1948 Act is quoted at note 28 infra.
4. Welsh v. United States, 404 F.2d 1078, 1080 (9th Cir. 1969).
5. 398 U.S. at 337.
appeals board ruled that Welsh was not entitled to any exemption under section 6 (j) of the Universal Military Training and Service Act of 1948, because his beliefs were not of the type contemplated by the statute. Shortly thereafter, the local draft board reclassified him qualified for military service.

Welsh received his induction order and reported to the induction center, but when his name was called he refused to submit to induction. Prosecution followed and he was convicted in federal district court of refusing to submit to induction into the armed forces. Welsh appealed his conviction on the grounds that it was without any basis in fact and also that it was based upon an unconstitutional distinction between theistic and non-theistic beliefs. The Court of Appeals for the Ninth Circuit affirmed the conviction, finding that while Welsh held his beliefs with the strength of more orthodox religious convictions, "he denied that his objection to war was premised on religious belief." 

The Supreme Court granted certiorari "chiefly to review the contention that Welsh's conviction should be set aside on the basis of this court's decision in United States v. Seeger." Without reaching the constitutional issues raised by the petitioner, the Court reversed the conviction "because of its fundamental inconsistency with United States v. Seeger." Delivering the judgment of the Court, Mr. Justice Black reasoned that the court of appeals had erred, because Welsh's deeply held belief in the total immorality of all war was clearly sufficient to satisfy the source of belief test enunciated in United States v. Seeger. Thus Welsh had been wrongfully denied conscientious objector status under 6 (j).

Firmly rooted in our national history is the policy of exempting from military service those persons whose religious beliefs forbid them to participate in war. In the Draft Act of 1917, Congress exempted from military service persons affiliated with a "well recognized religious sect or organization." The constitutionality of this act, including its conscientious objector provisions, was upheld in the Selective Draft Law Cases of 1918.

8. 404 F.2d at 1082 (9th Cir. 1969).
9. 398 U.S. at 335.
10. Id.
11. Mr. Justice Black announced the judgment of the Court and delivered an opinion in which Justices Douglas, Brennan and Marshall joined. Mr. Justice Harlan concurred in the result and filed an opinion. Mr. Justice White dissented and filed an opinion in which Justice Stewart and Chief Justice Burger joined. Mr. Justice Blackmun took no part in the consideration or decision of this case.
13. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 76. See also, Draft Act of Feb. 24, 1864, ch. 15, § 17, 13 Stat. 6, in which Congress granted conscientious objector exemptions to:
members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations.
14. 245 U.S. 366 (1918). Directing its attention to the conscientious objector provision of the 1917 Act, the Court stated:
And we pass without anything but statement the proposition that an es-
By the Selective Training and Service Act of 1940, Congress significantly broadened the basis for granting exemptions by extending such to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." This broader basis for granting exemptions soon became the subject of judicial controversy. In *United States v. Kauten*, the Court of Appeals for the Second Circuit construed the words "religious training and belief" to mean "a compelling voice of conscience arising from a sense of the inadequacy of reason as a means of relating the individual to his fellowmen and to his universe." Belief in a deity was not stated as a requirement for the granting of exemptions on religious grounds. The implication that this court did not consider such a requirement to exist became apparent in subsequent decisions.

In *Berman v. United States* the Court of Appeals for the Ninth Circuit rejected Kauten's unorthodox interpretation of "religious training and belief." The source of a registrant's beliefs, not the strength with which he held them, was the determinative factor in qualifying for conscientious objector exemption. In reaching this conclusion, the court relied upon Mr. Chief Justice Hughes' definition of religion in *United States v. Macintosh*. Hughes said that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."

It was with this split of judicial interpretation in view that Congress enacted 6(j). Congress, citing *Berman v. United States* adopted the definition of religion provided in *Macintosh* with two modifications: (1) the term "Supreme Being" was substituted for the term "God"; (2) political, sociological, or philosophical views or a merely personal moral code were expressly excluded as bases for exemption.

Establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more. *Id.* at 389-90.

16. 133 F.2d 703 (2d Cir. 1943).
17. *Id.* at 708.
18. See *United States ex rel. Phillips v. Downer*, 135 F.2d 521 (2d Cir. 1943), and *United States ex rel. Reel v. Badt*, 141 F.2d 845 (2d Cir. 1944), which are the same in principle as *Kauten*, although they are *habeas corpus* proceedings.
19. 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946) (Denman, dissenting).
20. *Id.* at 381. The court stated its conclusion as follows: It is our opinion that the expression "by reason of religious training and belief" is clear language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one. . . . [N]o matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religious in the sense of that term as it is used in the statute.
22. *Id.* at 613.
Section 6 (j) did not again become the subject of serious judicial concern until 1964, when the trilogy of cases cited as *United States v. Seeger*,24 came before the Supreme Court. In *Seeger* the Court was called upon to determine whether the unorthodox beliefs of the registrants fell within the purview of 6 (j). The strength with which the parties held their beliefs was not at issue.

After perusing the legislative history of 6 (j) and the historical origins of conscientious objector exemption, the Court concluded that Congress had not intended to limit exemption on religious grounds to only those registrants holding an orthodox belief in God.25 Stressing Congress' substitution of the all-inclusive term "Supreme Being", the Court arrived at the following test for source of belief under 6 (j):

We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.26

The Court's use of statutory construction to arrive at its decision in *Seeger* was apparently motivated by the desire to avoid the issue of whether 6 (j) violated the religious clauses of the first amendment by (1) not exempting non-religious conscientious objectors and (2) discriminating between theistic and non-theistic beliefs. While the use of statutory construction was not fully consistent with an objective reading of the legislative history, it was logically defensible since none of the parties claimed to be an atheist.

Had this not been so, and "if one of the parties were an atheist, quite different problems would be presented."27 The problems alluded to by Mr. Justice Douglas were inherent in the implicit theistic bias of 6 (j); and, while the broad meaning given to "Supreme Being" in *Seeger* significantly narrowed the express exceptions to the Supreme Being test, it did not obviate the section's discrimination between theistic and non-theistic beliefs.

Before *Welsh*, and in response to *Seeger*, Congress amended 6 (j) as follows:

As used in this section, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.28

By deleting reference to a Supreme Being, Congress tailored the statutory language to fit the test of belief in *Seeger*. However, the amendment's legislative history demonstrated a congressional desire to reaffirm the theistic requirement of the original section and to continue to exclude

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26. *Id.* at 165-66.
secular conscientious beliefs. The decision in Welsh is clearly at odds with this expression of congressional intent.

In evaluating the extent to which Welsh expanded the Seeger decision, attempts to distinguish the source of Welsh's beliefs from those of the parties in Seeger accomplishes little. The most that can be stated with any certainty is that Welsh, in characterizing his conscientious beliefs, was more insistent that they were devoid of any religious basis. Although Welsh never stated that he was an atheist, the court of appeals distinguished Seeger on this point.

This distinction was not without merit given the Court's statement in Seeger that "[1]n such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight." But Mr. Justice Black was quick to point out that the converse of this statement was not true, i.e., a registrant's characterization of his beliefs as non-religious does not carry equal weight. Such a distinction would be "a highly unreliable guide for those charged with administering the exemption."

Had the Court stopped in its analysis after concluding that Welsh's beliefs satisfied the Seeger test, Welsh would not have constituted a significant extension of Seeger. Instead, the Court carried the Seeger rationale to its logical extreme. A new test for determining whether the source of a registrant's belief comes within the purview of 6(j) was enunciated:

That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war. Including "deeply held" moral and ethical beliefs within the perimeter of exemption under 6(j) eliminated the remaining exceptions to the "Supreme Being" test and ridded 6(j) of its constitutionally troublesome discrimination between theistic and non-theistic "religious" beliefs.

The reasons which seem to have prompted the Court to render its decision without reaching the constitutional issues raised by the petitioner were well founded. The question of whether exemption from military service on religious grounds rises to the level of a constitutionally guaranteed

29. See Conf. Rep. No. 346, 90th Cong., 1st Sess. 49 (1967), which stated: The Senate conferees also concurred in the desire of the House language to more narrowly construe the basis for classifying registrants as "conscientious objectors." The recommended House language required that the claim for conscientious objection must be based upon "religious training and belief" as had been the original intent of Congress in drafting this provision of the law. The Senate conferees were of the opinion that congressional intent in this area would be clarified by the inclusion of language indicating that the term "religious training and belief" as used in this section of the law does not include "essentially political, sociological, or philosophical views, or a merely personal moral code."

31. 398 U.S. at 341.
32. Id. at 344 (emphasis added).
right under the first amendment has never been decided by the Court. The Court has, however, expressed by dictum its unwillingness to make such a declaration. In light of this fact, the continued existence of such an exemption depends entirely upon the constitutional validity of 6 (j).33 Therefore, while it may be successfully argued that Congress, in choosing to grant exemptions, must do so without discriminating between theistic and non-theistic religions, it does not follow a fortiori that Congress can be compelled to grant exemptions upon grounds with which it does not agree. Recognizing this dilemma, the Court chose to avoid the constitutional challenge to 6 (j) and not endanger the continued existence of conscientious objector exemption.

Mr. Justice Harlan, in a concurring opinion, disagreed with the majority's use of statutory construction as the means for obviating 6 (j)'s theistic bias.34 Rather, he would have employed the broad severability clause of the act35 to accomplish the same results. This, he argued, would have avoided the cynicism displayed toward the constitutionality of 6 (j) in the majority opinion. Harlan stated that the exclusion of non-theistic religious beliefs by Congress had violated the establishment clause of the first amendment, which required governmental neutrality in the area of religious belief. This "under-inclusion" of religious beliefs by 6 (j) was correctible by severance of that portion excluding secular conscientious beliefs and without rendering the entire exemption void.

The logical inconsistencies suffered by the majority opinion could, perhaps, have been avoided by severance of the offensive language; but in using this approach, one must assume that the section's remaining language has meaning standing alone. This assumption loses strength in light of the legislative history of 6 (j), which indicates that Congress intended that belief in a deity form the gravamen of exemption from military service "by reason of religious training and belief."36 In evaluating the merits of either approach, one concludes that both entail equal disregard for congressional intent. However, severance is a more straightforward method of correcting the infirmities of 6 (j) and does avoid the labored reasoning of the majority.

The dissenting opinion37 provides an indication of the divergence of opinion on the conscientious objector issue. In his opinion Mr. Justice White gives an insight into the constitutional problems presented by Congress' desire to base the qualification for a conscientious objector exemption on theistic religious grounds. Although noting the past unwillingness to

34. 398 U.S. at 344.
36. See Mr. Justice Harlan's discussion of the legislative history of 6 (j) in Welsh v. United States, 398 U.S. at 348-50, in which he states, in part:
   The natural reading of § 6 (j), which quite evidently draws a distinction between theistic and non-theistic religions, is the only one that is consistent with the legislative history. Id. at 348.
37. 398 U.S. at 367.
declare conscientious objector exemption a first amendment right, he states that "there is an arguable basis for § 6 (j) in the Free Exercise Clause..." But he could find no merit in Harlan's conclusion that the exclusion of non-religious conscientious objectors constituted a violation of the establishment clause. He concluded that the Court "should... not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law..."  

The term "religion" or "religious" is a nebulous concept, and much of the dissent's arguments rests upon the assumption that these words have definable contours. In short, there are beliefs, regardless of the strength of conviction, that cannot be considered "religious" in the sense that term is intended in the first amendment. It is this point of analysis that seems to be the focal point for the divergence of opinion on the establishment issue. While conscientious objection, as indicated by the dissent, may have a free exercise clause claim to constitutional status, whether it has a similar claim on establishment grounds remains unanswered after Welsh. The 1967 amendment of 6 (j) was not a fundamental change from the original section. Albeit the amended section is technically unaffected, the opinion in Welsh is sufficiently broad in scope to apply with equal force.  

Two groups of registrants who will continue to fall within the exclusions are:

those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency. The Court has now construed the test for conscientious objector status so broadly that the establishment issue will remain dormant and a registrant, whose "deeply held" conscientious beliefs forbid him participation in all wars, will be entitled to an exemption under 6 (j).  

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38. See cases cited note 3 supra.
39. 399 U.S. at 371.
40. Id. at 373.
42. This question has been answered in the negative by the Court in its recent decision on the "selective" conscientious objector issue. See Gillette v. United States, --- U.S. ---, 39 U.S.L.W. 4905 (U.S. March 8, 1971). However, this sort of claim to conscientious objector exemption is sui generis; and "selective" objection to only the war in Viet Nam seems clearly to be based upon policy or political reasons. In disposing of the petitioners' contention that to deny their right to conscientiously object to the Viet Nam War would constitute an establishment of religion, the Court in Gillette stated:

We conclude that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not. 39 U.S.L.W. at 4312.
44. 398 U.S. at 342-43.
LITIGATION EXPENSES INCURRED IN APPRAISING MINORITY SHAREHOLDERS’ STOCK ARE NOT DEDUCTIBLE

Woodward v. Commissioner of Internal Revenue1
Hilton Hotels Corp. v. United States2

In every state, with the exception of West Virginia, there are statutes which give minority stockholders who dissent from certain corporate transactions the right to receive payment for their stock.3 The types of transactions covered by the statutes vary; often included are charter amendment, merger, consolidation, and sale of assets.4 The parties are given the right to go to court and obtain an impartial appraisal if they are unable to agree on the value of the stock.5 The Supreme Court, in two recent cases, held that the litigation expenses incurred by purchasers in appraisal proceedings arising under these statutes were non-deductible for federal income tax purposes.6

In Woodward v. Commissioner of Internal Revenue, the taxpayers were the majority stockholders of the Telegraph-Herald, an Iowa publishing corporation. They voted their controlling shares in favor of a proposal to extend the corporate charter perpetually. A minority stockholder voted against the extension and, as a result, the majority stockholders were required by Iowa law to purchase the dissenting shareholder’s stock at its “real value.”7 The parties were unable to agree on the value of the stock, and taxpayers brought an action in state court for an appraisal. After extensive litigation, a value was fixed, and the taxpayers purchased the dissenter’s stock.8

In 1963, taxpayers paid out over $25,000 for various expenses connected with the litigation. They deducted this amount on their 1963 federal income tax returns, claiming that the expenses were “ordinary and necessary” expenses paid “... for the management, conservation, or maintenance of property held for the production of income,” and therefore deductible under section 212 of the Internal Revenue Code of 1954.9 The Commissioner of Internal Revenue disallowed the deductions on the theory that the expenses were “capital expenditures incurred in connection with the acquisition of

5. Id.
6. For a listing of law review articles on these appraisal statutes, and citations to the statutes for each state, see the MODEL BUS. CORP. ACT ANN., supra note 3, at § 74.
7. IOWA CODE ANN. § 491.25 (1949).
9. INT. REV. CODE of 1954, § 212 (in part): In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—
(1) for the production or collection of income;
(2) for the management, conservation, or maintenance of property held for the production of income...
capital stock of a corporation," and therefore not deductible. The taxpayers appealed to the Tax Court, where the Commissioner's determination was upheld, with two dissenting opinions. The Court of Appeals for the Eighth Circuit affirmed.

The objection of the dissenting shareholders in *Hilton Hotels Corp. v. United States*, on the other hand, was to a proposed merger between the Hilton Hotels Corporation and the Waldorf-Astoria Corporation. Hilton, as the surviving corporation, was to offer 1.25 shares of Hilton stock for every share of Waldorf stock not already held by Hilton. Hilton owned approximately 90% of the Waldorf stock and it voted this majority in favor of the merger. However, the owners of about 6% of the Waldorf shares objected to the merger and demanded payment for their stock as provided by New York law. As in *Woodward*, the parties could not agree on the stock's value and the dissenters commenced appraisal proceedings in the New York courts. After settlement of the litigation, Hilton deducted the fees connected with the appraisal proceedings as "ordinary and necessary business expenses," deductible under section 162 of the Internal Revenue Code. The Commissioner of Internal Revenue disallowed the deduction on the grounds that the expenses were capital expenditures. The corporate taxpayer, after paying the tax, sued for a refund in district court. There the Commissioner's determination was overruled, and the taxpayer's deduction upheld. The Court of Appeals for the Seventh Circuit affirmed the decision.

The Supreme Court, speaking through Justice Marshall, resolved the seemingly conflicting decisions by holding in both cases that litigation expenses incurred in connection with the appraisal of dissenting shareholders' stock had their origin in the acquisition of a capital asset and were non-deductible capital expenditures. *Woodward* was affirmed, and *Hilton* reversed.

While *Woodward* and *Hilton* are factually similar, they do have two factual distinctions which could have allowed the Supreme Court to affirm both decisions without, arguably, being inconsistent. Most obvious is the fact that the deductions in the cases were claimed under two different sections of the Internal Revenue Code of 1954. The other distinction is that in *Woodward* title remained in the minority stockholder after she registered her dissent, while in *Hilton* title immediately passed to the corporation.

   "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."
21. Id. at 583.
This was due to the difference between Iowa and New York law. The Supreme Court brushed aside this distinction, and it is of considerably less importance than the difference between section 162 and section 212 of the Internal Revenue Code.

These two sections differ in that section 162 applies to the expenses of a trade or business, while section 212 applies to the non-business profit making expenses of an individual. Both sections are substantially identical to their immediate predecessors, sections 23 (a) (1) and 23 (a) (2) of the Internal Revenue Code of 1939. Originally, however, the 1939 Code did not allow deductions for the non-business profit making expenses of an individual, even though the income resulting from such expenses was taxed. Recognizing the unfairness of this to the individual taxpayer, Congress, in section 121 of the Revenue Act of 1942, sought to remedy the inequity by adding section 23 (a) (2) to the Code. In construing the relationship between the two sections, the Supreme Court has held them to be comparable and in pari materia, and said that "it was manifestly Congress' purpose with respect to deductibility to place all income-producing activities on an equal footing." Deductions under section 212 are therefore to be "coextensive" with those under section 162 and "subject to the same limitations and restrictions."

Previous federal court decisions have been in conflict on the question of deductibility of litigation expenses incurred in appraisal proceedings, with the greater weight of authority holding them deductible. Deductions have been allowed under both section 162 and section 212. However, the cases allowing deductions under section 212 have all involved individual taxpayers who were on the selling side of the appraisal proceeding; the only deduction that has been granted to the purchasing side of the transaction has come under section 162. As the Court of Appeals for the Eighth Circuit pointed out in *Woodward*, when viewed from the purchaser's side it is difficult to see just what property held for the production of income the taxpayers are trying to conserve. The lower court did not say how they would have de-

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22. *Id.* at 584.
28. *Id.* at 45. See *Iowa S. Util. Co. v. Comm'r*, 333 F.2d 582, 386 (8th Cir. 1964).
cided *Woodward* if the taxpayers had been sellers, but did distinguish the positions by saying that in such a case "[t]here is not the conceptual difficulty with the phrase, property held for the production of income, that is present here." 33 *Stampfel v. United States*, 34 a case granting a deduction to a seller claiming under section 212, similarly distinguished between the position of the seller and that of the purchaser. While this reasoning is entirely logical in terms of the wording of section 212, it seems to run counter to the legislative purpose and judicial interpretation of the legislation. Fortunately, the Supreme Court based its decision on other grounds, for a deduction allowed to a corporate purchaser of stock under section 162 and disallowed to an individual purchaser under section 212 would hardly put "all income-producing activities on an equal footing." 35

The Supreme Court considered the expenses here to be non-deductible because they were capital expenditures. This class of expenses has been non-deductible ever since the modern federal income tax came into being in 1913. 36 Although section 263 of the Internal Revenue Code of 1954 is entitled "Capital Expenditures," 37 there is no single definition of the term in the Code. 38 Section 261 of the Code, however, makes clear that section 263 is an overriding section; that is, once an item is classified as a capital expenditure under section 263 it can not be considered deductible, even though it also happens to fit the "ordinary and necessary" provisions of sections 162 and 212. 39

The main problem for the taxpayers in both *Hilton* and *Woodward* was to keep the litigation expenses from being classified as capital expenditures. Had they been able to do this, the expenses would probably have been deductible under either section. As mentioned, the Supreme Court has construed section 212 in terms of its purpose rather than its literal meaning, 40 and the qualifying term "ordinary and necessary expenses," found in both sections, has been held not to require that the expenses be habitual or normal in the sense of occurring often, but rather that they be "the common and accepted means of defense against attack." 41

Whether litigation expenses of this type were capital expenditures or not depended on the Court's construction of Treasury Regulations 1.263 (a)-2 (a)

33. *Id.* at 319.
   No deductions shall be allowed for—(1) Any amount paid out for new building or for permanent improvements or betterments made to increase the value of any property or estate. . . .
41. Welch v. Helvering, 290 U.S. 111, 114 (1933); McDonald, *supra* note 38, at 169-70.
and 1.263 (a)-2 (c). These and other Treasury Regulations considerably broaden and clarify the scope of the term "capital expenditures" found in section 263. Regulation 1.263 (a)-2 (a) provides that "the cost of acquisition, construction, or erection of buildings, machinery and equipment, furniture and fixtures, and similar property having a useful life substantially beyond the taxable year" is a capital expenditure. The Court noted that this provision has been used by the courts to hold that "legal, brokerage, accounting, and similar costs incurred in the acquisition or disposition of such property are capital expenditures."

Treasury Regulation 1.263 (a)-2 (c) states simply that "the cost of defending or perfecting title to property" is a capital expenditure. If this regulation were rigorously applied, all litigation expenses might be capitalized, since "any lawsuit brought against a taxpayer may affect his title to property. . . ." The courts have not held that Congress meant for all litigation expenses to be capitalized. In order to lessen the potential severity of this regulation, the courts have developed a method of analysis known as the "primary purpose" test. Under this test, if the primary purpose of the litigation is the defense or perfection of title, the litigation expenses are capital expenditures; however, if the defense or perfection of title is not the primary purpose of the litigation, and title is only incidentally involved, the litigation expenses may be deductible. The main foundation of the taxpayers' arguments in both Hilton and Woodward was that this test should be applied to litigation involving the appraisal of dissenting shareholders' stock.

The taxpayers in Woodward urged that the test be extended and applied not only to cases directly involving defense or perfection of title, but to cases involving the cost of acquisition of a capital asset as well. Their argument was that the primary purpose of the litigation was not the acquisition of the stock, but the appraisal of its value, and that title was only incidentally involved since it was predetermined that it would pass to the majority stockholders. The same argument was advanced in Hilton from a somewhat stronger position; under the provisions of New York law title passed at the time the dissenters filed their objections. This factual dis-

42. Treas. Reg. § 1.263 (a)-2 (a) (1958); Treas. Reg. § 1.263 (a)-2 (c) (1958).
43. Winokur, supra note 39, at 458-59.
44. This regulation, as cited by the Court, provides that "[t]he cost of acquisition . . . of . . . property having a useful life substantially beyond the taxable year" is a capital expenditure. 397 U.S. 572, 575 (1970). This seems to read much more unfavorably to the taxpayer than the regulation quoted in its entirety, and appears very selective in the choice of words omitted.
47. Id. at 576-77. See Iowa Southern Utilities Co. v. Comm'r, 383 F.2d 382 (8th Cir. 1964); Indus. Aggregate Co. v. United States, 284 F.2d 639 (8th Cir. 1960); Shipp v. Comm'r, 217 F.2d 401, 402 (9th Cir. 1954); Rassenfoss v. Comm'r, 158 F.2d 764, 767 (7th Cir. 1946). See generally 4A MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.26 (1966).
50. Id.
tinction put the dissenters in the position of being Hilton's creditors, and allowed Hilton to argue both (1) that the question of title was remote rather than primary, and (2) that the litigation expenses were not part of the cost of acquisition of a capital asset, since the asset had already been acquired. The difference in result in the two cases in the courts of appeals was due to the fact that in Hilton the "primary purpose" test was accepted, while in Woodward it was rejected as having no applicability to a case involving the cost of acquisition of property.

There is some indication that even if the "primary purpose" test had been accepted in Woodward, the two courts would still have reached an inconsistent result. The Eighth Circuit Court of Appeals, while refusing to apply the test, also indicated that if it did apply the test the taxpayer would not prevail. The court felt the primary purpose of the litigation was to purchase the property, and the expenses were therefore "directly connected with the purchase of property." In Hilton, on the other hand, the primary purpose of the appraisal proceedings was considered to be the determination of the fair value of the shares.

Similar inconsistent results sometimes occur under the "primary purpose" test, for determining the primary purpose of litigation is often a difficult task. The instigator and the defender of litigation, for example, both have purposes; if they are not the same there is sometimes a problem in choosing whose is to govern. In addition, attempting to find the primary purpose presents the problem of where to look; the pleadings, the evidence, the eventual outcome, or some other aspect of the litigation may hold the solution. Instead of unduly faulting the test, however, the real problem most often seems the facts of the cases themselves. A multiplicity of factual situations abound in this area, and each case must be analyzed in view of its own peculiar facts. The dividing line between an expense that is "ordinary and necessary" and one that is incurred in the "defense or perfection of title to property" is often extremely narrow, and the complex fact situations make it more difficult to draw that line. The decisive distinctions found are "those of degree and not of kind." As Judge Blackmun pointed out in

52. Id.
53. Hilton Hotels Corp. v. United States, 410 F.2d 194 (7th Cir. 1969).
54. Woodward v. Comm'r, 410 F.2d 313 (8th Cir. 1969).
55. Id. at 317.
56. Id.
58. Compare United States v. Pate, 254 F.2d 480 (10th Cir. 1958), with Towanda Textiles, Inc. v. United States, 180 F. Supp. 373 (Ct. Cl. 1960); and Allen v. Selig, 200 F.2d 487 (9th Cir. 1952), with Garrett v. Crenshaw, 196 F.2d 185 (4th Cir. 1952).
60. Id.
61. Id. at 645, note 10. See also Iowa Southern Util. Co. v. Comm'r, 333 F.2d 382, 385 (8th Cir. 1964).
63. Welch v. Helvering, 290 U.S. 111, 114 (1933); Hilton Hotels Corp. v. United States, 410 F.2d 194, 196 (7th Cir. 1969).
Iowa Southern Utilities Co. v. Commissioner of Internal Revenue, 64 “the inconsistency, if it exists at all, may, however, not possess real depth or significance... there is no "ready touchstone" for every conceivable and variable fact situation." 65 This seems an accurate summation, for the test has often worked quite well in preventing undue hardship to taxpayers.

The Supreme Court, however, refused to apply the “primary purpose” test in Woodward and Hilton, and expressed its disapproval of any extension of this subjective test beyond cases in which the question of whether the taxpayer was actually defending or perfecting title to property is a definite issue. The Court considered the test difficult and uncertain, and one that failed to draw a "bright line." 68 While the uncertainty and difficulty would not seem to lie in the test so much as in other factors, the Court clearly prefers another method of analysis.

The standard for characterizing litigation expenses preferred by the Court is that most recently adopted in United States v. Gilmore. 67 This standard looks to the origin of the claim litigated, rather than to its purpose or consequences, 68 and is an “objective standard of deductibility.” 69 The approach is hardly a new one; it seems to have appeared first in Kornhauser v. United States, 70 and more recently in Deputy v. du Pont 71 and Lykes v. United States. 72

In Kornhauser, the Supreme Court granted a deduction, as a business expense, for the litigation expenses incurred by a taxpayer in defending a suit for an accounting brought by a former co-partner. The co-partner wanted a division of some stock held by the taxpayer, claiming that it had been received as compensation for services rendered during the existence of the partnership. The Court held the litigation expenses to be business expenses, rather than personal expenses, because they were “directly connected with, or ... proximately resulted from, his business.” 73

In Deputy v. du Pont, an individual taxpayer was denied a deduction for expenses incurred in borrowing stock. The stock was to be sold to executives of the du Pont Company, in order to give them a financial interest in the company. The Court said it was “the origin of the liability out of which the expense accrues which is material,” 74 and noted that the expenses did “not meet the test enunciated in Kornhauser v. United States, since they

64. 333 F.2d 382 (8th Cir. 1964).
65. Id. at 386.
70. 276 U.S. 145 (1928).
71. 308 U.S. 488 (1940).
proximately result not from the taxpayer's business but from the business of the du Pont Company.\textsuperscript{75}

Both \textit{Lykes v. United States} and \textit{United States v. Gilmore} denied deductions for legal expenses, under section 212 and its predecessor, section 23 (a) (2), on the ground that the expenses were personal in origin. In \textit{Lykes}, the taxpayer incurred litigation expenses in contesting a sizeable gift tax deficiency that resulted from a large gift of stock to his children. An adverse decision would probably have forced the taxpayer to sell his remaining stock. The Court refused to take this into consideration and said the legal expense "was not proximately related to the production of income," and was personal in nature because it was caused by the gift.\textsuperscript{76}

The legal expenses in \textit{Gilmore} were incurred in divorce litigation. The taxpayer claimed deduction for that part of the litigation expenses incurred in defeating his wife's claims to his income-producing property. Had his wife been successful, the taxpayer might have lost his controlling stock interests and corporate positions in three franchised automobile dealerships. The Supreme Court citing \textit{Kornhauser}, \textit{Lykes}, and \textit{du Pont}, said:

\begin{quote}
the principle we derive from these cases is that the characterization, as 'business' or 'personal,' of the litigation costs of resisting a claim depends on whether or not the claim \textit{arises in connection with} the taxpayer's profit-seeking activities. It does not depend on the \textit{consequences} that might result to a taxpayer's income-producing property from a failure to defeat the claim. \ldots \textsuperscript{77}
\end{quote}

The Court then held the expenses non-deductible because they "stemmed entirely from the marital relationship" and were personal in nature.\textsuperscript{78}

The \textit{Woodward} and \textit{Hilton} decisions broke new ground for the "origin of the claim" test. It had only been used previously, in the field of litigation expenses, to determine whether the expenses were personal in nature or whether they had their origin in business or income-producing activities. It appeared from \textit{Gilmore} that the test might be confined to this area, and at least one federal case after \textit{Gilmore}, \textit{Vermont Bank and Trust Co. v. United States},\textsuperscript{79} held that its application was limited.\textsuperscript{80} Now, by using the test in connection with Treasury Regulation 1.263 (a)-2 (a) to determine if a litigation expense had its origin in the cost of acquisition of a capital asset, the Court has considerably broadened its application in this field. It would now appear to be the controlling method of approach in all cases involving deductibility of litigation expenses which do not appear related to "defending or perfecting of title."\textsuperscript{81} Conceivably, it may be used in determining the deductibility of other expenses, not related to litigation, as well.

\textsuperscript{75} \textit{Id.} at 493-94. This case was decided prior to the amendment of the 1939 Code by the addition of section 23 (a) (2).

\textsuperscript{76} \textit{Lykes v. United States}, 345 U.S. 118, 124 (1952).


\textsuperscript{78} \textit{Id.} at 51.


\textsuperscript{80} \textit{Id.} at 685.

\textsuperscript{81} \textit{See} 397 U.S. 572, 577 (1970).
It is obvious that the Court believes the "origin of the claim" test to be a simpler and more reliable standard than one based on the primary purpose of the litigation. This simplicity may, however, be largely a result of the fact that it has not been applied too often and is thus less clouded by decisions which seemingly conflict. A conflicting decision, for example, could have been produced in Woodward and Hilton under the "origin of the claim" test. The Supreme Court, for example, could easily have held that the expenses had their origin in the corporate merger, and ordinarily "expenses incurred in reorganizing or recapitalizing a corporation are not deductible as ordinary and necessary business expenses." Under this reasoning, the claim in Woodward originated in a "profit-seeking activity—the renewal of a corporate charter," and could be deductible. This, of course, would create an inconsistent result and allow a deduction under section 212 after denying one under section 162. It is suggested that the origin of the claim may on occasion prove as difficult to determine as the primary purpose of the litigation.

An additional problem with the "origin of the claim" test should be mentioned. The "primary purpose" test has kept Treasury Regulation 1.263(a)-2(c) from being applied too rigorously. Construing Treasury Regulation 1.263(a)-2(a) in terms of the origin of the claim, however, provides no such guarantee against severe application, even though "an inflexible application of the rule that expenses incurred in connection with acquisitions... are capital expenditures" contains the same defect, in terms of potential hardship, as an inflexible application of the rule that "expenses incurred in defense or perfection of title" are capital expenditures.

If the test is severely applied, expenses very remotely connected with the acquisition of a capital asset may now be found to be capital expenditures because that is where they had their origin. As the dissenting opinion in Lykes points out, "[s]o treacherous is this kind of reasoning that in most fields the law rests its conclusion only on proximate cause and declines to follow the winding trail of remote and multiple causations." Unfair results, which rarely occur under the "primary purpose" test, may occur more often under the "origin of the claim" test.

In terms of future guidelines, Woodward and Hilton clearly hold that litigation expenses incurred by purchasers in appraising the stock of dissenting minority stockholders are part of the cost of acquisition of that stock. Whether deduction would be denied to a seller on the grounds that the liti-
gation expenses had their origin in the cost of disposition is another matter. While the Court doesn't explicitly say, acquisition and disposition costs are frequently mentioned together in parts of the opinion. Stempfel v. United States was pending before the Sixth Circuit Court of Appeals when Woodward and Hilton were decided. The court reversed the decision, and remarked that "[w]hile we recognize that in the instant case the taxpayers are sellers of stock rather than purchasers, as is true in the Woodward and Hilton cases, we believe the Supreme Court clearly intended its ruling to apply to both." It seems clear that this type of litigation expense will be considered a capital expenditure regardless of whether the taxpayer claiming the deduction is the purchaser or seller of the stock.

As for litigation expenses of other types, the courts will use an "objective standard of deductibility," and look to the origin of the claim involved, rather than the purpose or consequences of the litigation, in determining whether they are deductible. The extent of the rejection of the "primary purpose" test is not made clear in Woodward and Hilton, but it is very unlikely that it will be extended in the future beyond those cases which squarely involve the question of whether the taxpayer's purpose in the litigation is to defend or perfect title to property. Its application may be continued in this class of cases, but it is certainly not a favored standard otherwise.

JAMES D. EDGAR

INSURER'S OBLIGATION TO DEFEND AND INDEMNIFY: NOT A DEBT SUBJECT TO ATTACHMENT FOR PURPOSES OF OBTAINING QUASI IN REM JURISDICTION

State ex rel. Gov't Employees Insur. Co. v. Lasky

Plaintiff Taussig, a resident of Missouri, was injured in Rhode Island when a parked car that she was entering was struck by another automobile operated by defendant Slack, a resident of Rhode Island. Plaintiff brought suit in the Circuit Court of St. Louis County to recover damages. Based on an affidavit as to defendant's nonresidency, an attachment and summons was issued commanding the sheriff of Cole County to attach the lands, tenements, goods, moneys, and credits of defendant and to summon as garnishee the relator, Government Employees Insurance Company (hereinafter GEICO), a foreign corporation authorized to do business in Missouri.

91. Id. As this case points out, the "primary purpose" test is a creation of the lower courts, and the Supreme Court has never directly reviewed it.

1. 454 S.W.2d 942 (St. L. Mo. App. 1970).
Plaintiff alleged that GEICO's contractual obligation, as defendant's liability insurer, to defend any action brought against Slack and to indemnify him from any resulting judgment was a "debt" owing to defendant and thus subject to attachment. Defendant made a special appearance and moved to vacate the attachment through which the plaintiff was attempting to obtain quasi in rem jurisdiction over him. The motion was overruled by the respondent, Judge Lasky. Thereafter GEICO filed a petition for a writ of prohibition in the St. Louis Court of Appeals alleging that the trial court lacked jurisdiction, since GEICO owed its insured no "debt". The court issued a provisional rule of prohibition. Upon hearing the St. Louis Court of Appeals made permanent its provisional rule by holding that neither the obligation to defend nor the obligation to indemnify was a "debt" subject to attachment, since the obligation to defend was not "absolutely due as a money demand"2 and the obligation to indemnify was "contingent and speculative."3

A brief summary of the use of attachment and garnishment as a means of obtaining jurisdiction over a defendant is necessary for a better understanding of the present case. First, a state has the power, through its tribunals, to subject a nonresident's property situated within its limits to the payment of the legal demands of its own citizens.4 By the process of attachment or garnishment5 courts may obtain in rem6 or quasi in rem7 jurisdiction over a nonresident defendant whose property is in the state so long as there has been effective seizure of the property and adequate notice to the

2. Id. at 950.
3. Id.
5. The garnishment process is employed when the property of the defendant to be attached is in the hands of a third party who is present within the state. This property can be an intangible debt or personal property. In an attachment action the defendant has possession of his property at the time of the attachment. See H. Goodrich & E. Scoles, CONFLICT OF LAWS § 71 (4th ed. 1964). Since the effect of both attachment and garnishment is to bring property belonging to the defendant under the power of the court for purposes of jurisdiction, the words attachment and garnishment will not be distinguished in this note.
6. When a thing is subject to the judicial jurisdiction of a state, an action may be brought to affect the interest in the thing of all persons in the world. Such a proceeding is commonly referred to as a proceeding in rem. RESTATEMENT OF JUDGMENTS, Explanatory Notes § 32, comment a at 127 (1942).
7. If the purpose of the action is to affect the interests in the thing of particular persons only, the action is commonly referred to as quasi in rem. Proceedings quasi in rem are of two types, in both of which the jurisdiction of the state is to affect interests of particular persons in the thing. In the first type the plaintiff asserts an interest in a thing and seeks to have his interest established against the claims of a designated person or persons, e.g., an action to quiet title or remove a cloud of title to land. In the second type of proceeding, quasi in rem, the one with which this note is concerned, the plaintiff is not seeking to establish his interest in the thing but seeks instead to enforce a personal claim against a defendant and by employing the process of attachment and garnishment seeks to apply the thing to the satisfaction of his claim. An example of this type proceeding is an action in tort to recover damages with the action being initiated by attachment or garnishment where the state has no jurisdiction over defendant but does have jurisdiction over the thing belonging to defendant or of a person indebted to or under a duty to the defendant. See RESTATEMENT (SECOND) CONFLICT OF LAWS, INTROD. NOTE TO CHAP. 3 (PROPOSED OFFICIAL DRAFT, 1967).
non-resident. The court thereby acquires jurisdiction to render judgment to the extent of the value of the property so attached but cannot render a deficiency judgment against the nonresident defendant. Thus any judgment awarded to the plaintiff in an in rem or quasi in rem proceeding must be satisfied, if at all, from the attached property.

Secondly, attachment and garnishment exist only by virtue of statute and can be resorted to only in accordance with the express authorization of the statute. Missouri allows a plaintiff in any civil action to have an attachment against the property of the defendant where the defendant is not a resident of the state. If that property is a “debt” owed to the nonresident, garnishment in aid of attachment is authorized. When notice of garnishment is served on the garnishee (debtor), it has the effect of attaching all property in his possession belonging to his creditor, the defendant.

To be subject to attachment in Missouri, a debt must be an unconditional obligation independent of any contingency. In addition, it must be absolutely due as a money demand. Thus, an obligation payable in services rather than in money cannot be attached. Underlying this requirement that a debt be certain and absolutely due as a money demand is the desire “to avoid multiplicity of lawsuits which would result from unenforceable judgments based on attachment of speculative debts.”

Since location or situs of the property is important in ascertaining

14. § 521.010 (1), RSMo 1969; Mo. R. Civ. P. 85.01 (1).
15. § 525.010, RSMo 1969 provides:
All persons shall be subject to garnishment, on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debts of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees.
16. § 525.040, RSMo 1969 provides in part:
Notice of garnishment, served as provided [in these rules shall] have the effect of attaching all personal property, money, rights, credits, bonds, bills, notes, drafts, checks or other choses in action of the defendant in the garnishee's possession or charge, or under his control at the time of the service of the garnishment, or which may come into his possession or charge, or under his control, or be owing by him, between that time and the time of filing his answer. . . .
whether it comes within the jurisdiction of the court, difficulties frequently arise when the property is an intangible such as a debt owed to the defendant.\(^{21}\) The Missouri Supreme Court has taken the position,\(^{22}\) which is in accord with the position taken by the United States Supreme Court in *Harris v. Balk*,\(^{23}\) that a debt travels with the debtor and garnishment is allowed whenever the garnishee (debtor) is personally served in any forum in which his creditor, the defendant, could bring an action on the debt. If the garnishee is an insurance company doing business in the state, garnishment may be obtained by serving notice on the State Superintendent of the Insurance Department.\(^{24}\)

In the instant case the St. Louis Court of Appeals, after examining the insurer's contractual obligation to defend and indemnify in the light of these well-established principles, correctly concluded that such an obligation was not a "debt" subject to attachment, since the obligation to defend was "clearly not an indebtedness absolutely due as a money demand."\(^{25}\) The court questioned, "[i]n and of itself what monetary valuation could be placed on it?"\(^{26}\) Furthermore, the obligation of GEICO to indemnify defendant up to the limits of the liability policy was only a contingent obligation which would mature only if and when plaintiff obtained a valid judgment against the defendant insured. As the court stated, "[i]t would be difficult to imagine a so-called indebtedness more contingent and speculative than an action for personal injuries resulting from the alleged negligence of a defendant."\(^{27}\)

Neither the Missouri Supreme Court nor the Kansas City or Springfield Courts of Appeal have been faced with the issue of determining whether an insurer's obligation to defend and indemnify is a debt subject to attachment in this state. In the absence of a reexamination of this issue by the Missouri Supreme Court, *State ex rel. Government Employees Insurance Co. v. Lasky*\(^{28}\) (hereinafter GEICO) indicates such an obligation is not an attachable debt in Missouri so as to enable a resident plaintiff to obtain *quasi in rem* jurisdiction over a nonresident defendant with respect to an accident which occurred in another state. Thus, in light of the fact that personal jurisdiction over defendant was previously lacking both under Missouri's "long-arm" statute\(^{29}\) and Non-Resident Motorist Statute,\(^{30}\) this inability to obtain *quasi in rem* jurisdiction by attachment of the insurer's obligation will apparently leave plaintiff with the alternative of proceeding against the nonresident defendant in a distant forum.

To support his contention that GEICO's contractual obligation was a

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24. § 525.050, RSMo 1969; Mo. R. Civ. P. 90.04.
25. 454 S.W.2d at 950.
26. Id.
27. Id.
28. 454 S.W.2d 942 (St. L. Mo. App. 1970).
29. § 506.500, RSMo 1969.
30. § 506.210, RSMo 1969.
debt subject to attachment in Missouri, respondent relied on two New York cases holding such an obligation to be attachable. In Seider v. Roth New York became the only state to allow attachment of the obligation to defend and indemnify so as to enable a plaintiff to obtain quasi in rem jurisdiction over a nonresident defendant. In order to find an attachable non-contingent obligation to defend under New York's attachment statute, the New York Court of Appeals determined that the obligation was indefeasibly fixed the moment the accident occurred, since the insurance company, under the provisions of the policy, had a duty to investigate and pay medical claims. The obligation to indemnify, however, was dependent on proof of negligence. Nevertheless, the court of appeals allowed attachment of the obligation to indemnify, since the moment negligence was proven against the defendant (insured), the obligation then became fixed and therefore was no longer speculative. A strong dissent in Seider pointed out that the obligation to defend and indemnify was contingent and thus not attachable. Seider was reaffirmed by the same court a year later in Simp-

32. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The court of appeals based this decision on the prior case of In re Riggle's Estate, 11 N.Y.2d 73, 181 N.E.2d 496, 226 N.Y.S.2d 416 (1962) where attachment of the insurer's obligation to defend and contingently indemnify was allowed. The distinction which the court failed to mention in its majority opinion was that whereas in Riggle the defendant had, prior to the attachment of his insurer's obligation, been personally served and in personam jurisdiction had been obtained (thus causing the obligation to defend to accrue and a "debt" within the meaning of the statute to materialize), in Seider in personam jurisdiction was lacking.
33. N.Y. Civ. Prac. Law §§ 5201(a), 6202 (McKinney 1963) authorized garnishment of a debt which was "past due or which is yet to become due, certainly or upon demand" of the creditor. It is important to note that New York (by statute) and Missouri (by decisions construing section 525.010, RSMo 1969) each require, for a debt to be subject to attachment, that it be certain and not contingent. If it is not yet due it can be attached if it is certain to become due. Whereas New York would allow a debt in the nature of services to be attached so long as it gives promise of being translatable into an economically valuable tangible such as cash, Missouri requires that the debt be absolutely due as a money demand.
34. Seider v. Roth, 17 N.Y.2d 111, 113, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101 (1966). It is interesting to note that this obligation of the insurer to investigate and pay medical claims was not the same obligation which the appellant was contending to be the "debt". Apparently the court of appeals seized upon this provision in the liability insurance policy to sustain the contention that the obligation to defend was no longer contingent and thus attachable.
35. See 51 Minn. L. Rev. 158, 161 (1966).
   The so-called 'debt' which is supposed to be subject to attachment is a mere promise made to the nonresident insured by the foreign insurance carrier to defend and indemnify [the insured] if a suit is commenced and if damages are awarded against the insured. Such a promise is contingent in nature. It is exactly this type of contingent undertaking which does not fall within the definition of attachable debt contained in CPLR 5201 (subd. [a]), i.e., one which 'is past due or which is yet to become due, certainly or upon demand of the judgment debtor.' The bare undertaking to defend and indemnify is not an obligation 'past due' and it is not certain to become due until jurisdiction over the insured is properly obtained.
son v. Loehmann. It is important to note that of the states, in addition to Missouri and New York, which have been faced with the issue of determining if the contractual obligation of an insurer to defend and indemnify is a debt subject to attachment under their statutes, every state except New York has reached a result similar to that in GEICO. Furthermore, the Supreme Court of South Carolina in Howard v. Allen took occasion to reject the Seider decision. In considering the strength of the New York cases as precedent, the St. Louis Court of Appeals correctly concluded that the determination of whether such an obligation is a debt subject to attachment in this state "must be determined in the light of our statutes and our decisions construing them and applying them, not those of some other state." The court in GEICO noted that several authors had criticized the Seider decision. In Missouri there are three important objections to Seider.

First, such a decision would have the effect of creating a judicial direct action, a result not justified either by judicial precedent or by legislation.

41. Id. at 947-48.
42. See 16 BUFF. L. REV. 769, 773 (1967) where the author points out that such a result would follow if attachment of this obligation is allowed. Although the defendant (insured) can default and lose the value of the attached obligation, it will be in the interest of the insurer to defend in each case in the hopes of minimizing damages.
43. In Noe v. United States Fidelity and Guaranty Co., 406 S.W.2d 666 (Mo. 1966) the Missouri Supreme Court refused to allow a direct action to be maintained where a Missouri resident was injured in Louisiana due to the negligence of the insured whose policy of insurance was issued by defendant insurance company which was doing business in Louisiana. Although plaintiff could have maintained the action in Louisiana under its direct action statute, the court held that the Louisiana direct action statute was procedural in nature and did not create a separate and distinct cause of action enforceable in the courts of Missouri. This decision tends to illustrate a reluctance on the part of the court to create direct actions in this state.
44. A legislative disapproval of direct actions can be implied from § 379.200, RSMo 1969 which provides that if a final judgment is not satisfied within thirty days from the date of the judgment, then the judgment creditor is permitted to proceed against the insured and his insurer to reach and apply the insurance money to the satisfaction of his judgment. Thus, it would be difficult to justify a result that would in effect allow a plaintiff to maintain a direct action before judgment without the leadership of the legislature. See 16 BUFF. L. REV. 769, 774-75 (1967) where the author points out that the Seider decision allows a direct action in New York where strong legislative disapproval can be implied from the New York law.
Second, such a holding would create another problem centering around the relationship between the insurer and the insured under the terms of the liability policy. Under Missouri law if the defendant (insured) made an appearance to defend on the merits he would subject himself to personal jurisdiction and a possible judgment in excess of the value of the attached obligation of his insurer to defend and indemnify. On the other hand, if the defendant does not appear in the action but defaults instead, he could be guilty of violating the policy's cooperation clause and could face the loss of future protection by his liability insurer if plaintiff subsequently brought an in personam proceeding against him. Furthermore, in an action where the defendant faced potential liability in excess of the policy limits, he would not knowingly submit himself to personal jurisdiction or permit his insured to enter an appearance on his behalf which would have the same effect. In such an instance the insurer could lose its property without ever being allowed to defend the action on the merits and without the plaintiff ever having demonstrated liability on the part of the defendant (insured). Such a procedure has been held to be unconstitutional as a violation of due process in that it amounts to a taking which does not comport with "traditional notions of fair play and substantial justice." In effect, such a procedure amounts to a direct action without sufficient procedural safeguards.

Finally, if Missouri were to permit such an obligation to be attached, the court would be violating the established rule that an attaching garnishor (the plaintiff) acquires only such rights against the garnishee as the garnishee's creditor (the defendant) possessed at the time of attachment. No process or proceeding can place the garnishee in a different or worse position than he would have occupied if sued directly by his creditor. This follows from the fact that since plaintiff has not obtained jurisdiction over defendant in proper proceedings, then the garnishee's obligation to defend has not arisen. Therefore, the garnishee's creditor (the defendant) has no rights at that time against him on the obligation. By allowing attachment, the court would be putting the garnishee in a position quite different from that occupied by him if sued by his creditor.

The procedure which allows a plaintiff to obtain quasi in rem jurisdiction over a nonresident defendant by attachment of his insurer's obligation to defend and indemnify can be characterized as an extension of a trend among the states to aid their residents in bringing actions against nonresidents. The enactment of long-arm statutes is evidence of such a trend. It is submitted that any such extension in this situation should be

45. §§ 521.360, .370, RSMo 1969.
47. Id. at 498.
48. Id. at 500.
51. Id.
53. Id.
made with the leadership of the legislature and not by the courts, although judicial extension of jurisdiction may be proper in other areas. The St. Louis Court of Appeals by its holding in GEICO, not only kept in line with prior Missouri decisions regarding garnishment of debts, but by so doing left any such extension in this area to the legislature where it rightfully belongs.

WENDELL R. GIDEON

RIGHT TO TRIAL BY JURY: A LINE IS DRAWN

*Baldwin v. New York*

Robert Baldwin was arrested August 20, 1968, and charged with "jostling," a violation of an ordinance apparently enacted by the New York legislature to combat pickpocketing in New York City. His pretrial motion for jury trial in New York City Criminal Court was denied pursuant to section 40 of the New York Criminal Court Act which declares that all trials in that court shall be without a jury. On the strength of a police officer's testimony, Baldwin was convicted by summary trial and given the maximum sentence of one year in the penitentiary. Baldwin's contention that section 40 was an unconstitutional denial of his sixth amendment right to jury trial was rejected by both the New York Supreme Court and the New York Court of Appeals. The United States Supreme Court reversed the conviction, on the ground that the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. The Court concluded that no offense for which imprisonment of more than six months is authorized is "petty" for purposes of the right to trial by jury.

54. In Howard v. Allen, ___S.C.—, 176 S.E.2d 127, 130 (1970) the court states, after refusing to allow attachment of the obligation to defend and indemnify: We are not without sympathy for the plight of the plaintiff. Unfortunately for her, there is no statute whereby she might obtain personal jurisdiction of the nonresident defendant. . . . It may very well be that her plight and that of others similarly situated deserves the serious consideration of the General Assembly, but this court is, of course, not empowered to legislate.

2. U.S. Const. amend. VI, which provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .
4. Baldwin v. New York, 399 U.S. 66, 69 (1970). The Court found it unnecessary to consider Baldwin's second argument that the New York City scheme was violative of the equal protection clause in that defendants charged with the same offense elsewhere in the state could receive a six-man jury. Id. at 71 & n.17.
5. Id. at 69. Justice White announced the judgment of the Court and delivered an opinion in which Justices Marshall and Brennan joined. Justices Black and Douglas concurred in the decision but read the Constitution as requiring jury trials for all crimes except those involving miniscule governmental sanctions. Id. at 74 & n.2.
The striking down of the New York procedure and the establishment of the petty-serious demarcation at six months were predictable upshots of the Court's decision in *Duncan v. Louisiana*, a landmark case decided only months before Baldwin's arrest. The Court in *Duncan* held that the sixth amendment requirement of a jury trial for a person charged with a "serious" offense is applicable to the states through the due process clause of the fourteenth amendment. The decision created a gray area for state judges. *Cheff v. Schnackenberg*, *Duncan* 's immediate predecessor in an oft-cited line of cases on this issue, told the judges that a possible six-month penalty was within the Court's concept of a petty offense while *Duncan* told them a possible two-year penalty was without it.

Much of what has been written about the *Duncan* decision—the historical and social factors which shaped the petty-serious distinction in its relationship with the right to jury trial—could be repeated in a discussion of the instant case, but *Baldwin* is significant in its own right. The acceptance of the maximum penalty test as the only *objective* criterion for drawing a line between petty and serious offenses was reaffirmed. Since the Court first squared off on the issue, other factors considered have been the sentence actually imposed, the nature of the offense, *i.e.*, classification of the crime as *malum in se* or *malum in prohibitum* and the indictability of the offense at common law. The Court in *Baldwin* cited the "near-

6. 391 U.S. 145 (1968). In a case related to *Baldwin* and decided the same day, the Court answered another question raised in *Duncan* by holding that trial by a six-man jury satisfies the sixth amendment as applied to the states, despite the federal requirement of twelve jurors. *Williams v. Florida*, 399 U.S. 78, 86 (1970).


12. *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970). The criterion was first used in *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937) in which the Court determined that an offense with a 90-day authorized penalty was not one for which the Constitution assured trial by jury.


15. *E.g., District of Columbia v. Colts*, 282 U.S. 63 (1930). Although the maximum penalty for conviction was only $100 and 30 days in jail, the Court said
uniform judgment of the Nation" as supportive of the six-month demarcation line. Yet, despite the seemingly clear holding, Baldwin raises at least four questions.

First, although the Court has determined that the "maximum penalty test" is the only "objective criterion," the Court apparently has not foreclosed the possibility that other factors mentioned above may in future cases force the offense into the "serious" classification even though the possible penalty does not exceed six months. Language in Justice White's majority opinions in both Duncan and Baldwin leaves little doubt the question is still open. The Court's balancing of deprivation of liberty and efficient court proceedings suggests the fulcrum (the petty-serious demarcation) might well shift when other factors are added to the liberty side of the scale. Five judges now on the Court would draw the upper limit of a petty offense no higher than six months. Since Justices Black and Douglas have adhered to a literal interpretation of the sixth amendment application to "all crimes," three of their associates would have to find other factors present in a particular case in order to expand the serious factor below the six-month line. The Court's emphasis on objective criteria diminishes the likelihood of such a decision.

A second question not discussed in Baldwin involves the more practical situation in which the defendant is charged with two or more 'petty' offenses with total possible maximum sentences exceeding six months. For example, a possible total of 12-months confinement for peace disturbance and resisting arrest violations by a single defendant should weigh the same in the Court's balancing as the one-year sentence facing Baldwin. This may be answered soon since the issue was raised in the Chicago Eight riot-conspiracy trial.

reckless driving is a "serious" offense because such conduct endangers property and life. Id. at 73. See also Schick v. United States, 195 U.S. 65, 68 (1904); Callan v. Wilson, 127 U.S. 540, 555 (1888).


17. 18 U.S.C. § 1 (1964) defines "petty" offenses in the federal system as those punishable by no more than six months in prison and/or a fine of not more than $500. This same upper limit for the state systems was recommended in the AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 20-23 (Approved Draft, 1968).


21. See Note 5 supra.

22. The Court already has determined that a multi-year probation was not sufficient to deem the charge "serious". Frank v. United States, 395 U.S. 147, 151-52 (1969). But additional guidelines also may be necessary when juvenile offenders face long reformatory terms. See Debacker v. Brainard, 396 U.S. 28 (1969), in which the Court did not have to answer the right to trial issue because the juvenile hearing was held prior to the Duncan decision which applied prospectively only. Id. at 50. See also In re Gault, 387 U.S. 1 (1967).


24. Walz, 13 Legal Questions Raised by the Trial of the Chicago 8 Minus 1 Plus 2, 17 PLAYBOY 176 (June, 1970):

[T]he U.S. Supreme Court has said men cannot be convicted of a
The Court’s singling out of New York City as the only jurisdiction denying a defendant the "... right to interpose between himself and a possible prison term of over six months, the common sense judgment of a jury ..." raises a third question: Is the Court implying that schemes in other states fall within the standards of Duncan and Baldwin? At least eight states do not afford an alleged misdemeanant the right to jury trial until he appeals and requests a jury for trial de novo—even though maximum penalties for misdemeanors in these states range from one to five years. The question, then, is: Does a jury trial during de novo review satisfy the sixth amendment? The Duncan Court briefly addressed itself to that question in a footnote but circumvented answering it. Justice Harlan, in a poignant dissent in Baldwin, answers in the negative, stating that this procedure has been deemed "incompatible with the sixth amendment for putting the accused to the burden of two trials if he wishes a jury verdict." His conclusion is simply a paraphrasing of his grandfather’s opinion for a unanimous Court in Callan v. Wilson, which held that a person charged with a serious federal offense must be accorded a jury trial at the first instance. Consequently, the Baldwin Court may have impliedly overruled Callan. The two-trial system raises an equal protection issue when an indigent defendant is involved since it is not atypical for a state to require some form of security before appeal is effected. The waiving of a security bond upon determination of indigency seems to fall within the rationale of Griffin v. Illinois. North Carolina, which denies a jury trial until de novo review in superior court, statutorily allows indigents to appeal without security. But a 1969 case in that jurisdiction, State v. Sherron, points out other incidents of such a scheme which may be violative of the equal protection clause. Defendant Sherron spent an unspecified number of days

"serious contempt"... except by jury. It is arguable that Judge [Julius] Hoffman's attempted circumvention of this dictate by issuing a stream of "petty" citations and by sentencing to six months or less on each is an unavailing gambit.

28. Duncan v. Louisiana, 391 U.S. 145, 158 n.30. (1968). The Court simply said that past interpretations of the sixth amendment are always subject to reconsideration.
30. 127 U.S. 540, 557 (1888). But is Callan precedent for the state courts as part and parcel of the Duncan decision? This highlights one of the problems inherent in the selective incorporation process, as discussed in Young, Review of Recent Supreme Court Decisions, 16 A.B.A.J. 994 (1970).
33. "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." Id. at 17-18.
35. 4 N.C. App. 386, 166 S.E.2d 836 (1969).
in jail awaiting appeal of a district court conviction and four-month sentence because he could not post a personal appearance bond. On a jury verdict of guilty, the superior court increased the sentence to 21-24 months and disallowed credit for the days he already had spent in jail. Sherron's price for a jury trial was indeed a costly one and certainly would cause future defendants to consider these risks before appealing to obtain a jury trial.

A recent case before the Missouri Supreme Court, *State ex rel. Wholey v. Provyn*,38 sought an answer to a fourth question raised by *Baldwin*, that of prospective or retroactive application. The *Wholey* case arose in the Kansas City court system, which felt the impact of *Baldwin* within weeks after the decision when eight persons successfully relied on *Baldwin* to overturn disorderly conduct convictions.37 The ruling forced the city, which by ordinance prohibited jury trials in municipal court,38 to revise its general penalty ordinance, reducing the maximum sentence from one year to six months.39 As a result of the favorable use of *Baldwin* in Kansas City, Wholey, an inmate of the Kansas City municipal farm, sought retroactive application of *Baldwin* as a basis for a writ of habeas corpus. The writ was denied for failure of the petition to state a claim on which any relief could be granted. Since there was no opinion, the denial was an apparent rejection of retroactive application by the Missouri Supreme Court.

In order to determine whether a new constitutional principle will be applied retroactively, the United States Supreme Court has established a three-factor analysis: (a) The extent of the reliance by law enforcement authorities on the old standards, (b) the effect on the administration of justice of a retroactive application of the new standards, and (c) the purpose to be served by the new standards.40 After *Duncan*, states certainly could not have relied in good faith on the proposition that a defendant facing possible imprisonment for more than six months could be refused a jury trial.41 The *Baldwin* Court's playing down of the effect of its decision would seem to negate any argument that retroactive application would have significant effect on the administration of justice. The final factor—the purpose to be served by the new standard—cuts against the argument for retro-

38. KANSAS CITY, MO., REV. ORDINANCES § 35.300 (1956).
39. Ord. No. 38541, § 1.17 (July 17, 1970), repealing KANSAS CITY, MO., REV. ORDINANCES § 1.17 (1956). However, the new general penalty ordinance, which applies to about 95 per cent of the violations, also contains a provision that each day's violation constitutes a separate and distinct offense, recalling the discussion in note 24 *supra*.
activity of the Baldwin "rule." The Court in DeStefano v. Woods43 limited Duncan to prospective application, stating that "[v]alues implemented by the right to jury trial would not be served measurably by requiring retrial of all persons convicted in the past . . . ."44 The Court gave no further explanation and relied heavily on the other two criteria. Standing alone, as it would in deciding Baldwin's application, this would seem a shaky basis for denying a fair trial under the sixth and fourteenth amendments. Regardless, the problem could be far less significant, and possibly non-existent, by June, 1972 (two years after the Baldwin decision), when the maximum sentences authorized under Duncan will have expired.

Although these four questions may have to be answered by the United States Supreme Court before the full effect of Baldwin will be known, its six-month imprisonment factor, unlike Duncan's two-year test, brings the constitutional right to jury trial into many municipal courts empowered to impose penalties in excess of six months without the necessity of a jury. Practically speaking, most persons appearing before those courts are first-offense defendants, more concerned with restricting the experience to the fewest moments and less concerned with a jury trial. But widespread publication of cases such as the one resulting in the Kansas City ordinance revision could cause those courts to take a close look at their procedures. The Missouri Municipal and Magistrate Judges Association offers a good example of judges determined to dispel "kangaroo court" and "assembly-line justice" charges.45 The association conducted an informational survey of municipal court judges46 just prior to Baldwin, the survey concluding that there is a general "... confusion as to whether, and in what courts, the defendant has the right to trial by jury."47 Little is known, however, about the day-to-day functioning of the Missouri municipal courts, isolated from the rest of the Missouri court system except for infrequent appeals.48 Only in the municipal and police courts of third and fourth class cities is the right to jury trial secured by statute.49 Charter cities such as Kansas City50 were left to decide for themselves at what point the right to jury trial attaches.51

44. Id. at 633.
45. Lauer, Prolegomenon to Municipal Court Reform in Missouri, 31 Mo. L. Rev. 69 (1966) points out some of the characteristics of the municipal court system which serve as bases for those charges.
46. MISSOURI MUNICIPAL & MAGISTRATE JUDGES ASS'N, A SURVEY OF MISSOURI'S MUNICIPAL COURTS (1970) [hereinafter cited as COURT SURVEY]. The survey, with a 75 per cent return from Missouri municipal and police court judges, was conducted in cooperation with the Missouri Bar and the University of Missouri-St. Louis Extension Division.
47. COURT SURVEY 31. The right clearly is available to defendants in magistrate courts regardless of the possible penalty. § 543.200, RSMo 1969.
48. COURT SURVEY 4.
49. §§ 98.080, .380, .550, RSMo 1969, respectively.
50. See note 38 supra.
51. The lack of uniformity is evidenced in the COURT SURVEY, which revealed that:
(1) 10 per cent of the responding judges did not complete grade school and another 24 per cent did not graduate from high school. Id. at 12.
(2) Only a third of the judges require a city attorney's presence at all municipal court sessions and 17 per cent never require his presence. Id. at 14.
The Missouri Supreme Court, sitting en banc, recently took a step toward reducing the confusion, and, at the same time, offered its first official interpretation of Baldwin. The case, State ex rel. Cole v. Nigro, involved a woman charged with obstructing a police officer in violation of a Kansas City ordinance, which then carried a maximum possible penalty of twelve months imprisonment. Pursuant to Kansas City's summary-proceeding ordinance, the municipal court judge denied her written demand for a jury trial. She petitioned for and received an alternative writ of mandamus from the Missouri Supreme Court on May 11, 1970. A month later Baldwin was decided and, as previously discussed, Kansas City reduced its general penalty provision to a maximum of six months. In quashing the alternative writ in Cole the court held that the new penalty ordinance is applicable to relator's pending case even though enacted after the date of the alleged offense; therefore, the six-month rule of Baldwin was satisfied. The court could have ceased discussion here, the case dispensed with in one paragraph. Instead, the court quoted at length from a handful of Missouri cases standing for two propositions in regard to prosecutions for municipal ordinance violations: (1) That the proceeding is civil in nature but quasi-criminal in procedure, and (2) that the right to a jury trial is embraced by neither common law nor the Missouri Constitution, which states that the "right of trial by jury as heretofore enjoyed shall remain inviolate. . . ."

The court then advised:

Baldwin requires, however, that the Missouri rule be modified to provide that in municipal court prosecutions where the maximum period of imprisonment exceeds six months a jury trial must be provided upon demand.

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(3) 50 per cent of the judges hear less than 100 cases annually and 6 per cent hear more than 3,000. Id. at 21.

(4) More than half of the courts may be entering void judgments because of the failure of city attorneys to sign traffic tickets filed against defendants. Id. at 25.

(5) Some municipal courts prosecute state statute offenders who are guilty of no municipal violation. Id. at 30.

(6) Ten years after the publication of Rules of Practice and Procedure for Municipal and Traffic Courts by the Missouri Supreme Court, barely more than half of the court judges have a copy of the rules and follow them. Id. at 23.

Few municipal courts provide each defendant with a pamphlet such as "Your Bill of Rights When Appearing Before the Municipal Court of the City of Columbia." This may be one reason less than one-sixth of the courts surveyed in the Court Survey have held a jury trial in the past two years. Neither Kansas City nor St. Louis municipal courts reported a single jury trial in that period. Although St. Louis city law authorizes a jury trial, in practice a defendant who requests a jury trial apparently must wait until he appeals de novo to the St. Louis Court of Criminal Corrections, which must grant the request for jury trial. St. Louis v. Moore, 288 S.W.2d 383 (St. L. Mo. App. 1956).

52. — S.W.2d — (Mo. En Banc 1971).
53. Id. at —.
54. Id. at —. See Mo. Const. art. I, § 22 (a).
55. State ex rel. Cole v. Nigro, — S.W.2d —, — (Mo. En Banc 1971). What if the relator in this case also had been charged with peace disturbance arising out of the same event, so that her maximum total sentence could exceed the six-month line?
Relying solely on the six-month penalty test, the court gave no weight to relator's argument that she was entitled to a jury trial because the offense was indictable at common law. Based on this advice, cities and towns in Missouri with authorized penalties in excess of six months might well follow Kansas City's example and redraw the maximum line at six months. If penalties were not reduced, a defendant could be charged with an ordinance violation which would be serious enough to raise the right to jury trial, yet still be a civil violation in nature—not a crime. The resulting anomaly in such a dual-natured proceeding is revealed in numerous cases, which show that a unanimous verdict is required, the defendant must be found guilty beyond a reasonable doubt, the judge cannot direct a verdict, a defendant's appeal is governed by the criminal code, and liability for the "debt" abates at the death of the convicted person. On the other hand, the city has the right to appeal an adverse decision, information or complaint requirements are eased, convicted defendants who are unable to pay must work out the fine or sentence at a prescribed daily wage, and the governor cannot pardon a person convicted of an ordinance violation. The "civil" characterization has been called a "fiction and a facade" for truly criminal enactments. By cloaking an offense in the less onerous label of "civil" the Missouri courts, and others accepting the doctrine, have perpetuated the inadequate proceedings revealed in the court survey.

By reaffirming this state's long-standing view on the nature of a municipal court proceeding and by limiting Baldwin strictly to its holding, the court in Cole seemed to be making its position clear, i.e., against

56. Id. at —. See note 15 supra.
57. King City v. Duncan, 238 Mo. 513, 142 S.W. 246 (1911).
63. See Kansas City v. Stricklin, 428 S.W.2d 721 (Mo. En Banc 1968).
64. § 98.020, RSMo 1969. See also Ex parte Hollwedell, 74 Mo. 395 (1881). The Supreme Court has held that the equal protection clause prohibits the jailing of indigents convicted of an ordinance violation for which a fine is the only punishment. Tate v. Short, — U.S. —, 91 S.Ct. 663 (1971).
65. See State ex rel. Kansas City v. Renick, 157 Mo. 292, 57 S.W. 713 (En Banc 1900). For a detailed discussion of these anomalies, see also Lauer, Prolegomenon to Municipal Court Reform in Missouri, 31 Mo. L. Rev. 69 (1966).
67. See Foreword, Court Survey 10-11 (1970): "[I]t is the system which produces courts like these that is to blame, not the judges. . . ."
68. Apparently taking a broader view of Baldwin, Judges Donnelly and Seller dissented, stating that the Missouri Constitution required that relator be entitled
the argument that a defendant should have the same rights in the lowest
city court as he would have in the highest federal trial court—a proposition
which, according to some, is the ultimate result of the line of reasoning
advanced in Baldwin and its predecessors. Theoretically, an affirmative
answer is indicated on the issue of whether a jury trial should be available
in all criminal (or quasi-criminal) prosecutions regardless of the possible
penalty for the offense. On the other hand, practical considerations, e.g.,
crowded court dockets, have demanded a contrary conclusion. In the absence
of sufficient empirical evidence minimizing those practical considerations, Baldwin strikes a conscionable and workable medium.

RONALD R. McMILLIN

RECEIVED TELEPHONE CALLS: AN END TO CONFUSION IN MISSOURI?

State v. Steele

The victim was a 19-years-old, unmarried, pregnant, college student. After discussing her problem with a friend, Cindy, she received a phone call from a man who said he was Cindy’s friend. She received a second phone call from a man who identified himself as “Doc.” They discussed plans for an abortion. On May 17, the girl received another call from a man identifying himself as “Doc.” She told him she wanted an abortion and that she could have the required $250 by the weekend. She also told the caller she would be at her roommate’s house in Kirkwood, Missouri, and gave him the phone number. On May 19, the girl received two phone calls from “Doc” at the Kirkwood residence. During the second call, “Doc” directed her to take a cab to the intersection of Highway 40 and Lindberg Blvd. The girl followed these instructions and was met by a man (not defendant) to whom she gave the money. He directed her to a motel room where another man she later identified as the defendant performed an abortion. Evidence at trial tended to show that the defendant was a graduate of chiropractic
to a jury trial because the charge exposed her to deprivation of her liberty and because the offense involved also was embraced by the state criminal code. State ex rel. Cole v. Nigro, — S.W.2d —— (Mo. En Banc 1971).


70. The majority opinion in Baldwin makes little use of statistics in discussing the possible administrative burden an expanded right to jury trial might present. See Baldwin v. New York, 399 U.S. 66, 74 n.22 (1970). The dissenting opinions of Chief Justice Burger, id. at 74, and Justice Harlan, Williams v. Florida, 399 U.S. 78, 135 (1970), include the argument that the peculiarities of a particular locality demand different petty-serious demarcations and Justice Harlan cites awesome statistics about the volume of judicial business in the New York City courts.

For a discussion of the added burden in Minneapolis municipal courts when jury trial was extended to intoxicated driving cases, see 47 MINN. L. REV. 99 (1962). The Columbia, Missouri, municipal court, which grants a jury trial upon request regardless of the offense, averages only one jury trial per month, according to Judge Roger D. Hines. See note 66 supra.

1. 445 S.W.2d 636 (Mo. 1969).
school and was called “Doc” by some people. Evidence of the phone conversations was objected to at trial as hearsay, but this objection was overruled. Defendant appealed to the Missouri Supreme Court.

The issue on appeal was whether there was sufficient identification of the caller to allow the admission of the evidence. If the identification was sufficient to establish the caller as defendant, the evidence would come in under the “admissions exception” to the hearsay rule.2 Conversely, if the identification was not sufficient the evidence would be inadmissible. The supreme court ruled that identification could be established by circumstances and that the circumstances in this case were sufficient to establish that the call was, in fact made by defendant.

The general rule is that testimony about a telephone conversation is not admissible absent identification of the caller.3 However, an exception is made when the testifying witness dials a given phone number. The person answering is presumed to be the person called if the number was obtained from a phone book or the person himself.4 Further, if a central switchboard places the caller in contact with another at the caller’s request, the presumption is that the person reached is the person requested.5

This presumption is not raised when the witness is the party receiving the call.6 If the party receiving the call recognizes the voice of the caller the evidence will be admitted,7 but this is not the only means of identifying the caller. In General Securities Co. v. Sunday School Publishing Board, Inc.,8 the Tennessee Court of Appeals held that identification of the caller could be made by circumstance. That case involved a suit on a promissory note in which a witness testified that he was called by a Mr. Wood, who inquired as to the validity of several notes. The Tennessee court held that since Mr. Wood was the only one handling this type of business for plaintiff, the circumstances were sufficient to identify Mr. Wood as the caller. Similarly, the Supreme Court of North Carolina held in State v. Strickland9 that an anonymous call instructing the prosecuting witness to look under his door mat for an extortion letter was admissible when, after the witness did in fact find the letter and followed the instruction to leave money in a flower pot, the defendant was apprehended while attempting to pick up the money.

2. McCormick, Evidence § 239 (1954). In situations when the caller is not a party, the identification of that caller could not of itself be enough to overcome a hearsay objection. In that case another exception to the hearsay rule must be found. This note will consider only the identification of the caller.
3. 31A C.J.S. Evidence § 188 (1964); New York Life Ins. Co. v. Silverstein, 53 F.2d 986 (8th Cir. 1931).
7. State v. Berezuk, 331 Mo. 626, 55 S.W.2d 949 (1932); Williamson-Halsey-Frazier Co. v. King, 58 Okla. 120, 158 P. 1142 (1916).
8. 22 Tenn. App. 590, 125 S.W.2d 160 (1939).
In *State v. Kladis* a policeman received a call from a woman who identified herself as Mrs. Kladis and reported someone breaking into her house. Several minutes later the woman called again to tell the officer to "cancel" the first call because the housebreaker was her husband. The Kansas Supreme Court, in affirming the husband's conviction of burglary of a grocery store, held that the calls were consistent with the overall scheme developed in the prosecution's case; the defendant was surprised while burglarizing a grocery store and fled, leaving his car and housekeys at the scene requiring him to break into his own house. This theory was supported by other evidence of defendant's guilt, but no direct evidence of the identity of the caller was produced, except the fact that the caller identified herself as Mrs. Kladis. Thus, the only circumstances tending to show who called were described in the prosecution's opening statement and not by witnesses.

The Texas Court of Civil Appeals has held in *Liberty Mutual Ins. Co. v. Preston* that the caller is also sufficiently identified if he reveals special knowledge that only he would know. In *Liberty Mutual* the witness received a call from a man identifying himself as Mr. Preston, who stated that he was having trouble with his car, a 1956 Oldsmobile, in a state park. When the evidence tended to show that Mr. Preston was driving a 1956 Oldsmobile and was in the vicinity of the park, the phone call was held admissible.

The test which summarizes these exceptions to the general hearsay rule was set out by the 9th Circuit Court of Appeals in *Carbo v. United States*:

The issue for the trial judge in determining whether the required foundation for the introduction of . . . [the phone call] has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by proponent.

The Missouri law prior to *Steele* was confusing because the St. Louis Court of Appeals and the Springfield Court of Appeals held oppositely on the matter of received phone calls, while the positions of the Kansas City Court of Appeals and the Missouri Supreme Court were uncertain. The first Missouri case involving a phone call received by a testifying witness, a Kansas City Court of Appeals case was *Kansas City Star Publishing Co. v. Standard Warehouse Co.* Plaintiff received a telephone inquiry about an advertisement placed in plaintiff's newspaper. The caller identified himself as the president of defendant company. It is not clear from the opinion which party offered the evidence, but since the court of appeals stated that the only issue was the authority of the person placing the ad to bind the defendant, and since the fact that the evidence was offered to show the president knew

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12. *Id.* See also Gutowsky v. Halliburton Oil Well Cementing Co., 287 P.2d 204 (Okla. 1955) where caller referred to details of a drilling operation then in progress; Commonwealth v. Du Hadway, 175 Pa. Super. 201, 103 A.2d 489 (1954) where caller tried to place a bet with raiding officer who answered defendant's phone).
13. 314 F.2d 718, 743 (9th Cir. 1963).
of the ad, it seems that it must have been offered by plaintiff, not the party who placed the call. The Kansas City Court of Appeals admitted the evidence, relying on Wolfe v. Missouri Pacific Railway Co.\textsuperscript{15} and Guest v. Hannibal & St. Joseph Railroad Co.\textsuperscript{16} In both of these cases the call was placed by the party offering the conversation thus they are questionable authority for the Kansas City Star decision. In 1928, the Kansas City Court of Appeals again decided the question in favor of admissibility in Miller v. Phenix Fire Ins. Co.\textsuperscript{17} Although it is not clear from the opinion who offered the conversation, the court again relied on Wolfe and Guest, this time citing Kansas City Star in the line of cases with Wolfe and Guest. This was probably because the Wolfe and Guest cases were cited as authority albeit incorrectly, in reaching the Kansas City Star decision.

Meanwhile, the Springfield Court of Appeals decided against admission in Meyer Miling Co. v. Strohfeld.\textsuperscript{18} The defendant in Meyer offered a witness's conversation with plaintiff to prove that plaintiff had notice of a defect in a note. The plaintiff had called the witness, a banker, to determine the worth of the note. In ruling the evidence inadmissible the court reviewed many of the Missouri authorities on the question, drawing a distinction between those cases in which the witness had placed the call, and those in which the witness had received the call. The call was held to be admissible in the former line of cases, whereas inadmissible in the latter. Unfortunately, the Springfield court placed the Kansas City Star case in the line of cases in which the witness placed the call, presumably because of the reliance in Kansas City Star on Wolfe and Guest.

The St. Louis Court of Appeals decided in favor of admission in Morriss v. Finkelstein,\textsuperscript{19} in which the plaintiff's attorney wrote a letter to a Mr. Levitt and shortly thereafter received a phone call from a man who identified himself as Mr. Levitt and referred to the attorney's letter. The St. Louis court in admitting the evidence read the prior cases, especially Kansas City Star, as standing for the proposition that a call received by the witness is admissible if the circumstances tend to identify the caller. In 1956, the St. Louis Court of Appeals held a call received by plaintiff's mother inadmissible for lack of identifying circumstances.\textsuperscript{20} Thus the St. Louis court was consistent in holding in favor of admissibility although it did require a great amount of corroborating identification evidence.

With the St. Louis court favoring admissibility, the Springfield court squarely against it, and the Kansas City court in doubt, the Missouri Supreme Court, prior to Steele, seemed to be wavering between the two cases.

\textsuperscript{15} 97 Mo. 472, 11 S.W. 49 (1888).
\textsuperscript{16} 77 Mo. App. 258 (K.C. Ct. App. 1898).
\textsuperscript{17} 9 S.W.2d 672 (K.C. Mo. App. 1928).
\textsuperscript{18} 224 Mo. App. 508, 20 S.W.2d 969 (Spr. Ct. App. 1929).
\textsuperscript{19} 145 S.W.2d 439 (St. L. Mo. App. 1940).
\textsuperscript{20} Herzwurm v. Mound City Cab Co., 290 S.W.2d 203 (St. L. Mo. App. 1956). The plaintiff was beaten for strike breaking and sued the defendant for fraud. The call was purportedly made by defendant assuring plaintiff, through his mother, that the strike was over and it was safe to return to work. The St. Louis court held that the identification was not established by the above circumstances and that defendant was, therefore, not bound by the statement.
positions. On certiorari of Meyer Milling, the supreme court adopted the Springfield court's reasoning in Meyer Milling. The court further evaded resolving the conflict by declining to hold the decision contrary to a prior holding of the supreme court, because the court had only cited the Kansas City Star decision with approval but had not decided the case, and therefore, it was not a holding of the supreme court. In 1982, the supreme court again considered the question and stated that circumstances would be sufficient to identify the caller; however, the supreme court held the evidence inadmissible because the identification in that case was insufficient. In Teel v. May Dept. Stores, the supreme court held a call received by a Mrs. Foster admissible, stating the circumstances were sufficient to identify the caller. However, both the plaintiff and the defendant testified as to the defendant's end of the conversation with Mrs. Foster. It seems likely that the evidence was admissible to clarify the entire conversation.

In view of Steele, it now appears that Missouri has definitely adopted the rule that identification of a caller may be established by circumstances surrounding the call. The supreme court relied on both the North Carolina decision, Strickland, and the Kansas decision, Kladis, in reaching its decision; the only Missouri case mentioned was State v. Berezuk. The remaining question is how far this doctrine will extend. It seems certain that it will be used in the criminal area, particularly in crimes of anonymity, or where the phone conversation is a part of the crime. The doctrine has been followed where the call tends to prove that notice to potential holders in due course was given; that a contract was made in negotiations by telephone; that liability exists; or if it is to be used

21. State ex rel. Strohfeld v. Cox, 325 Mo. 901, 30 S.W.2d 462 (En Banc 1930).
22. State v. Berezuk, 331 Mo. 626, 55 S.W.2d 949 (1932). The sister of the prosecutrix in a rape case received a call from defendant and discussed his relationship with prosecutrix. The supreme court held that the information in the conversation could have been possessed by others and, therefore, the circumstances were not sufficient.
23. 352 Mo. 127, 176 S.W.2d 440 (1943).
24. The plaintiff was suing for false imprisonment. She had been held with her sister-in-law by defendants' store detectives until both confessed to obtaining property under false pretense. The sister-in-law had charged goods to the account of a Mr. Foster who had been seeing the sister-in-law. During the confinement, the detectives called Mrs. Foster to ascertain whether the sister-in-law had authority to purchase on Mr. Foster's account.
25. 331 Mo. 626, 55 S.W.2d 949 (1932). See note 22 supra.
30. Miller v. Phenix Fire Ins. Co., 9 S.W.2d 672 (K. C. Mo. App. 1928);
as evidence of discrimination on the part of landlords. There is also one case which indicates that the identification by the caller himself, with no attendant circumstances shown, would be enough, but such a "boot strap" argument seems, to this author, unlikely to be followed. It appears from Steele that each case will turn on whether there are circumstances sufficient to identify the caller. How much is necessary is still somewhat uncertain, but if the call is part of an overall scheme of circumstances it seems likely that it will be admitted.

The cases decided by the Missouri courts have had stronger evidence than the minimum requirement stated in the opinion. One can say that if the caller mentions something which would not be general knowledge or the call seems to be a logical step in the sequence of events surrounding the transaction or crime, it will be admitted. As cases arise in the future with appropriate facts to test the minimum requirement, more definite guidelines should emerge.

WARREN D. WEINSTEIN

MORE EMANATIONS FROM RULE 10b-5

Kahan v. Rosenstiel

In March 1967, Schenley Industries, of which Lewis Rosenstiel was the controlling shareholder and chairman, was negotiating the possibility of a merger with P. Lorillard Company. Shortly thereafter, negotiations were terminated because Lorillard was not willing to give Rosenstiel the premium that he demanded for his interest, and Rosenstiel began negotiations with Glen Alden Corporation. In March 1968, Rosenstiel sold his controlling interest to Glen Alden, of which Meshulam Riklis was the controlling shareholder, for $80 a share. Concurrent with the sale it was publicly announced through various financial media that Glen Alden would make a tender offer to all of the common shareholders of Schenley, which would be comparable to the $80 per share paid to Rosenstiel.

Claiming that Glen Alden's offer was not equivalent to the $80 per share paid to Rosenstiel for his controlling interest and that other companies (including Lorillard) had been willing to make an offer that was generally more favorable to the minority shareholders, the plaintiff filed

33. State v. Steele, 445 S.W.2d 636, 639 (Mo. 1969) where the court said that "no hard and fast rule determines the adequacy of the circumstances in all cases."

2. The proposed offer consisted of cash, debentures, and warrants to purchase Glen Alden's stock. Id. at 164.

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an action\(^3\) under section 10b of the Securities Exchange Act of 1934\(^4\) and SEC Rule 10b-5\(^6\) (Rule 10b-5) seeking damages and "further relief as may be just." Plaintiff's suit was on behalf of all of the common shareholders of Schenley at the time of the transaction, except Rosenstiel, and named Glen Alden, Riklis, Schenley and its directors as defendants. Plaintiff alleged that defendants had (1) misrepresented the true value of the proposed tender offer, and (2) failed to disclose that Lorillard was willing to make a more favorable offer. Subsequent to the filing of suit, Glen Alden revised the tender offer. The plaintiff, still not satisfied, amended his complaint, and Glen Alden made a final tender offer which the plaintiff acknowledged was equal to the $80 per share given to Rosenstiel. These revisions were made without consulting plaintiff. The plaintiff admitted that his underlying cause of action had become moot. However, claiming that he had created a fund\(^7\) for the benefit of all the members of his class, he filed a petition to recover attorneys' fees.

In reviewing this petition, the District Court for the District of Delaware noted that in order to recover attorneys' fees, it was necessary for the plaintiff to show that his original cause of action was of a "meritorious quality," and that this required a showing that the complaint could have withstood a motion to dismiss.\(^8\) Because plaintiff had (1) failed to allege that he or the members of his class were purchasers or sellers, (2) failed to allege reliance on the alleged fraud, and (3) failed to establish a proper class, the court decided that plaintiff's claim could not have withstood a motion to dismiss.\(^9\) Further, it added that because no fund had actually

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   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of 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 Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
5. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1970) provides:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange,
   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (c) To engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
6. 424 F.2d at 174.
7. If the difference between the initial offer and the final offer is multiplied by the number of shares held by minority shareholders, the sum is approximately $3,000,000. Plaintiff requested 10% of this for expenses and attorneys' fees.
been created, plaintiff was in reality trying to recover attorneys' fees from an adverse party, which could not be done. On appeal, the Court of Appeals for the Second Circuit reversed and remanded the case to the district court to determine whether or not the plaintiff's suit had actually caused the subsequent offers, and to determine which, if any, of the defendants would be liable for the attorneys' fees.10

In Mutual Shares v. Genesco, Inc. the Court of Appeals for the Second Circuit stated, "[I]t is now common ground that an injured investor does have a private cause of action under Rule 10b-5."11 Fully one-third of the cases brought under the Securities Exchange Act of 1934 deal with Section 10b and Rule 10b-5.12 Because there has been so much activity in the Rule 10b-5 area since a private civil remedy was first implied,13 a brief review of the setting in which Kahan v. Rosenstiel14 was decided will help in analyzing the court's reasoning.

One of the first developments in the area was a holding in Birnbaum v. Newport Steel Corp.15 that a plaintiff had to be a "defrauded purchaser or seller of securities" to have standing to sue under rule 10b-5. This decision was based upon the court's interpretation of the legislative history of section 10b.10 Because the strict purchaser-seller requirement in Birnbaum has caused hardships17 in actions under Rule 10b-5, the courts have modified it drastically.18 In 1964, it was held that a "defrauded offeree" was not a seller and did not have standing under Rule 10b-5,19 but in 1967, Moore v. Greatamerica Corp.20 recognized standing to seek injunctive relief in a corporation which was not a seller or buyer but whose shareholders had received a fraudulent tender offer. The District Court for the Northern District of Ohio explained that it saw a trend to follow a "liberal interpreta-

10. There was language in the court of appeals decision which indicated that only Glen Alden and Riklis would be responsible for attorneys' fees, but on rehearing the court of appeals chose to let the district court make this determination. 424 F.2d at 168, 175. On remand the district court denied a motion by Schenley's directors to dismiss the petition for attorneys' fees as against them. Kahan v. Rosenstiel, 315 F. Supp. 1931 (1970).
11. 384 F.2d 540, 543 (2d Cir. 1967).
16. In Simmons v. Wolfson, 428 F.2d 455, 456 (6th Cir. 1970) the court mentioned another reason for the sustained vitality of the Birnbaum doctrine, where it said that without it the doors of "federal jurisdiction in claims for damages against corporate directors and officers arising out of breach of fiduciary duties" would be opened. For a rebuttal to this argument see Cohen, The Development of Rule 10b-5, 23 Bus. Law. 593 (1968).
tion of the Act in order to eliminate any undesirable practices." 21 This distinction between suits for equitable relief and suits for damages as related to standing in the 10b-5 cases in recent development 22 and comes at a time when the courts are also reworking their definitions of purchasers and sellers. Now "forced sellers" have standing, 23 and a corporation issuing its own shares is a seller within the meaning of the 1934 Act. 24 In 1967, the same year that the Moore decision was handed down, the Court of Appeals for the Second Circuit, originator of the Birnbaum doctrine, addressed itself to the equity-damage distinction in Mutual Shares Corp. v. Genesco, Inc. 25 In that case plaintiff was a minority shareholder, and the allegation was that the defendant had, through fraudulent activities, manipulated and depressed the market price enabling it to purchase shares at less than their true value from the minority shareholders. Plaintiffs had not sold their shares at the time of the suit. The court said that the claim for damages would have to be dismissed because of lack of standing. However, they went on to say "we do not regard the fact that plaintiffs have not sold their stock as controlling on the claim for injunctive relief," 26 and that stockholders can play "an important role in the enforcement" of section 10b in this way. 27 All of this activity prompted some commentators to suggest that the Birnbaum doctrine had met its demise. 28 However, recent cases indicate that the purchaser-seller requirement, as modified, is still alive. 29

The purchaser-seller requirement was particularly meddlesome to the court in Kahan because a tender-offer was involved. Although section 10b has been in existence since 1934, tender offers were rarely used before 1965. 30 Corporate tender offers have become one of the most popular means of acquiring control of another company. 31 In Crane Co. v. Westinghouse Air Brake Co. 32 the court lamented the problem of applying "to the devices,

21. Id. at 492.
22. In Greater Iowa Corp. v. McLendon, 378 F.2d 785 (8th Cir. 1967) the court said that plaintiff had to be a buyer or seller to seek injunctive relief.
23. See Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir.), cert. denied, 394 U.S. 970 (1967). Here the minority stockholder was effectively forced into a sale of his stock by virtue of his being left with the other alternatives of continued holding of shares in a non-existent corporation or exchange for shares in the surviving corporation. See also Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970).
25. 384 F.2d 540 (2d Cir. 1967).
26. Id. at 546.
27. Id. at 547.
29. See Greenstein v. Paul, 400 F.2d 580, 581 (2d Cir. 1968), where the court said that Birnbaum "is still the rule at least insofar as actions for damages are concerned." See also Iroquois Indus., Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970).
new and old, used in these battles [corporate take-overs] the protection contained in legislation existing at the dates of the action in suit."

33 In recognition of this problem, section 14 (e)34 was added to the Securities Exchange Act in 1968. In Electronic Specialty Co. v. International Controls Corp.,35 the Court of Appeals for the Second Circuit noted that section 14 (e) in effect "applies Rule 10b-5 both to the offeror and to the opposition and it is very likely, except perhaps for any bearing it may have on standing, only a codification of existing case law."36 Section 14 (e) was not applicable in Kahan because it did not go into effect until July 29, 1968 after the alleged violation in the case had occurred. It is submitted, however, that the fact that Congress had deemed it necessary to provide a remedy to the defrauded tender offeree, although somewhat belatedly, probably motivated the court in its determination to find standing in this case.

At the same time the debate concerning the standing issue has been going on, the courts have been trying to make it easier for those plaintiffs who meet the standing requirement to bring a Rule 10b-5 action. Because "numerous relatively small investors may be deterred from seeking individual relief and aggregation of claims may lure better or more expensive legal services,"37 class actions have been held proper under Rule 10b-5.38

Questions have also arisen as to what kinds of relief are available to plaintiffs. Section 28 (a) of the 1934 Act39 provides for recovery of "actual damages." Punitive damages are generally held to be unavailable in 10b-5 actions,40 but under certain circumstances attorneys' fees are recoverable.41

33. Id. at 793.
   It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.
35. 409 F.2d 937 (2d Cir. 1969).
36. Id. at 940-41.
39. Securities Exchange Act § 28 (a), 15 U.S.C. § 78bb (a) (1964) provides that: [n]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.
In Mills v. Electric Auto-Lite Co., a suit brought “both derivatively on behalf of Auto-Lite and as representatives of the class of all its minority shareholders,” the Supreme Court decided that section 28 (a) did not preclude the awarding of interim attorneys’ fees under section 14 (a) of the 1934 Act. Justice Harlan said:

[W]e cannot fairly infer from the Securities Exchange Act of 1934 a purpose of circumscribing the courts’ power to grant appropriate remedies. The courts must . . . determine whether the special circumstances exist that would justify an award of attorneys’ fees, including reasonable expenses of litigation other than statutory costs.

By analogy, the Court’s reasoning should apply to section 10b. The Court noted that the “fund” or “substantial benefit” case is the primary judge-created exception to the rule that attorneys’ fees will not be awarded in the absence of a statute or a contract between the parties. Normally these are class actions where a fund was created for or a substantial benefit conferred upon the members of a class. The Supreme Court explained that the reason for this rule was the unfairness in allowing the other members of the class to benefit at the expense of the plaintiff. The Mills opinion also notes that it is not a literal necessity that a fund be present, and states that attorneys’ fees can be awarded against a corporation in shareholders’ derivative actions. By imposing them against the corporation, the court can distribute the costs equally among the shareholders “regardless of whether an actual money recovery has been obtained in the corporation’s favor.” The Court was careful to point out, however, that attorneys’ fees were not being awarded against an adverse party, but were imposed on “the class that has benefited from them and that would have had to pay them had it brought the suit.”

It was within this setting that the court of appeals decided that it would be appropriate to award attorneys’ fees in Kahan. The court did not have much trouble in deciding that it was unnecessary to allege reliance to have a cause of action under Rule 10b-5 or in deciding that plaintiff represented a proper class. The significance of Kahan rests in the ingenious

42. Id. 
43. Id. at 378. 
44. Id. at 391. 
45. Id. at 391. 
46. Id., citing 6 J. Moore, Federal Practice ¶54.77 (2) at 1349 (2d ed. 1966). 
47. 396 U.S. at 392. 
48. See Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939). Here attorney’s fees were given to a plaintiff who brought an action on her own behalf because her case would have stare decisis effect, enabling other plaintiffs similarly situated to recover from specific assets of defendant. 
49. 396 U.S. at 394. 
50. Id. at 397. 
51. 424 F.2d at 173-74. The court said that the fact that the misstatement or omission was required to be “material” by § 10b and the fact that it was hard to show reliance on the part of a class did away with the requirement of alleging reliance.
52. 424 F.2d at 168-69.
application of the relaxed test for standing in suits for equitable relief announced in Mutual Shares Corp. and in the fact that it goes a step beyond Mills in allowing recovery of attorneys' fees from adverse parties.

While acknowledging that the underlying suit in this case was for damages, the court noted that the plaintiff had requested "further relief as may be just."53 The court reasoned further that since Rule 54 (c) of the Federal Rules of Civil Procedure allows a court to award "any relief appropriate under the circumstances,"54 plaintiff's suit should not have been dismissed "if a cause of action for injunctive relief were in fact inherent in the complaint."55 Having thus established that the plaintiff was seeking injunctive relief, the court decided that plaintiff and his class could have withstood a motion to dismiss and therefore had standing.

Addressing itself to the problem of awarding attorneys' fees from an adverse party, the court started with the premise that attorneys' fees are normally not awarded in the absence of a statute or contract authorizing them.56 Next, the court noted the "fund" or "substantial benefit" exception that was applied to the section 14 (a) case in Mills. While no fund was actually created in this case, the plaintiff contended that since defendants Glen Alden and Riklis had made the subsequent tender offers to the individual shareholders without consulting plaintiff, defendants were responsible for the fact that no fund existed. Plaintiff further argued that this action violated Rule 23 (e) of the Federal Rules of Civil Procedure57 requiring formal class settlements. In Moore's Federal Practice it is noted that courts of equity "may award attorney's fees in favor of one party against another, where . . . a defense . . . is maintained in bad faith, vexatiously, wantonly, or for oppressive reasons."58 Plaintiff contended that defendants' actions in "brazenly ignoring Rule 23 (e)"59 put them into this category. Acknowledging what could be called the "conduct" doctrine,60 the court noted that a substantial benefit had been conferred upon the members of plaintiff's class and accepted the plaintiff's argument that it was defendants' fault that no fund was created. Therefore, the court decided that the district court could, at its discretion, award attorney's fees stating:

If a court ultimately decides that a plaintiff created substantial benefit for others, it could find it inequitable to deprive plaintiff

53. Id. at 174.
54. Fed. R. Civ. P. 54 (c) states: "[e]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."
55. 424 F.2d at 174.
56. Id. at 165.
57. Fed. R. Civ. P. 23 (e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."
58. 6 J. Moore, Moore's Federal Practice 554.77 (2) at 1352 (2d ed. 1966).
59. 424 F.2d at 168.
of counsel fees, merely because defendants prevented the physical creation of the fund by flagrantly ignoring Rule 23.61

This "conduct" argument was unsuccessfully presented in a Rule 10b-5 action in the case of Stevens v. Abbott, Proctor & Paine.62 There the court decided that plaintiff was not entitled to attorney's fees where defendants had violated 10b-5 by "churning" her account.63 The court mentioned the "conduct" doctrine but said that the "interest of justice does not require the awarding of counsel fees"64 in this case. Kahan is the first case in which the "conduct" doctrine has been used as grounds for awarding attorney's fees from an adverse party, and it is certainly an extension of the mandate to allow recovery of attorneys' fees set forth in Mills.

The ruling in Kahan supports the proposition that Rule 10b-5 no longer means what it says. "If civil liability is to remain . . . it should be codified."65 The court took an implied tort, went out of its way to find a category in which plaintiff, if he fit, could have standing and then neatly implied plaintiff right into that category. Such mental gymnastics are certainly entertaining, but they do not contribute to the stabilization of the law in the Rule 10b-5 area.

It is hard to say exactly what effect, if any, Kahan will have on future 10b-5 litigation. The Court of Appeals for the Third Circuit did not explicitly repudiate the Birnbaum doctrine, but they certainly expressed disfavor with it and went out of the way to circumvent it. The case follows the precedent set forth in Mutual Shares66 by adopting a more liberal standing test in suits for equitable relief which does not require that plaintiff be a "purchaser or seller" at all, but only that there is some sort of causal connection between the alleged violation of Rule 10b-5 and the damage suffered by plaintiff.67 If Kahan is followed, it will not be necessary for a plaintiff to specifically seek injunctive relief in order to have standing if there is an inherent claim for injunctive relief in the cause of action68 It does not appear that Kahan will affect standing in damage suits under Rule 10b-5 unless this inherent claim is present.

Kahan does appear to go a step beyond Mills in allowing the recovery of attorneys' fees from an adverse party where there is no fund in effect or otherwise. It is important to remember, however, that the wrongful conduct

61. 424 F.2d at 168.
63. Churning involves excess trading in a client's account by his broker. Id. at 847.
64. Id. at 849.
66. 384 F.2d 540 (2d Cir. 1967).
67. The SEC as amicus in Rekant v. Desser, 425 F.2d 872 (5th Cir. 1970) argued that "the proper test for whether misrepresentations and omissions of material facts are in connection with the purchase or sale of any security, thus giving rise to a cause of action under Rule 10b-5, is whether they have influenced an investor's judgment to buy, sell or hold such a security." Id. at 879.
68. If the take-over had been completed before plaintiff brought his cause of action, an implied request for an injunction to stop the tender offer might not have been found.
involved in *Kahan* prevented the creation of a fund over which the court would have had control and from which the court could have granted attorneys' fees to the plaintiff. By doing so, the court could have distributed the costs equally among the members of his class. In view of the language in *Mills* showing disfavor at awarding attorneys' fees from the losing party, it is doubtful that the courts will go too far in finding exceptional "conduct" which warrants the awarding of attorneys' fees. At the very least, however, *Kahan* serves as a powerful notice to defendants in a Rule 10b-5 action that if plaintiff says he has a class action, it should be treated as such for settlement purposes until there is an in-court determination to the contrary. 69

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69. Had a proper settlement been made in the case, the members of plaintiff's class would have been required to share the cost of attorneys' fees.