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Recent Cases

ADMINISTRATIVE LAW—EFFECT OF SECTION 10(c) OF THE ADMINISTRATIVE PROCEDURE ACT ON THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES

United States v. Consolidated Mines & Smelting Co.¹

The United States brought this action as trustee for the Colville Indian Tribe to quiet title to lands within the tribe's reservation. The defendant, Consolidated Mines & Smelting Co., had asserted 56 mining claims on the land, but the Department of the Interior had held them invalid in six decisions. Four of these decisions were not appealed to the final agency authority, the Secretary of the Interior.² The district court first granted summary judgment to the United States affirming these four decisions on the ground that Consolidated had failed to exhaust its administrative remedies. Upon reconsideration, however, the court held that section 10(c) of the Administrative Procedure Act,³ (hereinafter APA) limits the general doctrine of exhaustion in that “[i]ntra-agency appeals are not a prerequisite to judicial review except to the extent statutes or appropriate agency rules command otherwise.”⁴ The decisions by the Interior were, therefore, judicially reviewable.

The court of appeals adopted this part of the district court's opinion

1. 455 F.2d 482 (9th Cir. 1971), aff'g in part & rev'g in part Civil No. 2412 (E.D. Wash., filed June 28, 1968).

2. A summary of the history of the decisions is as follows:
   Decisions 1 & 2: No "contest proceedings." (A unilateral decision was made by the Spokane Land Office Manager.) Appealed through the Secretary of the Interior; therefore, exhaustion was not an issue with regard to these decisions.
   Decision 3: No "contest proceedings." Appealed through Director, Bureau of Land Management, but not to the Secretary of the Interior.
   Decisions 4 & 5: "Contest proceedings." Appealed through Director, Bureau of Land Management. No appeal to the Secretary of the Interior.
   Decision 6: No "contest proceedings." No appeals.

   Decisions 1, 2, 3, and 6 invalidated certain claims because they had been located after the reservation had been withdrawn from entry by order of the Secretary of the Interior. Decisions 4 and 5 invalidated claims because they were not supported by valid discoveries. Id. at 437.

3. 5 U.S.C. § 704 (1946), which provides:
   Actions reviewable—Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

4. 455 F.2d at 441.
verbatim. Although the court dealt in detail with many other issues, this note will focus on the court's ruling on the question whether section 10 (c) of the APA has changed the rule requiring exhaustion of all available administrative appeals as a prerequisite to judicial review of administrative action.

The general rule of exhaustion is that a party must exhaust his administrative remedies before he may obtain judicial review of the validity of administrative action. The rule has its parallel in the usual requirement that a final judgment must be obtained in the trial court before an appellate court will grant review. As the Consolidated court noted, the courts apply the exhaustion requirement to deny judicial review in different factual situations. A court may apply exhaustion to prevent a party from challenging the jurisdiction of an agency before an administrative proceeding is completed. A court may also invoke exhaustion to deny review of an agency's interlocutory action or inaction, or of issues not presented to the agency. Finally, as the district court did

6. L. Jaffe, supra note 5, at 424.
7. 455 F.2d at 438-39.
8. L. Jaffe, supra note 5, at 424.
9. K. Davis, Administrative Law § 20.02 (1958). Despite the Supreme Court's statement in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1958), that where an agency's jurisdiction is challenged it is a "long settled rule of judicial administration that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted" (id. at 50), the Court has not always applied the rule. See, e.g., Greene v. United States, 376 U.S. 149 (1964) (confusing because exhaustion excused, but this was decided after the substantive issue had already been resolved); Allen v. Grand Cent. Aircraft Corp., 347 U.S. 535 (1954) (exhaustion excused because there was no properly authorized procedure to exhaust); Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) (exhaustion excused where order of commission held invalid on its face). But see Petroleum Exploration Inc. v. Public Serv. Comm'n, 304 U.S. 209 (1938). Professor Davis recommends deciding the exhaustion question in such cases on the basis of the weighing of three factors: (1) The degree of injury that would result from requiring the pursuit of administrative remedies; (2) the degree of certainty or doubt about the jurisdiction of the agency; and (3) the degree to which the dispute involves specialized questions that the agency is best equipped to resolve. K. Davis, supra, § 20.03, at 69.

Some state cases suggest that exhaustion does not apply where the challenge is constitutional in nature. See Flores v. Los Angeles Turf Club, Inc., 55 Cal. 2d 786, 361 P.2d 921 (1961); Levitt & Sons v. State Div. of Discrimination, 31 N.J. 514, 158 A.2d 177 (1960). The Supreme Court cases indicate that exhaustion is excused more often where the constitutionality of the legislation creating agency authority is challenged than where the constitutionality of the agency's application of the statute is questioned. Compare Myers v. Bethlehem Shipbuilding Corp., supra (proposed application of act allegedly unconstitutional and exhaustion required) with Allen v. Grand Cent. Aircraft Co., supra (enabling act allegedly unconstitutional on its face and exhaustion excused) and Lichter v. United States, 334 U.S. 742 (1948) (statute allegedly unconstitutional on its face and exhaustion excused). But see Aircraft & Diesel Equip. Corp. v. Hirsch, 334 U.S. 742 (1948) (constitutional attack on same statute attacked in Lichter but exhaustion required).

10. K. Davis, supra note 9, § 20.05.
11. Id. § 20.06, at 92.
initially in Consolidated, a court may apply exhaustion to deny review of an administrative action which is final at the agency level at which it is rendered, but which has not been appealed to a higher level of review within the agency.\footnote{Id. § 20.08, at 104.}

The usual exhaustion case is one where administrative appeals are still available and the plaintiff seeks judicial review prematurely. In some cases, however, the administrative remedy no longer exists, and the party who has not exhausted available remedies is the defendant. To apply exhaustion in such cases may result in the loss of a right or a defense.\footnote{L. JAFFE, supra note 5, at 450.}

Where application of the doctrine has resulted in the forfeiture of a defense, objections have been raised to its application. Because the doctrine is based on the judicial policy of encouraging administrative efficiency,\footnote{Yakus v. United States, 321 U.S. 414 (1944) (exhaustion principle used to bar defense to criminal action); Falbo v. United States, 320 U.S. 549 (1944) (because of failure to take all administrative appeals, defense barred). \textit{But see} Donato v. United States, 302 F.2d 468 (9th Cir. 1962) (exhaustion not required when failure to go through selective service process was excusable); United States v. McCrillis, 200 F.2d 884 (1st Cir. 1952) (defense of invalidity still available).} it is questionable whether it should be applied to a defendant. Although in Consolidated the party who failed to exhaust available administrative remedies was the defendant, the court did not analyze the exhaustion problem in these terms. Instead, the court approached the case as presenting the more limited question whether exhaustion applies to situations where intra-agency appeals were not pursued after final agency decisions.

The district court in Consolidated initially applied the general rule that failure to appeal an administrative decision to higher agency authority precludes judicial review. The Supreme Court formulated this rule in \textit{United States v. Sing Tuck},\footnote{United States v. Harvey, 131 F. Supp. 493, 496 (N.D. Tex. 1954).} where an alien was denied habeas corpus because he failed to appeal an exclusion order to the Secretary of Commerce and Labor. The statute involved in that case defined an exclusion order as "final" unless reversed by the Secretary on appeal.\footnote{194 U.S. 161 (1904).} The Court held that this statute required appeal to the Secretary before resort could be had to the judicial process. According to the Consolidated court, the Sing Tuck rule "has been consistently followed."\footnote{Id. at 166.}

Upon reconsideration, the district court held that section 10(c) of the APA abrogated the rule in Sing Tuck.\footnote{455 F.2d at 439. \textit{But see} United States v. McCrillis, 200 F.2d 884 (1st Cir. 1952) (not seeking administrative appeal is not a bar to defending against enforcement proceedings); United States \textit{ex rel.} Bradley v. Watkins, 163 F.2d 328 (2d Cir. 1947) (characterizing appellant as "alien" is a question of law for courts, so exhaustion not required).} That section provides as follows:

\textit{Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection}

\footnote{Id. at 439.}
whether or not there has been presented or determined any application . . ., unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative, for an appeal to superior agency authority.20

Relying heavily on Professor K. C. Davis's interpretation of section 10 (c),21 the court said that under this section reviewability is the general rule, subject to two exceptions. First, to the extent that an agency's governing statutes determine finality, the rule does not apply. The Consolidated court found no statute purporting to determine the finality of decisions of either the Bureau of Land Management or the Department of the Interior. Second, by its own rules the agency may condition reviewability upon exhaustion of intra-agency appeals by requiring that a party exhaust intra-agency appeals and providing that the agency action remains inoperative pending appeal. The court noted that the relevant agency rules22 required intra-agency appeal from those decisions by a hearing examiner that the Director characterized as "recommended decisions." In this case the Director had so designated decisions 5, 4, and 5; and Consolidated had appealed these decisions to the Director as required. Decision 6 was not designated a "recommended decision" under this rule, and appeal to the Director was not required. Therefore, all four decisions were judicially reviewable.23

The court of appeals affirmed this interpretation of section 10 (c) and said that in so doing it broke new ground. It noted that cases within the Ninth Circuit had indicated that the elimination of the exhaustion requirement would be undesirable.24 The court also noted that two Ninth Circuit cases involving mining claims25 had required exhaustion of intra-agency appeals, but distinguished these cases on the ground that neither had considered the effect of the third sentence of section 10 (c). Moreover,

21. K. Davis, supra note 9, § 20.08.
22. 43 C.F.R. § 221.76 (c) (1963).
23. Section 10 (c) is also relevant when the question is whether a party must seek rehearing within the agency before seeking judicial review. The case law with regard to rehearings is more confused than it is in the appeals situation. The tendency has been to excuse exhaustion. See, e.g., United States v. Abilene & S.R.R., 265 U.S. 274 (1924); Prendergast v. New York Tel. Co., 262 U.S. 43 (1923). Later cases have excused exhaustion when the indication is that rehearing will not produce substantial reconsideration. See, e.g., Levers v. Anderson, 326 U.S. 219 (1945). Professor Davis's interpretation of section 10 (c) is that such distinctions are swept away, and the simple standard of section 10 (c) applies. K. Davis, supra note 9, § 20.08, at 103-04.
25. Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964).

In Davis, the court denied review on the basis of the second sentence of section 10 (c). It interpreted that sentence to mean that preliminary or procedural action could be reviewed only upon review of final agency action. See SEC v. Eastern Util. Associates, 162 F.2d 385 (1st Cir. 1947). Such an interpretation tends to undercut the apparent clarity and simplicity of the rules regarding the necessity of exhausting available appeal opportunities. Characterizing the order objected to as "preliminary," "procedural," or "intermediate" would allow the court to postpone judicial review.
it recognized that Representative Walter, Chairman of the House subcommittee that drafted the APA, remarked that "the provisions of this section . . . involve no departure from the usual and well-understood rules of procedure in this field."26 However, the court accepted Professor Davis's contention that while this is accurate as to the first two sentences of section 10 (c), the third sentence substantially changed the law.27 The court acknowledged that judicial decisions have almost completely ignored the directive of section 10 (c).28 Nevertheless, the court said that "there appears to be little doubt that Congress intended to declare that failure to appeal administrative decisions to higher administrative authority would not preclude judicial review."29

Finally, the court examined the potential impact of its decision. In rejecting the contention that the decision would flood the district courts with theretofore unreviewable cases, the court gave as its reasons three limitations upon the scope of its decision.

First, the court abandoned the requirement of exhaustion of intra-agency appeals only subject to the two exceptions embodied in the last sentence of section 10 (c).30 The court pointed out that given these two exceptions, it is apparent why the government stated in its argument that it could "live with" this holding. To require exhaustion, the agency need only amend its rules. Hence, the exhaustion principle will remain a weapon in the government's arsenal.

Second, the court obviated the exhaustion doctrine only insofar as it applies to intra-agency appeals. The court's disposition of the appeal from decision 6 illustrates this limitation. The court held that Consolidated waived its argument that it was denied its right to an administrative hearing, saying that section 10 (c) "does not affect the rule that the claimant must raise his question in the agency proceedings, before he applies for judicial review."31 This ruling helped the court to conclude that its decision would not flood the district courts, for the claimant must still raise his question initially before the agency.

Finally, the court held that its decision applies only to mining claims "and does not apply to the rule of exhaustion of remedies as it may appear

27. K. DAVIS, supra note 9, § 20.08, at 101.
28. 455 F.2d at 439.
29. Id. at 439-40.
30. Id. at 440.
31. Id. at 452. The authority relied on by the courts of appeals—Adams v. Witner, 271 F.2d 29 (9th Cir. 1959), and United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 93 (1952)—is arguably open to another interpretation. The district court cited Adams and Tucker Truck Lines as well as Leedom v. IBEW, 278 F.2d 237 (D.C. Cir. 1960), for the proposition that the rule of waiver is flexible. Furthermore, neither the district court nor the court of appeals cited Hormel v. Helvering, 312 U.S. 552 (1941), which is contrary to the waiver theory. According to Professor Davis, more penetrating opinions were written in Hormel than in Tucker Truck Lines, which did not overrule Hormel. Also, Justice Frankfurter, dissenting in Tucker Truck Lines, refers to APA requirements for adjudicative proceedings as unwaivable limitations on the power of the agency. 344 U.S. at 59.
in other decisions of this court involving other agencies."32 It is unclear why the court's analysis of section 10 (c) should be limited to mining claims. The court stated that it had not had a chance to review the statutes of other agencies and felt compelled to limit the decision. Although this is perfectly consistent with the requirements of section 10 (c) in that the section does require reading the rules and the governing statutes of the pertinent agency, this language unnecessarily de-emphasizes the general applicability of section 10 (c). Perhaps in order to make the change more palatable, the court emphasized a case-by-case approach. Such an approach obviates the very purpose of section 10 (c), which is to bring "simplicity where simplicity is needed."33

ROSSELLE PEKELIS HIGGINS

CONSTITUTIONAL LAW—BURDEN OF PROOF IN JUROR DISCRIMINATION CASES IN MISSOURI

State v. Strawther1

The Circuit Court for Pulaski County, Missouri, convicted Stellman Strawther of first degree burglary. At trial, the defendant, a Negro, moved to quash the all-white jury, alleging "systematic exclusion of Negroes from jury panels in Pulaski County."2 In support of his motion, he presented testimony from the circuit clerk and the county clerk regarding the method of juror selection in Pulaski County.3 Both witnesses testified that the approximate 8000 registered voters in the county included only 80 to 100 blacks. Further, while both admitted that the names of Negroes had been drawn as prospective jurors, their testimony also established that no blacks had served on a venire4 within the county for the past 16 years. However, both witnesses stated that they knew of no systematic or intentional exclusion. On appeal, Strawther challenged the trial court's

32. 455 F.2d at 452.
33. K. Davis, supra note 9, § 20.08, at 103-04.
1. 476 S.W.2d 576 (Mo. 1972).
2. Id. at 577.
3. Id. The names of voters in the last election are typed on pieces of paper, separated and placed in the box by township. The names of 24 regular members of the petit jury panel and 24 alternates are then drawn from the box. These slips of papers do not indicate race. When a name is called, the board of jury commissioners decides whether the person is available and qualified. This board consists of the circuit judge, the circuit clerk and the three county judges.
4. A venire is the larger body of individuals called for jury service from which the actual trial judge is ultimately selected in the litigation process. For purposes of this casenote the terms "venire" and "jury panel" will be used interchangeably. Although in its most precise sense "venire" does not denote the body of persons from which juries are selected but only the writ by which these persons are selected (Posey v. State, 73 Ala. 490 (1885); see Black's Law Dictionary 1726 (4th ed. 1951); 2 Bouvier's Law Dictionary 3389 (3d rev. 1914)), it is often popularly used as denoting the body of persons (Posey v. State, supra), and will be so used in this note.
denial of his motion, contending that he had established a prima facie case of juror discrimination against blacks, which shifted the burden of proof on this issue to the state. The Missouri Supreme Court held that the defendant had not established a prima facie case of systematic exclusion of blacks from his venire. The court based its holding on three distinct grounds. First, the defendant showed only the past, general practice of juror selection in Pulaski County. This alone did not demonstrate the systematic exclusion of blacks from the defendant's venire. Second, the statistical probabilities considerably favored "the selection of an all-white jury panel." Third, the defendant's own witnesses established that the jury commissioners selected the venire without discriminatory intent.

A criminal defendant, via the sixth amendment right to jury trial and the due process clause of the fourteenth amendment, has the right to "a jury selected from a representative cross-section of those persons in the community who are eligible for jury service." A particular jury or venire need not contain persons from every legally cognizable group. However, a defendant cannot be "deprived by design of the chance" to have members of a particular class on his jury. Peters v. Kiff set out the rationale supporting this right:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

To establish an abuse of this right, the defendant must show that an identifiable class within the community has been excluded from the juror selection process. In each particular case, the court must determine whether a jury without the excluded group represents a fair cross-section of the community. The courts have recognized a wide range of social, political, racial and religious groups as identifiable classes within the community.

5. 476 S.W.2d at 578.
6. Id.
7. Id. The lack of discriminatory intent, however, does not destroy the prima facie case for discrimination by total exclusion. Hill v. Texas, 316 U.S. 400, 404 (1942); Smith v. Texas, 311 U.S. 128, 132 (1940).
8. State v. Smith, 467 S.W.2d 6, 7 (Mo. 1971). "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ...." U.S. Const. amend. VI. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law ...." Id. amend. XIV, § 1. See Ex parte Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 131 (1880); Strauder v. West Virginia, 100 U.S. 503 (1880).
11. Id. at 503.
Until recently, most courts, including those in Missouri, stated that a criminal defendant must be a member of the excluded class in order to have standing to raise the juror discrimination issue.14 These courts reasoned that unless a defendant belonged to the excluded class, the discrimination did not harm him. However, the United States Supreme Court recently reversed the conviction of a white man, because blacks were purposely excluded from the juror selection process.15 The three majority justices based their decision on the sixth amendment right to jury trial and the fourteenth amendment right to due process.16 Three justices concurred, stating that the exclusion of blacks from juries because of race violated the Civil Rights Act of 1875.17 The three dissenting judges argued that this discrimination did not harm the defendant.18 Thus, the position of the United States Supreme Court on the standing question is uncertain at the present time.

The major obstacle that confronts a criminal defendant alleging juror discrimination is meeting his burden of proof. This burden of proof fluctuates with the method of exclusion.19 If the state has used its peremptory challenges to exclude a particular group from jury duty, the defendant faces a difficult burden of proof. Under Swain v. Alabama20 he must establish that

the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived the challenges for cause. . . . 21

Missouri follows this rule.22 In State v. Davison23 the defendant attacked the constitutionality of a statute that gave the prosecutor 15 peremptory challenges in a 47-man venire.24 The defendant argued that this number

16. Id. at 498.
17. Id. at 505 (concurring opinion).
18. Id. at 507 (dissenting opinion).
21. Id. at 223.
22. See, e.g., State v. Brookins, 468 S.W.2d 42 (Mo. 1971); State v. Smith, 465 S.W.2d 482 (Mo. 1971); State v. Clark, 465 S.W.2d 387 (Mo. 1971); State v. Hudleston, 462 S.W.2d 691 (Mo. 1971); State v. Davison, 457 S.W.2d 674 (Mo. 1970).
23. 457 S.W.2d 674 (Mo. 1970).
24. § 546.180. 2 RSMo 1969 provides in part:
(2) In all such trials, the state shall be entitled to the following number of peremptory challenges:
(a) If the offense charged is punishable with death, or by imprisonment in the penitentiary not less than for life, to the number of fifteen, and no more . . . .
of challenges allowed the state to discriminate in jury selection. Citing Swain, the court held the statute constitutional, because the defendant failed to demonstrate a case-by-case abuse of the peremptory challenge.\textsuperscript{25} The apparent reasoning behind this rule is that the peremptory challenge insures jurors which “in fact and in the opinion of the parties are fair and impartial.”\textsuperscript{26} With a less stringent burden of proof, the challenge would no longer be peremptory. Further, the peremptory challenge holds a time honored position that the courts are reluctant to question.\textsuperscript{27} As yet, no Missouri defendant has succeeded in meeting this case-by-case requirement.\textsuperscript{28}

As argued in Strawther, juror discrimination can also occur when the selection process totally excludes a particular group from the venire. In Norris v. Alabama\textsuperscript{29} the defendant attacked his rape conviction alleging discrimination in the selection of prospective jurors.\textsuperscript{30} The defendant established that Negroes constituted 7.5 percent of the county population, but that no blacks had ever been called as grand or petit jurors. He also proved that no blacks had served on his venire, but offered no proof of actual discrimination in his particular case. The Supreme Court held that such evidence created a prima facie case of discrimination which shifted the burden of proof to the state to prove its practices non-discriminatory.\textsuperscript{31} Swain v. Alabama\textsuperscript{32} sets out the reasoning behind the prima facie rule:

The [prima facie rule] is a highly pragmatic one. It is designed to operate in jury cases so that once the defendant has made a showing of total exclusion, the burden on going forward with the evidence is placed upon the State, the party in the better position to develop the facts as to how the exclusion came about. The defendant is a party to one proceeding only, and his access to relevant evidence is obviously limited. The State is a party to all criminal cases and has greater access to the evidence, if any, which would tend to negative the State’s involvement in discriminatory jury selection.\textsuperscript{33}

A strong inference of discriminatory practice arises from evidence that members of a particular class have never been called as prospective jurors. This inference, when combined with evidence that no members of the same group served on the defendant’s venire, gives rise to a second inference that discrimination occurred in his particular case.\textsuperscript{34}

\begin{thebibliography}{999}
\bibitem{25} 457 S.W.2d at 678.
\bibitem{26} Swain v. Alabama, 380 U.S. 202, 212 (1965).
\bibitem{27} Cf. 39 Miss. L.J. 187 (1967).
\bibitem{28} Since 1970, defendants in five Missouri cases have alleged juror discrimination by peremptory challenge, but all have failed. Cases cited note 22 supra.
\bibitem{29} 294 U.S. 587 (1935).
\bibitem{30} Id. at 588.
\bibitem{31} Id. at 591.
\bibitem{32} 380 U.S. 202 (1965).
\bibitem{33} Id. at 240.
\bibitem{34} See Finkelstein, supra note 19, at 342; Kuhn, supra note 19, at 251-52.
\end{thebibliography}
In State v. Logan, the Missouri Supreme Court held that the defendant had established a prima facie case of juror discrimination by total exclusion. In this case, the court reporter testified that to his knowledge no Negro was summoned to serve on a venire in Callaway County, Missouri, during his 26 years in office. The defendant also established that blacks constituted a significant percentage of the county's population. Further, the sheriff testified that during his 6 years in office he had never called a Negro for jury duty, because he was not "raised that way." Citing Norris, the court stated that proof of past discriminatory practices establishes a prima facie case of juror discrimination by total exclusion. The Logan decision overruled State v. Thomas, which held evidence of past discriminatory practices immaterial to the question of intentional exclusion. Thomas required the defendant to bear the heavy burden of establishing actual juror discrimination in his particular case. The Logan opinion acknowledged that the Norris case controlled. Nevertheless, the court also emphasized that the defendant had introduced evidence of actual discrimination in his particular case. Because of the absence of such additional evidence, Strawther was a more difficult case than Norris. Nevertheless, prior to Strawther, the Missouri approach to total exclusion complied with federal standards.

Finally, juror discrimination can occur when a particular group is underrepresented in the venire selection process. In this area, the courts are less inclined to shift the burden of proof to the state. Although a showing of statistical improbability will establish a prima facie case in the total exclusion area, the same showing is insufficient if the group involved was partially represented on the venire. One reason for this position is the impracticability of demanding exactly proportionate representation of each class on each venire. Further, valid reasons exist for excluding particular persons. Some citizens, regardless of their social, economic, racial or religious affiliations, are simply unfit for jury duty. Thus, the state can rebut a defendant's statistical evidence by showing that the particular group was underrepresented because a number of its members were unqualified.

In an underrepresentation case, the defendant bears a heavier burden of proof than in the total exclusion area. In Whitus v. Georgia, two

35. 341 Mo. 1164, 111 S.W.2d 110 (1937).
36. Id. at 1169, 111 S.W.2d at 113.
37. Id. at 1170-71, 111 S.W.2d at 118.
38. Id. at 1168, 111 S.W.2d at 112.
39. Id. at 1173, 111 S.W.2d at 115.
40. Id.
41. 250 Mo. 189, 157 S.W. 330 (1913).
42. Id. at 203, 157 S.W. at 334.
43. 341 Mo. at 1172, 111 S.W.2d at 115.
46. E.g., drunkenness; blood relationship to the defendant or the prosecuting attorney; inability to read, write or communicate in the English language.
47. Kuhn, supra note 19, at 307.
black defendants appealed their murder convictions alleging systematic exclusion of Negroes from the jury list.\textsuperscript{49} They presented evidence that the jury list was drawn from segregated tax digests.\textsuperscript{50} In addition, the defendants established that although blacks comprised over 27 percent of the total county population, they constituted only 7.5 percent of the petit jury venire.\textsuperscript{51} By considering both the statistical evidence and the tax digest evidence, the Court found juror discrimination against blacks and reversed the convictions.\textsuperscript{52} The Missouri Supreme Court followed a similar approach in \textit{State v. Smith}\.\textsuperscript{53} In that case, the court found systematic and intentional underrepresentation of women on juries in Boone County, Missouri. Testimony by the circuit clerk, that not all women drawn from the jury rolls were actually called for fear of overloading the juries, constituted one basis for this finding.\textsuperscript{54} Statistical probabilities also influenced the court's decision:

> It is sufficient to say that we are convinced, from the record in this case, that the statistical possibilities shown combined with the testimony of those participating in the selection made a prima facie case, which shifted to the state the burden . . . .\textsuperscript{55}

Thus, in an underrepresentation case the defendant must show something in addition to statistical probabilities in order to meet his burden of proof. Arguably, Strawther was a total exclusion case. As in Norris and Logan, the defendant complained of the total exclusion of blacks on the venire in the county.\textsuperscript{56} However, the court, as one of its three grounds for denying relief, imposed upon the defendant a burden of proof closer to the standard reserved for underrepresentation cases:

> While past practices may be shown past practices will not make a prima facie case, unsupported by evidence that systematic exclusion was practiced in the composition of the particular panel from which the convicting jury was chosen.\textsuperscript{57}

Further, in Strawther the court distinguished Whitus, an underrepresentation case, rather than Norris and Logan, both of which involved total exclusion.\textsuperscript{58}

This confusion was arguably unnecessary, because the court probably could have denied Strawther relief under existing federal standards. As a second ground for refusing to find juror discrimination, the court pointed out that the statistical probabilities considerably favored selection of an all-white jury.\textsuperscript{59} Even if the appropriate Norris standard had been applied, the resulting disproportion would not have been significant enough to raise a federal constitutional question.

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\textsuperscript{49} Id.
\textsuperscript{50} Id. at 546-47.
\textsuperscript{51} Id. at 550.
\textsuperscript{52} Id. at 551.
\textsuperscript{53} 467 S.W.2d 6 (Mo. 1971).
\textsuperscript{54} Id. at 8.
\textsuperscript{55} Id. at 9 (emphasis added).
\textsuperscript{56} 476 S.W.2d at 577.
\textsuperscript{57} Id. at 578.
\textsuperscript{58} 476 S.W.2d at 577.
\textsuperscript{59} Id.
CRIMINAL LAW—INSTRUCTING ON MANSLAUGHTER—
ELIMINATING THE PRESUMPTION OF MALICE
IN MISSOURI HOMICIDE CASES

State v. Ayers¹

Defendant was tried on a charge of murder in the second degree. In addition to evidence that defendant shot and killed the victim, there was testimony that after defendant had been arrested and as he was leaving the police station in custody of the police, he said to a woman, "I told her I was going to do it if she didn't make up her mind between him and me, who she wanted, me or [the victim]."² On the basis of this evidence the judge instructed the jury on murder in the second degree and manslaughter. The jury returned a verdict of guilty of manslaughter.

Defendant Ayers appealed the conviction, contending that the giving of the manslaughter instruction was improper, that a child witness at the trial was incompetent to testify, and that his admissions to the police and the woman were improperly admitted into evidence. The supreme court rejected all three of the defendant's contentions and upheld the conviction.

The court devoted the primary portion of its opinion to a discussion of the appropriateness of the manslaughter instruction.³ In ruling that the giving of the manslaughter instruction was proper,⁴ the court significantly changed the law in Missouri on proving malice in an intentional killing. The court rejected the position taken by State v. Williams⁵ one in a line of cases on the presumption of malice in a case of an intentional kill-

¹ 470 S.W.2d 594 (Mo. En Banc 1971).
² Id. at 596.
³ The court touched briefly on the issues of the child's testimony and the admissions of the defendant. Regarding the child testimony, the court pointed out the presumption under the Missouri statute in favor of a child over 10 years of age being competent to testify and indicated there was no "clear abuse" of discretion by the trial court in allowing the child to testify since the evidence illustrated that she understood the obligation to tell the truth. Id.; see State v. Villinger, 237 S.W.2d 132 (Mo. 1951); State v. Jones, 360 Mo. 723, 230 S.W.2d 678 (1950); Petty v. Kansas City Pub. Serv. Co., 554 Mo. 823, 191 S.W.2d 653 (1945); Burnam v. Chicago G.W.R.R., 340 Mo. 25, 100 S.W.2d 858 (1936); State v. Herring, 268 Mo. 514, 188 S.W. 169 (1916); State v. Anderson, 252 Mo. 83, 158 S.W. 817 (1913); State v. Sykes, 248 Mo. 708, 154 S.W. 1130 (1913); State v. Connors, 233 Mo. 348, 135 S.W. 444 (1911); State v. Headley, 224 Mo. 177, 123 S.W. 577 (1909); State v. Jeffries, 210 Mo. 302, 109 S.W. 614 (1908); State v. Brown, 209 Mo. 413, 107 S.W. 1068 (1908); State v. Prather, 136 Mo. 20, 37 S.W. 805 (1899); Cadmus v. St. Louis Bridge and Tunnel Co., 15 Mo. App. 86 (St. L. Ct. App. 1884); § 491.060, RSMo 1969.

⁴ The court also rejected the defendant's contention that the Miranda doctrine had been violated, ruling that the admissions by the defendant to the woman and the police were voluntary and not barred by Miranda. 470 S.W.2d at 537; see Miranda v. Arizona, 384 U.S. 436 (1966); State v. Peck, 429 S.W.2d 247 (Mo. 1968); State v. Burnett, 429 S.W.2d 239 (Mo. 1968). The court therefore allowed the admissions to come in as direct evidence of the defendant's guilt. 470 S.W.2d at 536-37; see State v. Smith, 377 S.W.2d 241 (Mo. 1964); State v. Hutsel, 357 Mo. 336, 208 S.W.2d 227 (1948).
⁵ 442 S.W.2d 61 (Mo. En Banc 1968).

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ing, and in a rather vague opinion attempted to eliminate the presumption of malice that previously had arisen whenever the state proved an intentional killing by the defendant. In order to realize the impact of Ayers on the proof of malice in homicide cases, one must examine the state of the law in this area prior to the Ayers decision.

The generally accepted position before Ayers was that if the state established an intentional killing by the defendant, a presumption arose that the killing was done with malice.6 This is the traditional position on the presumption of malice formulated under the common law and developed fully by the time of Blackstone.7 Support for this presumption had been strong in Missouri prior to Ayers as a result of a line of cases decided between 1856 and 1968.8 These decisions expressed no doubt that if the state proved an intentional killing, a presumption of malice arose.9 There still remains strong support for this position in many other jurisdictions.10 These jurisdictions usually take one of two approaches in determining when the presumption is applicable. Some states say simply that any intentional killing of a human being will be presumed to be with

8. See State v. Williams, 442 S.W.2d 61 (Mo. En Banc 1968); State v. Smith, 240 S.W.2d 671 (Mo. 1951); State v. Whited, 360 Mo. 956, 231 S.W.2d 618 (1950); State v. Lawson, 360 Mo. 95, 227 S.W.2d 642 (1950); State v. Battles, 357 Mo. 1223, 212 S.W.2d 753 (1948); State v. Smith, 355 Mo. 59, 194 S.W.2d 905 (1946); State v. Lyle, 353 Mo. 386, 182 S.W.2d 530 (1944); State v. Hogan, 352 Mo. 379, 177 S.W.2d 465 (1944); State v. Eaton, 154 S.W.2d 767 (1941); State v. Kenyon, 343 Mo. 1168, 126 S.W.2d 245 (1939); State v. McCracken, 341 Mo. 697, 108 S.W.2d 372 (1937); State v. Majors, 329 Mo. 148, 44 S.W.2d 163 (1931); State v. Malone, 327 Mo. 1217, 39 S.W.2d 786 (1931); State v. Eason, 322 Mo. 1239, 18 S.W.2d 71 (1929); State v. Richmond, 321 Mo. 662, 12 S.W.2d 94 (1928); State v. Farrell, 320 Mo. 319, 6 S.W.2d 857 (1928); Ex Parte Johnson, 280 S.W. 702 (Mo. 1925); State v. Snow, 299 Mo. 143, 288 S.W. 1069 (1925); State v. Stewart, 278 Mo. 177, 212 S.W. 855 (En Banc 1919); State v. Larkin, 250 Mo. 216, 157 S.W. 600 (1913); State v. Kyles, 247 Mo. 640, 155 S.W. 1047 (1918); State v. Bowles, 146 Mo. 6, 47 S.W. 892 (1898); State v. Frazier, 137 Mo. 317, 38 S.W. 913 (1897); State v. Fitzgerald, 130 Mo. 407, 32 S.W. 1115 (1895); State v. Evans, 124 Mo. 397, 28 S.W. 8 (1894); State v. Anderson, 98 Mo. 461, 11 S.W. 981 (1889); State v. Tabor, 95 Mo. 585, 8 S.W. 744 (1888); State v. Anderson, 89 Mo. 312, 1 S.W. 135 (1886); State v. Harris, 76 Mo. 361 (1882); State v. Gassert, 65 Mo. 352 (1877); State v. Underwood, 57 Mo. 40 (1874); State v. Holme, 54 Mo. 153 (1873); State v. Hays, 28 Mo. 287 (1850).
9. Typical of the position taken by the courts is that expressed in State v. Battles, 357 Mo. 1223, 212 S.W.2d 783 (1948), in which it was said: Where a homicide is intentionally committed with a deadly weapon used upon a vital part of the body and there is no witness to the occurrence, murder in the second degree is presumed in the absence of evidence tending to show a different grade of offense or that such killing was justifiable or excusable.
10. It is significant to indicate here that Ayers expressly repudiates the language of only one case, State v. Williams, 442 S.W.2d 61 (Mo. En Banc 1968), out of the long line of precedent set out in note 8, supra.
malice.\textsuperscript{11} Other jurisdictions require the intentional killing to have been committed with a deadly weapon.\textsuperscript{12}

Next it is important to examine the effect this presumption has on the burden of producing evidence and the risk of non-persuasion in a homicide case. Initially, the state has the burden of producing evidence showing that the defendant did intentionally kill the victim. Once this has been accomplished, a presumption arises that the killing was done with malice, and the state can get to the jury on a charge of murder in the second degree.\textsuperscript{13} At this point, the burden of producing evidence to rebut the presumption devolves upon the defendant.\textsuperscript{14} As a result, in order for the defendant to be entitled to an instruction on manslaughter, he must produce evidence of mitigating or extenuating circumstances surrounding the intentional killing.\textsuperscript{15} Proof of these circumstances eliminates the malice that is essential to convict the defendant of murder in the second degree. In Missouri, these mitigating circumstances are referred to as adequate provocation. Prior to State v. Williams, if the defendant based his claim of provocation on an attack by the victim there had to be evidence in the case of physical violence to his person; mere fear of the victim was not adequate.\textsuperscript{16} However, the Williams case rejected this theory and held a manslaughter instruction must be given if "there is evidence to warrant a finding by the jury that the defendant was guilty of manslaughter.\textsuperscript{17}


\textsuperscript{12} E.g., Handley v. State, 96 Ala. 48, 11 So. 322 (1892); Herhal v. State, 243 A.2d 703 (Del. 1968); Fletcher v. State, 227 Ind. 697, 88 N.E.2d 146 (1949); State v. Myers, 248 Iowa 44, 79 N.W.2d 382 (1956); People v. Horton, 19 App. Div. 2d 80, 241 N.Y.S.2d 224 (1963); Nance v. State, 210 Tenn. 328, 358 S.W.2d 327 (1962); Rodgers v. State, 44 Tex. Crim. 350, 71 S.W. 18 (1902); State v. Bowyer, 143 W. Va. 812, 101 S.E.2d 243 (1957). This additional requirement of a deadly weapon probably has little effect on the application of the presumption since practically all intentional killings are committed with a deadly weapon.

\textsuperscript{13} State v. Snow, 293 Mo. 145, 238 S.W. 1069 (1922); State v. Kyles, 247 Mo. 640, 155 S.W. 1047 (1913); State v. Underwood, 57 Mo. 40 (1874); State v. Mangino, 108 N.J.L. 475, 156 A. 430 (Cl. Err. & App. 1931).\textsuperscript{14} Note, Criminal Law—Self-Defense—Burden of Proof—Instructions, 21 J. Crim L. & C. 609 (1931).

\textsuperscript{15} See State v. Tinson, 461 S.W.2d 764 (Mo. 1970); State v. Holt, 494 S.W.2d 576 (Mo. 1968); State v. Brookshire, 368 S.W.2d 373 (Mo. 1963); State v. Kelton, 299 S.W.2d 493 (Mo. 1957); State v. Littlejohn, 356 Mo. 1052, 204 S.W.2d 750 (1947); State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556 (1932); State v. Carey, 318 Mo. 436, 282 S.W. 22 (1926); State v. Conley, 225 Mo. 185, 164 S.W. 193 (1914); State v. Jones, 64 Mo. 391 (1877); State v. Starr, 38 Mo. 270 (1866).

\textsuperscript{16} State v. Brookshire, 368 S.W.2d 373 (Mo. 1963); State v. Haynes, 329 S.W.2d 640 (Mo. 1959); State v. Bongard, 330 Mo. 805, 51 S.W.2d 84 (1932); Stanford, Manslaughter: Adequacy of Provocation in Missouri, 90 Mo. L. REV. 112 (1955).

\textsuperscript{17} 442 S.W.2d at 64.
as that offense is defined by the Missouri statute. As a result, although the Williams case broadened the definition of adequate provocation by eliminating the requirement of physical violence to the defendant's person, the case also reaffirmed the presumption of malice in an intentional killing and thus kept the burden of rebutting that presumption on the defendant.

However, the presumption of malice only shifts the burden of producing evidence, not the burden of persuasion, to the defendant. In other words, in order to get a conviction the prosecution still must prove beyond a reasonable doubt that the defendant did intentionally kill the victim. Unfortunately, the phraseology of some of the instructions in past cases dealing with the presumption of malice seems to allow the presumption to shift more than just the burden of producing the evidence onto the defendant. Many of the instructions in the early Missouri cases actually mentioned the presumption and specifically pointed out that it devolved upon the defendant to rebut the presumption of malice or he would be presumed guilty of murder in the second degree. Although this is a correct statement of the law, an instruction worded in this fashion can only confuse the jury and might lead them to believe that in order to rebut the presumption of malice the defendant is required to prove he did not intentionally kill the victim. Of course, this is exactly what the presumption should not do.

As a result of the presumption's operation, if the evidence tended to show an intentional killing, the presumption of malice would arise, and the court would be required to instruct on murder in the second degree. Further, if there was no evidence of adequate provocation in the case, an instruction on manslaughter would be improper. In Ayers, neither defendant nor the state presented any evidence indicating a basis for finding mitigation. Therefore, if the court in Ayers had followed the above analysis the giving of the manslaughter instruction would have been improper. However, the court in Ayers approved the manslaughter instruction.

18. Section 559.070, RSMo 1969 provides that:

Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter.


20. An example of such an instruction, from State v. Evans, 124 Mo. 397, 28 S.W. 8 (1894), reads:

If you find from the evidence that the defendant intentionally killed Peter Fine by shooting him with a loaded pistol and that such pistol was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of proof to the contrary; and it devolves upon the defendant to adduce evidence to meet or repel that presumption, unless it is met or repelled by the evidence introduced by the state.

Id. at 411, 28 S.W. at 12.


22. State v. Williams, 442 S.W.2d 61 (Mo. En Banc 1968); State v. Battles, 357 Mo. 1225, 212 S.W.2d 753 (1948); State v. Lyle, 353 Mo. 386, 182 S.W.2d 530 (1944); State v. Eaton, 154 S.W.2d 767 (1941); State v. Richmond, 321 Mo. 662, 12 S.W.2d 34 (1928); 40 Am. Jur. 2d Homicide § 531 (1968).

23. 470 S.W.2d at 537.
thus implicitly rejecting the traditional presumption of malice resulting from proof of an intentional killing.\textsuperscript{24} The court began by defining manslaughter as the intentional killing of a human being.\textsuperscript{25} Under this interpretation of the Missouri statute,\textsuperscript{26} if all the state's evidence shows is an intentional killing the homicide would be manslaughter. The court also stated that in order to prove a case of murder in the second degree the prosecution must show an intentional killing with premeditation\textsuperscript{27} and malice.\textsuperscript{28} This approach requires the state actually to prove malice in order to establish murder in the second degree and no longer allows the state to rely on the presumption of malice arising from mere proof of an intentional killing.

Therefore, it is clear from the opinion that when the evidence merely establishes that the defendant intentionally killed the victim, an instruction on manslaughter is required.\textsuperscript{29} The court expressly overruled that portion of \textit{State v. Williams}\textsuperscript{30} that required "proof of facts tending to show want of premeditation and malice to warrant an instruction on manslaughter."\textsuperscript{31} The defendant is no longer required to produce evidence of provocation in order to get a manslaughter instruction. Further, in light of the fact that in \textit{Ayers} the defendant opposed the manslaughter instruction, the trial court apparently is required to give this instruction whether the defendant requests it or not.

Furthermore, it can be inferred from the opinion that for the state to get an instruction on murder it must show an \textit{absence} of mitigating and extenuating circumstances.\textsuperscript{32} The court is not clear in this regard, but its statement that the state must prove malice as an element of murder in the second degree could be interpreted as requiring the state to produce evidence of lack of adequate provocation in order to prove a malicious killing. If the court places this requirement on the state it would substantially increase the state's burden in establishing murder in the second degree. Therefore, in all probability, the court would allow the state to fulfill any such requirement by showing all the circumstances surrounding the killing and thus implying that there were no mitigating circumstances.\textsuperscript{33} Whichever approach the court takes, it will be a significant change from the burden now on the state in homicide cases.

\textsuperscript{24} Louisianav and Pennsylvania also support the position taken by \textit{Ayers} on the presumption of malice. \textit{See e.g., State v. Trivas, 32 La. Ann. 1086 (1880); Commonwealth v. Myers, 402 Pa. 451, 167 A.2d 295 (1961).}

\textsuperscript{25} \textit{See} statute quoted note 19 \textit{supra.}

\textsuperscript{26} The premeditation requirement of section 559.020 RSMo 1969 on murder in the second degree merely refers to the defendant's fully formed intent to kill. Therefore once the state establishes that the defendant intentionally killed the victim it will have satisfied the premeditation requirement of the statute.

\textsuperscript{27} 470 S.W.2d at 537.

\textsuperscript{28} \textit{Id.} at 538.

\textsuperscript{29} \textit{Id.} at 537.

\textsuperscript{30} It should be emphasized that this is the only aspect of \textit{State v. Williams} that \textit{Ayers} overruled.

\textsuperscript{31} 442 S.W.2d at 64.

\textsuperscript{32} This interpretation of \textit{Ayers} is suggested by the comments on the Proposed Criminal Code of Missouri (1971) (unpublished draft by Prof. Hunvald).

\textsuperscript{33} This conclusion is suggested by \textit{id.}
Although it might appear from the court's ruling that a manslaughter instruction is required in every homicide case, the court indicated that there are circumstances in which the instruction is improper. The court described this situation broadly as existing when there is an entire absence of evidence upon which to base a conviction of manslaughter. In supporting this position the court cited *State v. Jones* and *State v. Bradley*. In *State v. Jones* the state produced witnesses who were with the defendant before the killing and testified to facts tending to prove that the defendant intentionally killed the victim with malice and premeditation. The defendant produced no evidence to the contrary, and the court instructed on murder only. In *State v. Bradley*, the defendant killed the victim while perpetrating an armed robbery and was charged with felony-murder under the Missouri statute. Therefore, it appears that the court at least would uphold the refusal of a manslaughter instruction where the state produces unrebutted evidence of malice or where the evidence shows only felony-murder.

The very least the *Ayers* opinion says is that if all that the evidence in the case indicates is that the defendant intentionally killed the victim, and it does not indicate premeditation or deliberation, a manslaughter instruction is required. This will greatly increase the number of manslaughter instructions given in homicide cases, probably requiring such an instruction in all instances except the two limited situations described in *Ayers*. This approach affords the jury the alternative of finding the defendant guilty of manslaughter when they believe the evidence warrants such a verdict but is not sufficient to convict the defendant of murder in the second degree, whereas under the previous rule in this situation the jury was only allowed to find the defendant guilty of murder in the second degree or acquit him. In addition, because the opinion establishes proof of malice as an element of murder in the second degree, *Ayers* seems to put a greater burden on the state in obtaining a murder instruction. Whether the courts will require the state to prove a lack of mitigating circumstances to establish malice or allow the prosecution to show that all the circumstances surrounding the killing fail to indicate the existence of mitigating circumstances in order to establish malice and get a murder instruction is a matter of conjecture. But regardless of the interpretation of *Ayers* in this latter situation it is apparent that the case will have a far-reaching effect in the homicide area.

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34. 470 S.W.2d at 538. This position of Ayers was reaffirmed in *State v. Jackson*, No. 56574 (Mo., Sept. 25, 1972), where the court held that a manslaughter instruction was not required since there was an entire absence of evidence on which to rest a verdict of guilty.
35. 64 Mo. 391 (1877).
36. 361 Mo. 267, 234 S.W.2d 556 (1950).
37. This position indicates that the Missouri case law requiring evidence of mitigating circumstances (see cases cited note 15 supra) to get a manslaughter instruction is still applicable in certain situations.
38. These two situations are when the state produces evidence of malice and premeditation that goes unrebutted by the defendant or where the defendant is charged with felony-murder. See text accompanying notes 34-37 supra.
EVIDENCE—ADMISSION OF VIDEO TAPE

Hendricks v. Swenson

Joseph Hendricks was convicted of first degree murder by the Circuit Court of St. Louis County. His conviction and resulting sentence were affirmed by the Missouri Supreme Court.2

Hendricks petitioned for a writ of habeas corpus to the United States District Court, which denied his writ. From that denial he appealed to the Eighth Circuit Court of Appeals, contending that the trial court erred in admitting into evidence statements made by him to police officers and a video tape recording of those statements on the ground that the statements were obtained by physical and mental coercion.

In affirming the denial of the writ, the court of appeals first upheld the district court's conclusion that the statements were given freely and voluntarily. The court went on to rule that the recording of the statements on video tape and the introduction into evidence and display to the jury of the tape did not impair appellant's rights under the Federal Constitution. In support of this use of video tape the court cited recent changes in the Federal Rules of Criminal Procedure and Civil Procedure and several state court decisions. The court pointed out that the video tape would be incriminating only if the statement it contained was incriminating. Further, the court stated that the admission into evidence of video taped statements and confessions could protect the rights of the accused and aid the trier of fact in determining the truth if a proper foundation was laid.

The dissenting opinion observed that there were certain flaws inherent in video tape reproduction that should prevent its use in criminal trials except under strict safeguards.

Video tape recording is a process by which both video and audio television signals are preserved as electromagnetic impulses on a layer of magnetically sensitive material.3 The process is substantially similar to audio tape recording.4

Audio tape recording utilizes a thin5 tape one-fourth inch wide consisting of a tough, flexible backing6 coated on one side with magnetically sensitive particles7 in a holding material called a binder. This tape is

1. 456 F.2d 503 (8th Cir. 1972).
4. Much of the technical detail for this note was developed from an interview with J. Wendell Jeffries, Associate Director of Instructional Television, and Dan Klein, Chief Engineer for Instructional Television for the University of Missouri-Columbia.
5. A detailed treatment of the technical aspects of magnetic video tape recording is beyond the scope of this note. The discussion herein is intended only to familiarize the reader with the basic process.
6. Thickness of audio recording tape in common use varies from .5 mils (one-half of one-thousandth of an inch) to 1.5 mils.
7. The material generally used today is Mylar. Earlier backings were of acetate.
8. Finely divided iron oxide particles are generally used. Other coatings are being used for special low-noise application in audio recording fields. Their use may be extended into video fields.

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passed in front of a specially designed electromagnet called the recording head, which imposes magnetic patterns on the sensitive coating of the passing tape corresponding to the frequency and intensity of the input signal. The recorded signal may then be played back or reproduced without further processing by rewinding the tape and passing it by another electromagnet, the playback head, which senses these impulses and emits a small current corresponding to the impulses. This current is then amplified and converted into sound.

The greater the speed of the tape past the heads, the wider the spectrum of frequencies that can be recorded and reproduced. For reproducing speech, a spectrum ranging from 100 cycles per second at the bottom to 10,000 cycles per second at the top is considered quite adequate. A greater range is preferable for reproducing music, especially high fidelity, which requires a spectrum ranging from 20 cycles per second at the bottom to 18,000 cycles per second at the top. Translated into tape speed, the latter frequency requires at least 7.5 inches of tape per second to pass the head. Professional machines used in recording studios operate at 15 inches per second in order to achieve maximum potential bandwidth.

Magnetic recording of television signals requires a very broad spectrum of frequencies, encompassing some 4.5 million cycles per second. In order to facilitate such broad frequency response a tape speed in excess of 90 miles per hour would be required. Fortunately, the important factor is not the tape speed alone; it is the speed of the tape relative to the heads.

In addition to having a transport mechanism to move the tape at uniform speed, the video tape recorder has a mechanism that spins the recording heads so that the required tape/heads speed can be achieved. The prototype video tape recorder employed an assembly of four heads revolving perpendicularly to the path of the tape. As the 2-inch wide tape moved past the head assembly at 15 inches per second, the recording heads traced a series of nearly vertical paths across its width.

These machines, called "2-inch quads," remain the standard of video tape reproduction. Their expense makes their use impractical, however, by all but the major television stations and the networks.

More recently the helical scan recorder has produced highly satisfactory results. The same principle of head motion is employed, but the tape path encircles the heads in a spiral or helix. As the tape moves around horizontally spinning heads a series of head paths some 9 inches long are traced diagonally across the width of the tape. Tape to head speed approxi-

8. The motion of the tape must be uniform, because variations in the speed will result in frequency variations of the reproduced audio. The machinery that facilitates this uniform motion is called the tape transport mechanism.
9. J. Bernstein, supra note 3, at 68.
10. Id. at 94-95.
11. Id. at 95.
12. Id. The head assembly rotates at 14,400 r.p.m.
13. The paths traced would be precisely vertical were it not for the motion of the tape past the head assembly. The combination of motions produces an inclination of 3.5 degrees from the vertical.
14. The price of one of these machines may be as high as $140,000.
mating that produced by the 2-inch quads can be achieved. The mechanism itself costs much less to manufacture, resulting in lower prices for helical scan machines. In addition, lower operating costs are possible because some models operate at speeds of 7.5 inches per second, resulting in lower tape costs.

As its cost has decreased, the video tape recorder has found increasing use. Several suggestions have been made for its use in law practice. Many law enforcement agencies have begun to avail themselves of the device as a means of preserving evidence that ordinarily would have been recorded on an audio tape recorder or motion picture camera.

The few courts to consider the admissibility of video tape have compared the medium to sound motion pictures or sound recordings and have stated that video tape is admissible if a proper foundation is laid. The criteria for admission that video tape must satisfy are those that qualify sound motion pictures for admission. These criteria rest on the rules governing admission of still photographs. Inquiry will be directed toward what should constitute a proper foundation for video tape admission.

Proper foundation for photographs, motion pictures, and video tape requires evidentiary showings on two issues. There must first be testimony identifying the content of the picture in order to establish the relevance of the photograph to the lawsuit. In determining relevance, the court

15. Systems complete with camera may be obtained for less than $2,000. See articles cited note 17 infra.
17. Hicks, Video Recording in Police Identification, 59 J. CRIM. L.C. & P.S. 295 (1968) (details a program initiated by the Miami, Florida, police department to replace the line-up system under a federal grant at a cost of less than $13,000); Kane, Videotape Recording, 50 J. AM. JUD. SOC'y 272 (1967) (similar program begun by Santa Barbara, California, police at a cost of $3,000).
22. In State ex rel. Highway Comm'n v. Cone, 338 S.W.2d 22 (Mo. 1960), the court stated:

In final analysis the decision rests on the principles of relevancy of the
must weigh the probative value of the evidence and its potential for confusion of the jury. Courts exclude photographic evidence as irrelevant where it is merely cumulative or where the content or events represented are so different in time, place, or circumstances from those in issue as to confuse or mislead. With motion pictures, and by analogy video tape, the court may order irrelevancies excised. Such determinations and orders are within the discretion of the trial court.

Second, photographic evidence must be authenticated or verified. In its simplest form, this requires testimony by a witness who has seen the subject pictured that the photograph fairly and accurately represents that subject at the relevant point in time. Absent some special problem, this showing coupled with identification meets the foundation require-

fact or facts pictured and not on the propriety of evidencing a relevant fact by a photograph. If the fact to be evidenced by the photograph is itself not admissible, it cannot be proved by photograph or otherwise.

Id. at 27; accord, 3 J. Wigmore, Evidence § 792, at 184 (8th ed. 1940).

Professor Scott suggests that a photograph should be admitted whenever it:

(1) Has a reasonable tendency to prove some material fact in issue; (2) appears that it would have been competent for the jury to have viewed the subject of the pictures at the time taken had such been practical; (3) assists the trier of fact in understanding the case; (4) corroborates other evidence in the trial; (5) would be useful for impeachment; or (6) assists the witness in explaining his testimony. 2 C. Scott, supra note 19, § 1022.

23. Putsche v. Atlas Scraper & Eng'r Co., 300 F.2d 467 (9th Cir. 1962); Finn v. Wood, 178 F.2d 583 (2d Cir. 1950).


28. 3 J. Wigmore, supra note 22, § 793. See also 2 C. Scott, supra note 19, § 1023; 32 C.J.S. Evidence § 715 (1964).


Neither passage of time nor changed conditions render a photograph inadmissible if the changes are explained or are insubstantial. People v. Mines, 270
ment. Modern cases tend to regard proof of the technical details of still photography and processing as "irrelevant and immaterial" "unrealistic roadblocks." 

In determining the admissibility of motion pictures, however, courts have been concerned about the powerful effect on juries of the reproduction of motion coordinated with sound. Courts have also been troubled by the susceptibility of motion pictures to distortion and alteration. This concern manifests itself in requirements of proof beyond the testimony described above. Technical proofs designed to guarantee the accuracy of the film are made the sine qua non of admission. These technical proofs generally relate to showing that events or motions are accurately portrayed.

Where accurate representation of motion is particularly important, as is frequently the case with surveillance films showing a plaintiff performing activities inconsistent with his claims of injury, the courts have demonstrated considerable concern with the speed of the film through the camera, and film has even been excluded where adequate proof of the speed could not be given. Courts have placed particular emphasis


32. 2 C. Scott, supra note 19, § 1027.


34. See, e.g., People v. Dabb, 32 Cal. 2d 491, 501, 197 P.2d 1, 5 (1948).


A more difficult problem is presented when the event is reconstructed or re-enacted. Courts have been concerned over the reconstructor's bias. Grant v. State, 171 So. 2d 361, 364 (Fla. 1965), cert. denied, 384 U.S. 1014 (1966); J. Wicmore, supra note 22, § 798 (a), at 203: "[M]oreover, the party's hired agents may so construct [the event] as to go considerably further in his favor than the witnesses' testimony has gone."


The speed of the film through the camera (measured in frames per second) should not be confused with the light sensitivity of the film, often referred to as film speed.

on the fact that by simple adjustments to the camera or projector, motion
can be made to appear faster or slower than that actually photographed.40

With video tape this is not such a problem. Uniformity of tape speed
is critical,41 and any significant variation will cause the television picture
to "roll" or "smear" horizontally.42 The 2-inch quads employ "control"
tracks of synchronized pulses and computing units that sense these pulses
and vary the playback speed to keep it in constant synchronization with
the recording speed.43 Helical scan units also use control tracks, and
variations of playback speed from synchronization with the recording
speed result in immediate loss of picture. The slow- and stop-motion
effects seen on major television networks require additional electronic
paraphernalia. In short, to produce a recognizable picture the tape must
be run at the same speed at which it was recorded. Therefore, proof of
tape speed should not be unduly emphasized as additional foundation.

Because of their optical design, various types of lenses used in pho-
notography incorporate distortions.44 Thus, depending upon the issue in
the lawsuit, inquiry into the type of lens and the manner and degree of
distortion may be proper. Camera position in relation to the subject
photographed is also significant.45

Additionally, television has its own inherent distortions. The tele-
vision camera is more sensitive than the motion picture camera to shadows
and coarse surfaces.46 Thus, a rough-surfaced object may appear in pro-
nounced contrast. Conversely, given the same camera angle a smooth
surface may appear "washed out." The position of the camera vis-à-vis

This case has been criticized as overly technical. See Paradis, The Celluloid Wit-

40. Slow motion is produced by operating the camera at a more rapid rate
than the projector; fast motion is produced by operating the camera at a slower
rate than the projector. At the extremes of the spectrum, the change in speed
would be obvious. However, minor variations can be undetectable by the casual
viewer and might make a slowly ambulating plaintiff appear to walk at a normal
speed, or a cautious or hesitant machine operator appear reckless or facile.

41. See note 8 supra.

42. These effects are all too familiar to television viewers and are referred
to by technicians as "video tape breakup."

43. The need for this synchronization should be apparent. If the process
is visualized as creating a series of parallel lines diagonally across the width
of the tape, then the playback process must match those lines with the paths of
the whirling playback heads.

44. An example of this is the long telephoto lens often used in sur-
veillance photography. This lens has the apparent effect of bringing distant
objects closer to the camera and compressing objects into the same vertical plane.
Motion at right angles to the lens direction would not be subject to this distor-
tion, but motion parallel to the direction of the lens would appear distorted.

45. Mikus v. United States, 433 F.2d 719, 725 (2d Cir. 1970); Philippi v.
New York, C. & St. L. Ry., 136 S.W.2d 339 (St. L. Mo. App. 1940); De Tunno

46. H. Zetttl, TELEVISION PRODUCTION HANDBOOK (2d Ed. 1968):

The camera picture tubes (imageorthicon and vidicon) have a
tendency to pick up and exaggerate certain shadow areas. For instance,
a boom [mike] shadow that is hardly noticeable in the studio may
show up clearly on the control room monitor. Dark shadows beneath
the eyes, nose, and chin quite frequently distort a person's face un-
the subject and the position and intensity of the lighting have marked effects on the appearance produced. Television also has the effect of “fattening” its subject perceptibly. Some subjects require special treatment, such as make-up and special lighting, to achieve a “normal” appearance on the screen. The dissent in Hendricks raises these points, arguing that such flaws should bar admission of video tape into evidence in the absence of special procedures. The majority of the court apparently rejected this argument. In a case where the appearance of the subject is in issue, however, such inquiries would be proper, at least with regard to the weight to be given the evidence.

When dealing with physical evidence that is by nature subject to destruction, alteration, or contamination, courts often require a showing of a chain of custody. Application of this requirement to motion pictures and sound recordings is an attempt to insure against editing or alteration.

favorably. A man may be as clean-shaven as possible, but without make-up his beard area may appear as dark, uneven blotches on the television screen.

The monochrome picture tubes tend to photograph warm colors (warm reds, oranges, browns, tans) lighter—that is, the colors appear slightly washed-out—whereas cool colors (blue-reds, blues, blue-greens) photograph darker. Correct make-up colors must be chosen to compensate for these distortions.

The customary overhead television lighting creates several undesirable shadows, notably under the eyebrows and beneath the eye, and under the nose and chin area. In some cases the shadows are so objectionable that corrective make-up must be applied.

Id. at 370-71 (emphasis added).

47. Id.
48. Id. at 383.
49. See note 46 supra.
50. 456 F.2d at 508-09.
51. Id. at 506 (emphasis added):
We do not agree with our colleague as to the need for make-up and other preparation to project a better image. To permit the applying of make-up would defeat the true purpose of a statement which is to present the facts as they are. . . .

If a proper foundation is laid for the admission of a video tape by showing that it truly and correctly depicted the events and persons shown . . . it is . . . a protection of defendant’s rights. . . .

The majority assumes the very point in issue and arguably does not meet the dissent squarely on the ground of television’s inherent distortive effects.

52. For example, suppose plaintiff sues for intentional infliction of emotional harm, claiming severe weight loss; and defendant offers video tape of plaintiff, who in the tape appears not to have lost any weight.
53. This requirement is commonly applied to drugs. See Gallego v. United States, 276 F.2d 914 (9th Cir. 1960); Sorce v. State, 497 P.2d 902 (Nev. 1972).
56. The party against whom evidence is offered may request expert examination if such would assist in authentication. Compare Commonwealth v. Roller,
Video tape can be easily edited. On the 2-inch quads, editing can be almost undetectable. This is accomplished by use of "black box" circuitry, which blends the signal over the spliced area. This circuitry is not available on the helical scan recorders except at substantial additional cost. Without this compensating circuitry, editing throws the machine's internal synchronization awry, causing picture roll or smear until synchronization can be restored by the control track. Examination of the tape by an expert would reveal all but the most professional editing jobs.

Video tape is also subject to damage or destruction by exposure to certain outside influences. Exposure to a magnetic field can destroy or cause degeneration of the magnetic imprint. The possibility of this happening by accident is remote, since a very strong magnetic field is required to be in close proximity to the tape to cause any discernible effect.

A more significant problem is the tape's vulnerability to heat and humidity. The binder holding the layer of magnetic particles to the flexible backing is quite sensitive to its surrounding environment. Excessive amounts of heat or humidity cause the binder to lose its grip on the backing; patches of the binder and magnetic material will slough off the backing, with resulting loss of the signal in that area of the tape. Alternatively, the backing may become sticky and cause the tape to adhere to portions of the recorder mechanism, thereby jamming the machine. This latter defect renders the tape worthless, and is a particular problem with helical scan recorders, where the tape is required to slide smoothly across a large bearing surface.

Thus, in cases where the potential for abuse is high or the repercussions of abuse would be particularly severe, imposition of the chain of custody requirement is desirable. The recent development of video tape cassettes may have some utility in facilitating such a requirement.

Specific foundation requirements vary with the relevancy of the film and the particular issue it is offered to prove. In each case the court should balance the probative value of the film against the potential to
mislead, and impose appropriate requirements to insure accuracy. Given the multiplicity of issues to which a film might be relevant, it should be apparent that no procrustean listing of requirements is possible.\(^64\) The matter instead falls within the discretion of the trial court.\(^65\)

The obvious person to give much of the authentication testimony relating to the technical details of video tape recording is the operator of the recorder.\(^66\) No particular qualifications of the operator need be shown.\(^67\) If the authenticating witness is not the operator, there is some authority that he must have been present when the film was made.\(^68\) The cases indicate, however, that the witness need not have been present at the filming if his absence does not affect his competency to give the required authentication testimony.\(^69\)

The use of video-taped statements or confessions as evidence against a criminal defendant involves special considerations, because such use brings the foibles of the medium into relief against the constitutional paradigm of an essentially fair criminal procedure.\(^70\) Most courts consider the greatest value of the video taped or filmed confession to be that it provides highly probative evidence that the confession was truly voluntary and free from coercion.\(^71\) If this value is to be maximized, the constitutionally necessary warnings and waivers should be included in the taped record.\(^72\) This provides protection for both the accused and the state by clearly demonstrating the voluntary nature of the accused’s acknowledgments and waivers.\(^73\) Although no holdings have been discovered requiring such procedure for video tape confessions,\(^74\) some courts have indicated

\(^64\) See 3 J. Wigmore, supra note 22, § 798 (a), at 203.
\(^68\) C. McCormick, Evidence § 214, at 533 n.72 (2d ed. 1972).


73. Id. (video tape allowed state to sustain burden of proof of waiver).

74. But see State v. Edgell, 30 Ohio St. 2d 103, 283 N.E.2d 145 (1972).
that such a procedure should be followed. Wise policy suggests that when video tape is to be used to record an accused's confession, it record the entire transaction surrounding the taking of the confession together with the giving of the warnings by the interrogator and the accused's clear waiver.

Generally, if only a portion of the accused's statement or confession is offered in evidence against him, he has the right to require that the entire confession or statement be introduced so that he may take advantage of any direct or contextual exculpations. This requirement precludes editing of the confession by the state, either through alteration of the recorded tape, or through turning the recorder on and off during the recording of the confession. This principle might also apply where because of faulty technical procedures or careless preservation, portions of the taped signal have been lost. To minimize the risk of admitting an edited or damaged tape, a court could require showing the chain of custody of the tape from its original recording to the courtroom, or, as is suggested by the dissent in Hendricks, it could require that the defendant be given a copy of the tape. Use of the newly developed video cassette could well be an answer to many of these problems, particularly where editing is involved.

There remains today little question that video tape evidence is admissible in a criminal or civil trial provided a proper foundation has first been laid. The foundation required by most of the courts that have considered its admissibility has been that which would have been required to admit a similar sound motion picture. Certain cases may properly

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76. Certain collateral advantages may result from this procedure. In Paramore v. State, 229 So. 2d 855, 859 (Fla. 1969), the entire proceeding at the police station between defendant and the interrogators had been video taped; the state was not required to show continuity of possession.


Every confession, admission or declaration sought to be used against anyone must be used in its entirety, so that the person to be affected thereby may have the benefit of any excunction or explanation that the whole statement may afford.


81. 456 F.2d at 509 (dissenting opinion).

82. See note 63 supra.
require additional proof going to authentication in order to guarantee the accuracy of the video tape.

_Hendricks v. Swenson_ may be read as rejecting the idea that the inherent distortions in video tape and television preclude the admission of video tape. But where video tape is used to preserve and display statements or confessions of criminal defendants, courts may properly require that a stricter standard of authentication be followed to preserve the integrity of the taped confession. Additionally, courts should encourage showing the required warnings and waivers on the video tape as a protection to both the state and the defendant. With proper consideration of its idiosyncrasies, the medium of video tape may be of significant aid to the courts. Its increased use should be encouraged in both civil and criminal fields.

**Stuart W. Conrad**

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**INCOME TAXATION—PROFIT-SHARING PLANS—PROHIBITED DISCRIMINATION IN EMPLOYER CONTRIBUTIONS WEIGHTED FOR YEARS OF SERVICE**

_Bernard McMenamy, Contractor, Inc. v. Commissioner_ 1

Bernard McMenamy was the president, general manager, treasurer, and sole stockholder of Bernard McMenamy, Contractor, Inc. McMenamy and other corporate employees were participants in a profit-sharing plan established by the corporation. The plan provided that employer contributions were to be allocated among the accounts of the participants according to a formula based on compensation and length of service. At any given level of compensation, the longer the service of an employee, the larger the proportion of employer contributions allocated to his account. 2

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2. 442 F.2d 359 (8th Cir. 1971), aff'd 54 T.C. 1057 (1970).
3. Tres. Reg. § 1.401-1 (b) (1) (ii) (1956) states:
A profit-sharing plan is a plan established and maintained by an employer to provide for the participation in his profits by his employees or their beneficiaries. The plan must provide a definite predetermined formula for allocating the contributions made to the plan among the participants and for distributing the funds accumulated under the plan after a fixed number of years, the attainment of a stated age, or upon the prior occurrence of some event such as layoff, illness, disability, retirement, death, or severance of employment.
4. This result was achieved by first multiplying each participant's compensation by the following figures, cast in the form of percentages:

<table>
<thead>
<tr>
<th>Years</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 years' service</td>
<td>100</td>
</tr>
<tr>
<td>2 years but less than 5 years</td>
<td>110</td>
</tr>
<tr>
<td>5 years but less than 10 years</td>
<td>120</td>
</tr>
</tbody>
</table>
Because McMenamy had more years of service than any other participant, the proportionate allocation of employer contributions to his account was greater in relation to his compensation than the proportionate allocation to the account of any other participant in relation to that participant's compensation. The Tax Court found this scheme of allocating employer contributions to be discriminatory in favor of an officer, shareholder, and supervisory employee under section 401(a)(4) of the Internal Revenue Code of 1954, which provides:

(a) A trust . . . forming part of a . . . profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
   (4) . . . if the contributions or benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees.

The court ruled that because the plan was discriminatory, it failed to qualify under section 401(a). The United States Court of Appeals for the Eighth Circuit affirmed. In so holding, the court appeared to apply strictly the Internal Revenue Service's "compensation operations test" for determining whether a profit-sharing plan discriminates in favor of a member of the prohibited group listed in section 401(a)(4).

The Eighth Circuit Court of Appeals cited the Seventh Circuit Court of Appeals case of Auner v. United States as directly supporting its holding in McMenamy. In Auner, a professional association established a profit-sharing plan in which four doctors and eight supporting personnel participated. The four doctors were officers of the association and, compared to the other employees, "highly compensated." Thus, if the contributions or benefits provided under the plan discriminated in their favor, it failed to qualify under section 401(a).

Employer contributions to the plan were allocated to the individual participants under a formula based on seniority points and training and experience points. Each participant was assigned seniority points, which increased with years of continuous service with the association and its

10 years but less than 15 years 150
15 years or over 200

The resulting product was called the participant's weighted contribution, and employer contributions were then allocated to each participant's account according to the proportion that his weighted contribution bore to the total weighted contribution of all participants. 54 T.C. at 1057-58.

5. Id. at 1059. Bernard McMenamy had 11 years of service as of the first year of contributions. All of the other participants had 6 years of service or less.

6. Id.
7. Id. at 1057.
8. Id. at 1063.
9. 442 F.2d at 360.
10. See text accompanying notes 28-30 infra.
11. See 442 F.2d at 360.
12. 440 F.2d 516 (7th Cir. 1971).
13. Id. at 519, citing Rev. Rul. 56-497, 1956-2 CUM. BULL. 284, 286, approved in Commissioner v. Pepsi-Cola Niagara Bottling Corp., 399 F.2d 390, 393 (2d Cir. 1968).
predecessor partnership. Each participant was also assigned training and experience points, which increased with the number of years of experience in previous similar employment and time spent in certain types of training. Employer contributions were allocated to each participant's account in amounts directly proportional to the product of his seniority points and his training and experience points.\textsuperscript{14}

As a result of the formula the four doctors, who received only 87 percent of the total compensation paid to the participants, received 95 percent of the employer contributions.\textsuperscript{15} The court found this ratio of contributions to compensation enjoyed by the group of doctors to be discriminatory.\textsuperscript{16}

Because both of these profit-sharing plans were discriminatory in favor of a member of the prohibited group set forth in section 401 (a) (4), they failed to qualify for the tax advantages available to plans qualifying under section 401 (a). If a plan qualifies, the corporation receives an immediate deduction for its contributions to the plan,\textsuperscript{17} the earnings of the plan are tax exempt,\textsuperscript{18} and the employee may defer the tax payable on his plan benefits until he receives them.\textsuperscript{19} In \textit{McMenamy} the court disallowed deductions to the corporation for its contributions to the profit-sharing plan. In \textit{Auner} the court disallowed deferral by an employee of the tax payable on his plan benefits.

Both of these profit-sharing plans would have qualified under the original provisions of the federal income tax law, which required only that a qualified plan benefit "some employees."\textsuperscript{20} By 1937 President Roosevelt realized that the tax exemption had been "twisted into a means of tax avoidance by the creation of pension trusts which include[d] as beneficiaries only small groups of officers and directors who [were] in the high income bracket."\textsuperscript{21} Therefore, Congress adopted section 401 (a) (4) in order

\begin{quote}
\textit{to insure that stock bonus, pension, or profit-sharing plans are operated for the welfare of employees in general, and to prevent the trust device from being used for the benefit of shareholders, officials, or highly paid employees.} \textsuperscript{22}
\end{quote}

Current Treasury Regulations reflect this policy.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{14} 440 F.2d at 518.
\item \textsuperscript{15} \textit{Id.} at 519.
\item \textsuperscript{16} \textit{Id.} at 520.
\item \textsuperscript{17} \textit{INT. REV. CODE} of 1954, \textsection{} 404.
\item \textsuperscript{18} \textit{INT. REV. CODE} of 1954, \textsection{}
\textsection{} 401, 501.
\item \textsuperscript{19} \textit{INT. REV. CODE} of 1954, \textsection{}
\textsection{} 402, 403.
\item \textsuperscript{20} \textit{INT. REV. CODE} of 1939, ch. 1, \textsection{} 165 (a), 53 Stat. 67 (now \textit{INT. REV. CODE} of 1954, \textsection{} 401).
\item \textsuperscript{21} 81 Cong. Rec. 5125 (1937) (letter to Congress from President Roosevelt).
\item \textsuperscript{23} Treas. Reg. \textsection{} 1.401-4 (a) (1) (f) (1956) states:
\textit{In order to qualify under section 401 (a), a trust must not only meet the coverage requirements of section 401 (a) (3), but, as provided in section 401 (a) (4), it must also be part of a plan under which there is no discrimination in contributions or benefits in favor of officers, shareholders,}
\end{itemize}

\url{https://scholarship.law.missouri.edu/mlr/vol38/iss1/11}
The Internal Revenue Code contains no positive definition of the "discrimination" referred to in section 401 (a) (4). However, section 401 (a) (5) states that a profit-sharing plan is not discriminatory if the allocation of employer contribution bears a uniform relationship to total compensation or the basic or regular rate of compensation of plan participants.\textsuperscript{24} Nor do the Treasury Regulations define "discrimination." They merely state that employer contribution allocation formulas other than the one expressly approved in section 401 (a) (5) may be permissible\textsuperscript{26} and that variations in contributions are permissible so long as the plan, "viewed as a whole for the benefit of employees in general, with all its attendant circumstances," does not discriminate in favor of members of the prohibited group.\textsuperscript{28} The Senate and House reports to the 1942 Internal Revenue Code also fail to indicate how "discrimination" should be defined.\textsuperscript{27}

In an attempt to correct this deficiency the Internal Revenue Service has adopted a "compensation operations test" to determine whether a profit-sharing plan discriminates in favor of the prohibited group. Under this test no formula for allocating employer contributions to plan participants will be regarded as discriminatory per se. If at any time,\textsuperscript{28} however, the operation\textsuperscript{29} of such a formula results in employer contributions allocated to a member of the prohibited group being proportionately greater in relation to his compensation than the contributions to the other plan participants in relation to their compensation,\textsuperscript{30} the plan is discriminatory. The courts of appeals in McMenamy and Auner applied this test strictly.

Profit-sharing plans that allocate employer contributions according to such formulas as salary times years of service,\textsuperscript{31} salary plus years of service,\textsuperscript{32} or salary weighted for years of service\textsuperscript{33} are considered non-discriminatory if they meet the "compensation operations test." The above formulas would meet the test only where all plan participants have the same years

employees whose principal duties consist in supervising the work of other employees, or highly compensated employees as against other employees whether within or without the plan.

\textsuperscript{24} \textit{Int. Rev. Code} of 1954, \S\ 401 (a) (5).

\textsuperscript{25} \textit{See} Treas. Reg. \S\ 1.401-4 (a) (2) (ii) (1956); Rev. Rul. 69-421, 1969-2


\textsuperscript{26} Treas. Reg. \S\ 1.401-4 (a) (2) (iii) (1956).


\textsuperscript{28} The Tax Court in \textit{McMenamy} stated that the Internal Revenue Service will "judge the plan on the basis of the facts existing before it." 54 T.C. at 1063 (1970).


\textsuperscript{30} \textit{Id.;} Rev. Rul. 57-77, 1957-1 \textit{Cum. Bull.} 158. Under this test, shareholders are compared to all other participants, including other members of the prohibited group. The Tax Court in \textit{McMenamy} rejected McMenamy's argument that it should have compared the contributions made on behalf of all employees in the prohibited group with the contributions made on behalf of other employees. \textit{See} 54 T.C. at 1064.


of service or where members of the prohibited group have fewer years of service than other plan participants.

The "compensation operations test" for discrimination in profit-sharing plans is to be distinguished from the "benefits test" for discrimination in fixed-benefit pension plans.\(^\text{34}\) In the latter test, the comparison for purposes of discrimination is based upon benefits ultimately to be received, rather than contributions presently being made.\(^\text{35}\) Thus a pension plan is discriminatory if the benefits received by a member of the prohibited group are proportionately greater in relation to his compensation than the benefits received by the other plan participants in relation to their compensation. This difference in focus permits a fixed-benefit pension plan to take years of service into account in allocating employer contributions, even though, in the earlier years of the plan, a larger share of employer contributions may be allocated to members of the prohibited group with long service in order to fund their retirement benefits adequately.\(^\text{36}\) Judge Drennen of the Tax Court, dissenting in McMenamy, saw no reason for prohibiting profit-sharing plans from doing the same. Because section 401 sets forth the same requirements for qualification of pension and profit-sharing plans, he would apply the "benefits test" to both.\(^\text{37}\)

The "benefits test" is inapplicable to profit-sharing plans for two reasons, however. First, in a fixed-benefit pension plan, the benefits to be ultimately received are predetermined and thus can be examined at any time during the plan's existence; in a profit-sharing plan, the benefits are not predetermined, because employer contributions are geared to profits, which fluctuate yearly, and the amount of profits to be shared each year is subject to the discretion of the board of directors.\(^\text{38}\)

34. A fixed-benefit pension plan is one that provides definitely determinable benefits. See Treas. Reg. § 1.401-1 (b) (1) (i) (1956).
35. See Rev. Rul. 57-77, 1957-1 CUM. BULL. 158.
36. Volkening Inc. 13 T.C. 723 (1949).
37. 54 T.C. at 1066 (dissenting opinion).
38. Treas. Reg. § 1.401-1 (b) (1) (ii) (1956). Previously, the Internal Revenue Service had insisted that a qualified profit-sharing plan include a definite contribution formula for determining the percentage of profits to be shared each year. I.T. 3661, 1944 CUM. BULL. 315. The courts later held, however, that such a formula was not required. McClintock Trunkey Co. v. Commissioner, 217 F.2d 329 (9th Cir. 1954); Commissioner v. Produce Reporter Co., 207 F.2d 586 (7th Cir. 1953); Lincoln Elec. Co. Employees' Profit-Sharing Trust v. Commissioner, 190 F.2d 326 (6th Cir. 1951); E.R. Wagner Mfg. Co., 18 T.C. 657 (1952). The Internal Revenue Service officially abandoned its definite formula rule in 1956 in T.D. 6189, 1956-2 CUM. BULL. 973.

The "benefit test" applies more appropriately than the "compensation operations test" to two other types of plan. In a money-purchase pension plan the employer makes an annual contribution to the employee's account in accordance with a definite formula. Rev. Rul. 68-592, 1968-2 CUM. BULL. 168, states:

Contribution in this case are fixed without being geared to profits. Furthermore, the contributions are allocated to employees' accounts in accordance with a definite formula that takes into account each employee's compensation and length of service. Thus, each employee's share of these contributions is definitely determinable.

Thus it would appear that the "benefits test," rather than the "compensation operations test," would apply to money-purchase pension plans. However, such

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32
Second, the "compensation operations test" for profit-sharing plans only was clearly enunciated in 1944. In 1954, Congress arguably approved this test by re-enacting the Internal Revenue Code without altering this Internal Revenue Service interpretation of discrimination.

Judge Drennen also considered the profit-sharing plan in McMenamy qualified because it satisfied the test for qualification set out in Ryan School Retirement Trust. Ryan states that a profit-sharing plan is disqualified under section 401(a)(4) only if

[some] provision of the plan itself was inherently discriminatory, [and if there was some] ulterior motive to frame its provisions to channel the major part of the funds to the officer group because of any events or circumstances which the management foresaw or expected to occur.

There are three reasons, however, why this language is inapplicable to McMenamy.

First, Ryan is distinguishable on its facts. In Ryan, adverse business conditions arising after the establishment of the pension plan caused the employment of many of the original plan participants to be terminated. Upon the termination of an employee's service, a percentage of the amount of trust funds that had been allocated to his account was forfeited to the plan and allocated among the accounts of the remaining plan participants, five of whom were officers. As a result, the five officers' share of the trust fund increased from 8.4 percent at the inception of the plan to 58 percent seven years later. The Commissioner of Internal Revenue argued that the plan operated to discriminate in favor of the officers because the amount credited to them as a group exceeded the amount credited or paid to the rank and file employees. In rejecting the Commissioner's position, the Tax Court stated that even if the officer group was credited with a


Treasury Reg. § 1.401-1 (b) (1) (iii) (1956) states that a stock bonus plan is one established and maintained by an employer to provide benefits similar to those of a profit-sharing plan, except that the contributions by the employer are not necessarily dependent upon profits and the benefits are distributed in stock of the employer company. For the purpose of allocating and distributing the stock of the employer which is to be shared among his employees or their beneficiaries such a plan is subject to the same requirements as a profit-sharing plan.

If the contributions are not dependent upon profits, the "benefit test" would seem to apply to stock bonus plans also.

40. 54 T.C. at 1062. In United States v. Correll, 389 U.S. 299 (1967), the Court said:

Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law. Id. at 305.
41. 24 T.C. 127 (1955).
42. Id. at 134.
43. Id. at 133.
disproportionate amount of the trust funds, it was due to unforeseen circumstances, rather than the operation of the plan. In contrast, the allocation formula in McMenamy was known at the time of the establishment of the plan to operate in favor of a member of the prohibited group.

Second, the language "inherently discriminatory" is inconsistent with the "compensation operations test." The "compensation operations test" examines a plan to determine whether seemingly neutral factors used in allocating contributions cause it to operate in favor of prohibited group members. On the other hand, the language "inherently discriminatory" suggests a concern with form rather than operation. An example of "inherently discriminatory" form is the establishment of two plans, or two groups within one plan, and then the allocation of higher contributions to the group or plan benefiting members of the prohibited group. Obviously, the Internal Revenue Service would be concerned with such discrimination. But Treasury Regulations state the Internal Revenue Service is also concerned with a plan's effects in operation.

Third, Ryan is inconsistent with Treasury Regulations if it requires the Internal Revenue Service to prove "ulterior motive" to channel the major part of the funds to the prohibited group in order to disqualify the plan. The Treasury Regulations state that "[a]ll of the surrounding and attendant circumstances and the details of the plan will be indicative of whether . . . a plan is for the exclusive benefit of employees in general." Thus, the Regulations allow a finding of discrimination merely on the basis of a plan's effects in operation.

McMenamy and Auner support the Internal Revenue Service's strict application of its "compensation operations test" to profit-sharing plans. As Judge Drennen's dissent in McMenamy correctly points out, these decisions will have their greatest impact on closely held corporations. Such corporations usually have few employees, and some of these employees are usually shareholders. Because these shareholders usually are the founders of the corporation, they have the most years of service. Until these shareholder-employees retire, the corporation will be barred from allocating contributions on the basis of past years of service, unless it considers only those years of service after the establishment of the plan.

ROBERT L. COPE

44. Id. at 132. See also Ets-Hokin & Galvan, Inc., 21 CCH Tax Ct. Mem. 717, 724-25 (1962), where the court said that the mere existence of discrimination was insufficient to condemn the plan since it was the accidental and peculiar result of the conditions and circumstances of the business.

45. 54 T.C. at 1064.


47. Rev. Rul. 69-158, 1969-1 Cum. Bull. 126; H.R. Rep. No. 2333, supra note 22, at 51, where it is stated that "the use of one scale for officials and a less generous scale for other employees would be discriminatory."

48. See Treas. Reg. § 1.401-1 (b) (3) (1956).

49. Id.

50. 54 T.C. at 1065.

51. The Tax Court in McMenamy suggested this arrangement. Id. at 1062.
LABOR LAW—WILDCAT STRIKES AND SECTION 301 OF THE TAFT-HARTLEY ACT

Sinclair Oil Corp. v. Oil Workers Union^1

In January, 1969, Sinclair Oil Corporation and the defendant union were negotiating a new contract for both the production and maintenance employee unit and the clerical employee unit at a Sinclair plant. Employees of both units were members of the defendant union. Pending agreement, members of both units went on strike. With regard to the production and maintenance unit, Sinclair and the union reached an agreement that contained a no-strike clause; but they reached no agreement as to the clerical unit. The clerical unit remained on strike; and employees in the production and maintenance unit refused to cross the picket line, thereby breaching the no-strike clause in their agreement with Sinclair.

Based on this breach, Sinclair brought this action, consisting of three counts, in federal district court. In count 1 Sinclair sought damages from the union under section 301 of the Taft-Hartley Act,^2 alleging that the union had authorized the work stoppage. In count 2, also brought under section 301, Sinclair alternatively sought damages from six individual members of the union for their refusal to cross the picket line "despite, and contrary to, the express instructions" of the union. Finally, in count 3, Sinclair sought damages from the same six individuals named in count 2, basing its claim on state law and predicating federal jurisdiction upon diversity of citizenship.

On the union's motion, the district court dismissed count 2 as failing to state a claim upon which relief could be granted, but denied the union's motions to dismiss counts 1 and 3. Sinclair appealed from the order granting the dismissal of count 2, and the union appealed only from the denial of its motion to dismiss count 3. Basing its decision on federal labor policy and congressional intent, the United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of count 2. How-

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1. 452 F.2d 49 (7th Cir. 1971).
   (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
   (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
3. 452 F.2d at 54.
ever, the court of appeals reversed the district court's denial of the union's motion to dismiss count 3. The court reasoned that because federal law controls in all actions based on a breach of a collective bargaining agreement, inconsistent decisions based on state law could not be upheld. Therefore, if the individual strikers could not be held liable for damages in count 2 based on federal law, they likewise could not be held liable in count 3 for the same acts based on state law.4

At the time of the enactment of section 301 of the Taft-Hartley Act, Congress perceived a deteriorating labor situation deserving national attention.5 This reaction was prompted by an increase in the number of mandays lost as a result of work stoppages from 8,720,000 in 1944 to 116,000,000 in 19466 and an unprecedented 4,985 strikes in 1946.7 Congress believed that one means of combating this increase of industrial strife would be to make unions more responsible for breaches of collective bargaining agreements.8 Prior to the enactment of section 301, unions were often effectively immune from contract violation suits. In many states, procedural requirements made it necessary for the plaintiff to serve process on all the members of an unincorporated union—an almost impossible task.9 In addition, the NLRB had decided that an employer could not require a union to incorporate or post bond in order to facilitate recovery in the event of a union breach.10

In debates leading to the enactment of section 301, Senator Taft expressed the widely held view that legislation should also exempt individual union members from personal liability for the breach of a collective bargaining agreement by their union.11 This reticence to hold individual union members liable for breaches of collective bargaining agreements was occasioned by the results in Loewe v. Lawlor,12 the so-called Danbury Hatters case. In that case, an employer recovered damages from individual union members for the loss resulting from a union-ordered, nationwide boycott of his product. The members' liability was based on their continued dues-paying membership in the union under circumstances in which they knew or should have known of the union's illegal interference

4. Id. at 55.
5. S. REP. No. 105, 80th Cong., 1st Sess. (1947); H. REP. No. 245, 80th Cong., 1st Sess. 3 (1947), which states:
   During the last few years, the effects of industrial strife have at times brought our country to the brink of general economic paralysis. Employees have suffered, employers have suffered—and above all the public has suffered.
7. Id.
8. S. REP. No. 105, supra note 5, at 16 which states: "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace."
9. Id. at 15.
11. 92 CONG. REC. 5705 (1946).
with the employer's interstate commerce.\textsuperscript{13} Although the individual members probably could not have altered the union's actions had they tried, liability was nevertheless imposed. As a result, many of the members suffered financial disaster.\textsuperscript{14}

By enacting section 301, Congress sought to increase union responsibility by providing for suits by and against labor unions as legal entities in federal courts without regard to the citizenship of the parties or the amount in controversy. In addition, section 301 gave the advantages of limited liability to union members without the incorporation of the union.\textsuperscript{16} These provisions were enacted to promote the federal labor policy of maintaining industrial peace by providing for equality of bargaining power between employers and employees and encouraging the processes of collective bargaining.\textsuperscript{16}

The Supreme Court furthered this federal labor policy by holding that by implication section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements"\textsuperscript{17} and that the courts must fashion such law "from the policy of our national labor laws."\textsuperscript{18} The Court subsequently stated that this federal substantive law is to prevail over conflicting state law whether the action is brought in state\textsuperscript{19} or federal court.\textsuperscript{20}

\begin{itemize}
  \item \textsuperscript{13} 235 U.S. at 534-35.
  \item \textsuperscript{14} See Loewe v. Savings Bank, 236 F. 444 (2d Cir. 1916).
  \item \textsuperscript{15} See statute quoted note 2 supra.
  \item \textsuperscript{16} National Labor Relations Act (Wagner Act) § 1, 29 U.S.C. § 151 (1970), which states:
    \begin{quote}
      The inequality of bargaining power between employees . . . and employers . . . substantially burdens . . . the flow of commerce . . .
    \end{quote}
    \begin{quote}
      It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . .
    \end{quote}
    S. REP. No. 105, supra note 5, at 17, states:
    \begin{quote}
      It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements.
    \end{quote}
    \begin{quote}
      . . . [Such a step] will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.
    \end{quote}
  \item \textsuperscript{17} Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957). In this case, the union sued under section 301 to compel arbitration in accordance with the provisions of the collective bargaining agreement. The lower courts, unable to find any authority under federal or state law, denied relief. The Supreme Court reversed and held that federal labor policy required the granting of relief.
  \item \textsuperscript{18} Id. at 456.
  \item \textsuperscript{19} By granting jurisdiction to the federal courts, section 301 does not divest state courts of jurisdiction over actions for breach of collective agreements (Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)), nor is the jurisdiction of the courts preempted by the NLRB even when the breach also constitutes an unfair labor practice. Smith v. Evening News Ass'n, 371 U.S. 195 (1965).
  \item \textsuperscript{20} Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). The Court stated:
    \begin{quote}
      \textsuperscript{[1]}The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive
    \end{quote}
\end{itemize}
If employees strike without union authorization in violation of a no-strike clause in the collective agreement, the union may under certain circumstances escape liability. Although in order to avoid liability the union need not do everything within its power to stop a wildcat strike, it must refrain from encouraging, adopting, or prolonging the strike. This concept of narrow liability for the union is logical in that the union may not have the loyalty of all its members, and to hold the union responsible for an unauthorized strike would be unfair.

If the union is not liable, the employer may well inquire whether he may sue the employees directly for his damages under section 301. Though an argument can be made that employees are excluded as parties by the language of section 301, the Supreme Court has held that the individual employee is a proper plaintiff to an action enforcing his individual rights under section 301 against his employer, his union, or both. Thus, it would seem that employees could be made defendants by the employer when they breach a collective bargaining agreement. Though employers have failed in attempts to recover from employees under section 301, in each case the union was also arguably liable. In dismissing such attempts, the Supreme Court has held that where a union is liable in damages for the violation of a collective agreement, its officers and members cannot be. In so holding, however, the Court specifically reserved the question whether the individual members would be liable in the absence of union liability.

The present case is the first to decide the question of individual member liability for breach where the union is not liable. In holding that the individual members could not be held liable, the court relied heavily on congressional intent and federal labor policy. In view of the congressional concern with limiting the liability of the members for acts of the union, a reaction stemming from the result in the “Danbury Hatters” case, the court felt that it was unlikely that Congress intended to subject employees to the possibility of financial ruin solely because they struck without the union’s approval. Further, the court pointed out that when Congress debated section 301, reference was made to discharge and discri-

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27. The court states that this question is one of first impression. 452 F.2d at 50. No other case has been found deciding this question.
29. See Loewe v. Savings Bank, 236 F. 444 (2d Cir. 1916) (involving an execution issued upon the judgment in the “Danbury Hatters” case); 92 CONC. REC. 5705 (1946).
pline, and not civil damages, as remedies the employer might utilize when faced with a wildcat strike. In addition, the court, aware of its duty to formulate federal substantive law in accordance with the federal labor policy of promoting industrial peace, rejected Sinclair's argument that employers' recovery of damages from wildcat strikers would encourage peaceful settlements of labor disputes. The court pointed to the majority opinion in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, which noted that an award for damages "would only tend to aggravate industrial strife and delay an early resolution of the difficulties . . . ." Though not utilized by the court, an additional, supporting argument that has been suggested is that to award an employer damages against individual strikers would be inconsistent with national labor policy as revealed in sections 7 and 8 of the National Labor Relations Act. These sections regulate wildcat strikes on the assumption that the severest penalty inflicted upon an unprotected employee is discharge.

As a result of the court's decision, the only recognized remedies left to an employer faced with a wildcat strike are discipline and discharge. Although they are well established, these remedies may be inadequate. Any strike, whether authorized by the union or not, has an adverse economic effect on the employer. Not only are immediate orders lost, but future business may be affected as well, as customers switch to other suppliers who can deliver on time. Thus, the employer's goal is an immediate end to the illegal strike, but discharge or discipline of a few strikers may actually prolong the strike by increasing industrial strife. On the other hand, mass discharges of the wildcat strikers may not be feasible where the strikers are particularly numerous or so skilled that training of replacements would involve considerable delay.

An alternative remedy the employer may seek is an injunction against striking employees. An injunction would provide the employer with the means to gain an immediate resumption of operation. Injunctive relief would also avoid some of the evils associated with the damage award. The individual employee may be held liable for damages whether or not he realizes that the unauthorized strike was in violation of the collective agreement. Because the rights of the strikers are judicially determined before an injunction is issued, however, employees who incur liability for failure to obey an injunction must necessarily realize the illegality of their

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32. *See* statute quoted note 16 *supra*.
34. *Id.* at 248.
39. The court in the present case reserved the question whether the employer could have obtained an injunction against the wildcat strikers. 452 F.2d at 49 n.10.
actions. Also, an employee is more likely to obey an injunction than to accede to threats of a damages suit, because violation of an injunction entails immediate and assured liability rather than the distant and contingent liability usually associated with an action for damages. An injunction also is likely to create less industrial strife, because any penalty assessed against the strikers for their illegal conduct will go to the court and not to the employer. Furthermore, if the injunction is ignored, the court will have broad discretion in shaping punishment;\(^\text{40}\) in a damage suit, on the other hand, the amount of damages depends on the objective harm done. Given this discretion, the court can avoid the harsh results, demonstrated by the “Danbury Hatters” case,\(^\text{41}\) that may occur when employees are charged with damages.

Attempts to secure injunctions under section 301 have met resistance, however. Although section 301 read alone would seem to provide for injunctions as a possible remedy,\(^\text{42}\) section 4(a) of the Norris-La Guardia Act\(^\text{43}\) forbids the issuance by federal courts of injunctions compelling employees to return to work in situations involving labor disputes. The coexistence of these two statutes has presented the Supreme Court with the problem of determining whether the prohibition on issuance of injunctions in the Norris-La Guardia Act should be interpreted so as to prevent the use of injunctions to enforce collective bargaining agreements against unions under section 301. In Sinclair Refining Co. v. Atkinson,\(^\text{44}\) the Court held that a strike that violated a no-strike clause in a collective agreement was a labor dispute as defined by the Norris-La Guardia Act\(^\text{45}\) and that therefore a federal court could not issue an injunction against the union to stop the strike. Six years later, the Court expanded the reach of the Sinclair decision by holding that a suit by the employer in a state court to enjoin a strike in violation of a no-strike clause could be removed as a matter of course to a federal court, where such injunctions are prohibited.\(^\text{46}\)

In the Boys Markets case, the Supreme Court overruled its decision in

\(^{40}\) 43 C.J.S. Injunctions § 276 (1945).
\(^{41}\) See Loewe v. Savings Bank, 236 F. 444 (2d Cir. 1916) (involving an execution issued upon the judgment in the “Danbury Hatters” case).
\(^{42}\) Stewart, supra note 38, at 680, states: [R]ead alone, 301 means just what it says—suits may be brought to enforce labor agreements in federal courts. Federal courts may hear these suits and grant whatever relief prayed for seems proper. Since “suits” encompasses legal or equitable proceedings, the federal courts should be able to issue injunctions. . . .
\(^{43}\) 29 U.S.C. § 104 (1970) states: No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as the terms are herein defined) from doing, whether singly or in concert, any of the following acts:
(a) Ceasing or refusing to perform any work or to remain in any relation of employment. . . .
\(^{44}\) 370 U.S. 195 (1962).
\(^{46}\) Avco Corp. v. Aero Lodge 735, 990 U.S. 557 (1968).
Sinclair, and held that federal courts could issue injunctions prohibiting strikes in violation of a no-strike clause where the collective bargaining agreement provided for binding arbitration of the dispute that led to the strike. The Court stated that the Sinclair case stood "as a significant departure from [the Court's] otherwise consistent emphasis upon congressional policy to promote the peaceful settlement of labor disputes through arbitration." 47 Although the Boys Markets case involved a union-authorized strike, the rationale of the opinion applies as well to wildcat strikes, requiring the strikers to arbitrate their disputes rather than strike. In addition, the Court stated that whether an injunction will be granted in each case will depend on

[o]rdinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from denial of an injunction than will the union from its issuance. 48

The same balancing of interests might also be applied to determine whether an injunction will be issued against wildcat strikers.

In the present case, the Seventh Circuit Court of Appeals held that an employer cannot recover damages from individual employees who strike in violation of a collective bargaining agreement and without their union's authorization. The court concluded that this holding was required in view of congressional intent and federal labor policy. Although discharge and discipline remain as recognized remedies that the employer may utilize to deal with illegally striking employees, such methods are of questionable effectiveness in ending the strike. Injunctive relief, on the other hand, avoids many of the undesirable aspects of the damage award while being more effective than discharge or discipline in ending the strike. Moreover, the rationale of the Boys Markets case suggests that injunctive relief should be available against individual union members.

John Holtmann

47. 398 U.S. at 241.
REMEDIES—ENJOINING A NUISANCE—DAMAGES TO THE DEFENDANT AS A CONDITION OF GRANTING THE INJUNCTION

Spur Industries, Inc. v. Del E. Webb Development Co.¹

In 1956, defendant Spur Industries' predecessors in interest began development of cattle feedlots in an area approximately 15 miles west of the urban center of Phoenix, Arizona. At that time the land in the area was essentially devoted to agriculture and ranching. In 1959, plaintiff Del E. Webb Development Co. completed the purchase of 20,000 acres of ranch land, the southwestern portion of which was within 500 feet of defendant's feedlots. Webb began construction of a golf course with the intention of developing an extensive retirement community to be known as Sun City. A year later the first homes were sold in an area approximately two and one-half miles north of the feedlots.

In 1967, plaintiff Webb filed its original complaint, alleging that the feedlots prevented further development of over 1,300 lots and that the defendant's operations were a public nuisance to those residents in the southern portion of the new community because of the flies and odors. The trial court granted a permanent injunction against Spur's operation of a cattle feedlot near Sun City. The Arizona Supreme Court affirmed the injunction order, but also declared that "Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down."² In effect, the court granted a conditional injunction, because in order to obtain the injunction, the plaintiff was compelled to indemnify the defendant for his costs in moving or shutting down his business.

A private nuisance generally is considered to be an unreasonable interference with the use and enjoyment of another's land.³ In determining whether to grant injunctive relief, the courts apply a two step balancing test. First, they balance several factors to determine whether the activity constitutes a nuisance.⁴ Second, if the activity is a nuisance, they often balance the hardships to determine whether injunctive relief is appropriate.⁵ In this case, the appellate court had little difficulty in agreeing with the trial court that the feedlots constituted a private nuisance⁶ and that the damage sustained by the residents of Sun City justified the issuance of a permanent injunction.⁷

2. Id. at _____, 494 P.2d at 708.
6. With regard to feedlots as nuisances, see Note, "Ill Blows the Wind that Profits Nobody," Control of Odors from Iowa Livestock-Confinement Facilities, 57 Iowa L. Rev. 451 (1971); Annot., 18 A.L.R.2d 1083 (1951).
7. The court also stated that the activity constituted a public nuisance and that the residents of Sun City could have successfully maintained an action to abate it. 108 Ariz. at _____, 494 P.2d at 706. This aspect of the case is beyond the scope of this note.

https://scholarship.law.missouri.edu/mlr/vol38/iss1/11
Having established that a nuisance existed and that a permanent injunction was the proper remedy, the court made the relief conditional upon indemnification of the party creating the nuisance for its costs of moving or shutting down. Although the court cited no precedent for this novel remedy, conditional injunctions are not unprecedented.8 The leading case is Boomer v. Atlantic Cement Co.9 In that case, injunctive relief was denied, conditional upon defendants paying permanent damages to the plaintiff. After determining that the activity was a nuisance, the court balanced the relative hardships and determined that the benefits to the community from defendants' §45 million cement plant outweighed the plaintiff's interests in enjoining the nuisance. Bartman v. Shobe10 is a case reaching a similar result, in dealing with a partially constructed waste disposal plant that would have permitted sewage effluent to drain onto the plaintiff's land. Again, the activity was held a nuisance but injunctive relief was denied. However, the defendant was required to pay the plaintiff damages.

In the above cases injunctive relief was denied upon the condition that damages be paid by the defendant. In contrast, the Spur court granted the injunctive relief upon the condition that damages be paid by the plaintiff. The only case comparable to Spur in this regard is New Castle City v. Raney.11 In Raney, the court granted an injunction conditional upon the plaintiff's payment of the expense of removing the nuisance.12 The decisions differ in that in Spur the plaintiff was required to pay the cost of shutting down or moving the feedlots; in Raney the plaintiff was required to pay only the costs of shutting down the milldam.

The factor that caused the court to grant an injunction only upon the condition that plaintiff pay defendant's costs of moving or shutting down its activity was that plaintiff "came to the nuisance." Some courts view the doctrine of "coming to the nuisance" as an absolute defense to a nuisance action.13 The rationale is threefold: (1) Granting injunctions in such cases would encourage litigation and speculation;14 (2) according such relief would be contrary to the ancient maxim volenti non fit injuria ("no legal wrong is done to him who consents");15 and (3) those who

10. 353 S.W.2d 550 (Ky. 1962).
11. 6 Pa. Count Ct. 87 (Lawrence County C.P. 1889), rev'd on other grounds, 130 Pa. 546, 18 A. 1666 (1890).
12. Id. at 94.
seek the benefits of locating in the country must be prepared to accept the disadvantages. On the other hand, the majority of jurisdictions treat “coming to the nuisance” as merely one of the factors to be considered in the weighing process when determining the unreasonableness of defendant’s conduct. The Arizona court found Spur to be the victim of a “knowing and willful encroachment” by the plaintiff and appeared to adopt the minority view.

This would normally have foreclosed the plaintiff from obtaining injunctive relief. However, the court proceeded to inject the public interest in health into the balance and concluded that this public interest demanded that injunctive relief be granted. But, because Webb came to the nuisance, the court felt that he should be required to indemnify the defendant. The court expressly limited the application of this novel remedy to those situations

[w]herein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

The applicability of this doctrine may not be limited to those jurisdictions that accept the “coming to the nuisance” doctrine as an absolute defense. In jurisdictions where it is merely one of the factors to be considered, the doctrine conceivably could be justification for invoking this remedy. For example, the Raney court concluded that the “coming to the nuisance” doctrine was not a defense to an injunctive action but was a factor to be considered and that because the defendant was without fault, it would be an undue burden to force him to bear the costs of shutting down his operation.

In cases such as Boomer and Bartman, where the court denies injunctive relief upon the condition that defendant pay damages, the result is that a private party is allowed to continue its nuisance if he pays the plaintiff permanent damages. This is frequently called “inverse condemnation.” It has been argued that this violates the prohibition, contained

18. 108 Ariz. at ____, 494 P.2d at 706.
19. Id. at ____, 494 P.2d at 707.
20. Id. at ____, 494 P.2d at 708.
21. 6 Pa. County Ct. at 93-94.
22. This author would make a distinction between involuntary and voluntary “inverse condemnation.” Involuntary inverse condemnation occurs when a party seeks to enjoin a nuisance created by a private party and the court denies the injunctive relief conditional on the payment of damages by the defendant. Thus, the defendant is permitted to condemn an easement on plaintiff’s property.

Voluntary inverse condemnation describes a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal
in most state constitutions, against condemnation for private use.

There are two theories upon which the objection can be overcome. First, it is arguable that since the injunction was granted because of an overriding public interest, the taking was a public taking. Although it was not verbalized by the court, this might be the proper analysis of the Bartman case, where the court placed great emphasis on the public interest in waste disposal. The court implied that if the defendant had been a public organization, it would have had the eminent domain power. The court also said that the normal procedure after completion was for the plant to be conveyed to a public agency, and therefore equity demanded that the injunction be denied.

Boomer presents an entirely different picture. The only public interest was the community interest in the economic benefits derived from defendant's cement plant. Under the American rule, this type of interest would often not be a sufficient basis for the use of the governmental eminent domain power, i.e., the community could not have condemned a tract of land so that the defendant would have been able to expand his factory. Hence, the taking in Boomer could not be characterized as a "public taking"; and another theory would have to be relied on.

A second theory is that courts may approve such private condemnations in the exercise of their general equity powers, despite the private condemnation prohibition. In fact, the courts have assumed that they have this power. The Bartman court dismissed the objection based on private condemnation, because the relief sought was equitable in nature, and the Boomer majority ignored the issue altogether. In City of Harrisonville v. W. S. Dickey Clay Manufacturing Co., the United States Supreme Court seemed to approve this theory:

Where substantial redress can be afforded by the payment of

exercise of the power of eminent domain has been attempted by the taking agency.


25. 355 S.W.2d at 556.
26. Id. at 555, 556.
28. 355 S.W.2d at 555.
29. 289 U.S. 334 (1933).
money and issuance of an injunction would subject the defendants to grossly disproportionate hardship, equitable relief may be denied, although the nuisance is indisputable. This is true even if the conflict is between interests which are primarily private.30

Thus, it would appear that many courts have chosen to ignore the private condemnation issue. By ignoring the issue, the courts imply that in equity the constitutional objection is not applicable.

The Spur court's approach in granting a conditional injunction might be subject to a more substantial objection based on private condemnation. The court decided that "coming to the nuisance" was ordinarily an absolute bar to the issuance of an injunction and that Webb came to the nuisance. The defendant could argue that at this point as to Webb it had the privilege to commit a nuisance. The court balanced this factor against the interests of the residents of Webb's development and decided to issue an injunction conditional upon Webb's paying Spur its costs of moving or shutting down its operation. By so ruling, the court allowed Webb, a private party, to obtain a negative easement31 over defendant's land if he paid the defendant's costs of moving or shutting down. Thus, the court arguably allowed a taking of defendant's property for private use.32

In the final analysis, the court in Spur in an exercise of its equitable power balanced the interests of the public in health against the defendant's priority of occupation and the plaintiff's coming to the nuisance, and concluded that an injunction conditional on payment of damages by the plaintiff was the proper remedy. The Arizona court recognized that it was incumbent upon it to protect the interests of both parties and that conditional equitable relief lends itself well to this.33 While the result is novel, upon the facts it is the only proper result. The alternatives are inadequate: either deny the injunction, thus continuing the public health hazard, or grant the injunction but deny compensation to the innocent defendant.

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30. Id. at 338.
31. A negative easement is "one which precludes the owner of land subject to such easement from doing an act which if no easement existed, he would be entitled to do." Wilson v. Owen, 262 S.W.2d 19, 24 (Mo. 1953).
32. In the normal situation where a court grants an injunction against a nuisance, the courts have long recognized that no condemnation has occurred. The rationale is that an owner's privilege to use his property is limited and does not include the privilege to commit a nuisance. Thus, when equity enjoins a nuisance, it does not deprive the owner of his property. See Clutter v. Blankenship, 346 Mo. 961, 964, 144 S.W.2d 119, 121 (1940). Spur can be distinguished in that the court indicated that as to Webb, the defendant had a defense. 108 Ariz. at ___, 494 P.2d at 707. The Arizona court fails to raise this issue, perhaps under the assumption that in equity the constitutional objection is not applicable.
RETROACTIVE TERMINATION OF INTERESTS IN LAND—
NEBRASKA REVERTER ACT HELD CONSTITUTIONAL

Hiddleston v. Nebraska Jewish Education Society

On June 20, 1891, for a consideration of $100, Hiram R. and Minnie Avery conveyed an acre of land by warranty deed to the trustees of School District No. 60. In the description of the land the deed stated: "This Deed is to become null and void as soon as the land ceases to be used as school property." The land was used as school property until November, 1968, when the School District of Omaha, successor in interest to School District No. 60, sold the land as surplus to the Nebraska Jewish Education Society.

Nine years before this sale by the school district, the Nebraska legislature had passed a statute providing that:

Neither possibilities of reverter nor rights of entry or reentry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken shall be valid for a longer period than thirty years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or reentry is created to endure for a longer period than thirty years, it shall be valid for thirty years.

If constitutional, this statute terminated the interest retained by Hiram Avery or his successors as of May 15, 1959, because at that time the occurrence upon which the estate was limited had not happened.

Attacking the retroactive feature in the statute, Martha Avery Hiddleston and others, as heirs-at-law of the original grantor, brought a suit to quiet title, alleging a conveyance in fee simple determinable and the happening of the stated event. Plaintiffs alleged the statute violated the contract and due process clauses of the United States and Nebraska Constitutions. Relying on the new Nebraska statute, the Education Society demurred. The trial court dismissed the petition, and the Nebraska Supreme Court affirmed, holding that neither on its face nor as applied in this situation did the Nebraska statute violate either constitution.

The Nebraska statute is one of several state statutes that deal with

1. 186 Neb. 786, 186 N.W.2d 904 (1971).
2. Id. at 788, 186 N.W.2d at 905.
3. Id.
5. Section 76-2,103 provides that possibilities of reverter and rights of reentry created more than 80 years prior to May 15, 1959, which were exercisable before May 15, 1959, could be enforced if action was brought within 1 year. Obviously, this saving provision would be of no help in the instant case, as the condition was broken 9 years after the act was passed and 8 years after any action was maintainable.
6. 186 Neb. at 788-89, 186 N.W.2d at 905-06.
7. The defendant society also contended that the original deed to the school district passed title in fee simple absolute, with the additional words of description setting forth the purpose of the conveyance, rather than limiting it. That argument was rejected by the Nebraska Supreme Court. Id. at 788, 186 N.W.2d at 905.
8. Id. at 790-91, 186 N.W.2d at 907.
the termination of possibilities of reverter and rights of reentry. These statutes have been prompted by the problems caused by the case and statutory law governing such interests. For example, in a number of American jurisdictions possibilities of reverter and rights of reentry cannot be devised or transferred inter vivos. Consequently, they pass on the death of the holder of such interest by intestate succession. As a result, after a period of time the interest is usually divided among many individuals who are scattered over wide areas, making cooperation to release the interest unfeasible. Other problems stem from the fact that reverters and reentry rights have been held to be exempt from the rule against perpetuities. This exemption is rationalized by the fact that these interests are owned by living and, theoretically, ascertainable persons. Finally, in the absence of statute, possibilities of reverter and rights of

9. To date 14 states have enacted statutes dealing with these interests: Connecticut, Florida, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, Ohio, and Rhode Island. The statutes are cited in notes 19 and 21 infra. Many other states have title marketability statutes that have been used to affect titles by barring or extinguishing all interests of ancient origin unless appropriate measures are taken to place the interests on the recent record. P. BAYSE, CLEARING LAND TITLES § 171 (2d ed. 1970). The prime object of the Marketable Title Acts enacted in Connecticut, Florida, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, and Wisconsin is to limit the time needed to search and examine records by requiring periodic rerecording of nonpossessory interests in order to preserve them. Id. §§ 172-90 (discussing the statutes of each of the above states). Possibilities of reverter and rights of reentry are usually excepted from these statutes, however, and the Ohio and Minnesota statutes seem to be the only authorities for a marketable title act cutting off a reversionary possibility of record. The latter statute was used in Wichelman v. Mesner, 250 Minn. 88, 83 N.W.2d 800 (1957). See also L. SIMES & C. TAYLOR, IMPROVING CONVEYANCES BY LEGISLATION 3-17, 295-362, especially 349-358 (1960); J. SCURLock, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND, 80-95, 227-91 (1953); Barnett, Marketable Title Acts—Panacea or Pandemonium?, 53 CORNELL L. REV. 45 (1967) (with a Model Act at 95-97); Bayse, TRENDS AND PROGRESS—THE MARKETABLE TITLE ACTS, 47 IOWA L. REV. 261 (1962).

10. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS, §§ 1860-63, 1902-03 (2d ed. 1956) [hereinafter referred to as SIMES & SMITH]. RESTATEMENT OF PROPERTY § 159 (1966) says a possibility of reverter is alienable, but section 160 says a right of entry is not unless the conveyance falls within one of the exceptions of section 161. These exceptions are: If the conveyance is an effective release; when the conveyor and the conveyee both hold the same right of entry and could by acting jointly assert the right on breach of condition; where the right supplements a reversionary interest in the same land held by a holder of right, and he conveys both interests. See also Fratcher, A MODEST PROPOSAL FOR TRIMMING THE CLAWS OF LEGAL FUTURE INTERESTS, 1972 DUKE L.J. 517, 521-22, 525-26.

11. In Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E.2d 922 (1950), land given to a church had greatly increased in value, but the church could not sell because of a condition in the deed. The church later went out of existence. So many heirs were involved that expenses for a receiver, a genealogist, and attorneys amounted to $14,609.75. The heirs ultimately received amounts varying from $6.45 to $744.00. W. LEACH & J. LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 44-46 (1961). See also Fratcher, EXORCIZE THE CURSE OF REVERSIONARY POSSIBILITIES, 28 J. MO. B. 34 (1972).

reentry are not generally subject to policy restraints such as those on restrictive covenants.  

In answer to these problems, some states have allowed free alienability and devisoriality of reverter and reentry rights. Other states have enacted statutes that in some way limit the effectiveness of such a limitation on a fee simple. These statutes fall into several categories. One type, found in Arizona, Michigan, Minnesota, and Wisconsin, purports to eliminate nominal conditions where there is no intended actual and substantial benefit to the person in whose favor the conditions are to be performed. A second type, found in Florida, provides that after 21 years the condition triggering the reverter or reentry right will be enforced only as a covenant. This approach allows the court to deny enforcement because of a change in conditions. A third type of statutory solution allows the sale of the free simple free of such future interests as reverter and reentry rights, with the future interest to attach to the proceeds of the sale. The fourth, and most common, variety limits the period for effective enforcement of limitations (usually to 21 or 30 years) and may

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The four states that have passed this type of legislation protect holders of future interests by providing that interested persons shall be given notice and shall be made parties to any action seeking to authorize a transfer of the property. If the court authorizes a transfer, the typical result is that the proceeds of sale . . . shall, in all respects, be substituted for and stand in the place of the property sold or leased as regards the ownership and enjoyment thereof, and all persons shall have the same estates or interests, vested, contingent, or executory, in such proceeds of sale . . . .


or may not provide for periodic recording of the interest to preserve it for subsequent periods.\textsuperscript{22} The Nebraska statute is of this last type and provides for both prospective and retroactive application. It does not allow recording to save pre-existing interests which had not matured by the effective date of the legislation.\textsuperscript{23}

Six other states whose statutes allowed retroactive termination of possibilities of reverter and rights of reentry had previously decided the constitutional issues raised by Hiddleston. Four upheld the constitutionality of the statute; two held the retroactive provisions invalid. In \textit{Biltmore Village, Inc. v. Royal},\textsuperscript{24} the Florida Supreme Court held unconstitutional a section of the Florida statute that provided a one-year period in which to file suit on those interests matured by the effective date of the legislation,\textsuperscript{25} saying it “arbitrarily cuts off the right in one year unless suit is brought to enforce it. Such saving provision affords no remedy . . . where [the] breach of covenant has not accrued . . . .”\textsuperscript{26} The court also said that the interest involved was a “vested right.”\textsuperscript{27}

A year later the Illinois Supreme Court reached the opposite result in \textit{Trustees of Schools v. Batdorf}.\textsuperscript{28} In that case the court said a possibility of reverter created by an 1895 deed to a school district was extinguished because the limitation had not matured by the effective date of the act. In reversing a trial court decision favoring the validity of the possibility of reverter, the court said that the act was passed in recognition of the operation of possibilities of reverter as “clogs on title, withdrawing property thus encumbered from the commercial mortgage market long after the individual, social or economic reason for their creation has ceased, and at a time when the heirs from whom a release could be obtained would be so numerous as to be virtually impossible to locate.”\textsuperscript{29}

Prior to \textit{Batdorf}, Illinois courts had laid the groundwork for such a decision, holding, in a line of cases dealing with statutory dedication of streets, that reverter and reentry rights could be dealt with by the legislature free from “any constitutional limitation.”\textsuperscript{30} Illinois courts had also previously held that such interests were not “vested.”\textsuperscript{31} While some writers

\begin{itemize}
\item \textsuperscript{22} See statutes cited note 21 supra.
\item \textsuperscript{23} See note 5 supra.
\item \textsuperscript{24} 71 So. 2d 727 (Fla. 1954).
\item \textsuperscript{26} 71 So. 2d at 729.
\item \textsuperscript{27} Id. at 729-30. The dissent in Royal doubted that the case was a test of the statute, asserting that the reverter failed to survive a tax sale in the chain of title. The case has been criticized for its failure to discuss adequately the case of Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398 (1934). See Comment, \textit{Legislative Limitation of Reverter and Forfeiture Provisions in Conveyances and Devises of Land—A Proposed Statute for Kansas}, 15 Kan. L. Rev. 346, 354-56 (1967).
\item \textsuperscript{28} 6 Ill. 2d 486, 130 N.E.2d 111 (1955).
\item \textsuperscript{29} Id. at 492-93, 130 N.E.2d at 114-15.
\item \textsuperscript{30} People \textit{ex rel.} Franchere v. Chicago, 321 Ill. 466, 476, 152 N.E. 141, 144-45 (1925); Prall v. Burkhardt, 299 Ill. 19, 36, 132 N.E. 280, 287 (1921).
\item \textsuperscript{31} People v. Lindheimer, 327 Ill. 367, 21 N.E.2d 313 (1939): “[A] right, to be within [the contract clause] protection, must be a vested right. It must be

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saw possible grounds for a successful constitutional attack on the statute, the Batdorf decision and its reasoning have generally been well accepted. In 1965 New York became the third state to rule on the retroactive feature of its statute and the second state, along with Florida, to strike it down on constitutional grounds. In Board of Education v. Miles, the New York Court of Appeals held that section 345 of the New York Real Property Law was not drawn for the protection of subsequent purchasers in good faith, so as to uphold the constitutionality of the impairment of a property right . . . and would [not be] sustainable as within the police power for the reason that [it] alter[s] the obligation of a deed . . . without necessarily doing so for the protection of bona fide subsequent grantees.

The Miles case has been criticized, but not just for its holding that section 345 could not be used to terminate retroactively old, previously unmatured and unrecorded interests. The decision's focus on the burden of recording rather than the issue of public and economic welfare, which is the basis for such legislation, has borne the brunt of the criticism.

something more than a mere expectation based upon an anticipated continuance of the existing law . . . .” Id. at 373, 21 N.E.2d at 321. Note, supra note 13, at 646. But see 1 American Law of Property § 4.12 (L. Simes ed. 1952), and 6 American Law of Property § 24.3 (A.J. Casner ed. 1952), for the suggestion that most American jurisdictions consider reverters and reentry rights to be vested future interests.

33. See, e.g., 34 CHI.-KENT L. REV. 250 (1956); 5 DePaul L. Rev. 325 (1956); 1965 ILL. L. F. 941. But see 54 Mich. L. Rev. 863 (1956), which questions the Illinois decisions and holdings that such interests are not “property”; and 1956 ILL. L. F. 297, in which the author asserts the constitutional question is not settled and that even with different facts may limit the scope of Batdorf. The later case of Blackert v. Dugosh, 12 Ill. 2d 171, 145 N.E.2d 606 (1957), though, took the same position as Batdorf.
35. N.Y. Real Prop. Law § 345 (McKinney 1968). The statute was passed in 1958. Holders of previously created interests had until September 1, 1961, to record and preserve their holdings. It should be noted that N.Y. Real Prop. Law § 59 (McKinney 1968), allows the devise and sale of reverters and rights of reentry before maturation.
36. 15 N.Y.2d at 372, 207 N.E.2d at 185, 259 N.Y.S.2d at 185. The court also said that there was too much of a burden on unascertained or unborn persons to record to preserve the reverter. “[U]nder the circumstances . . . [it is unconstitutional] since it purports to bar the remedy before the right to enforce it has matured.” Id. at 374, 207 N.E.2d at 186-87, 259 N.Y.S.2d at 187-88.
37. The lower court, in upholding the statute, had said it was in the public interest to regulate this kind of title, and that without regulation such interests could adversely affect free alienability and development of land. “It is neither the impairment of contract nor a denial of due process to require a man who owns so tenuous and troublesome an interest to put it down in a public record.” Board of Educ. v. Miles, 18 App. Div. 2d 87, 99, 238 N.Y.2d 766, 772 (1963), See Comment, supra note 26, at 356; 1966 Duke L. J. 272; 1965 Ill. L. F. 941; and 17 Syracuse L. Rev. 571 (1965), where the writer questions the compatibility of such a decision with the freedom from outdated restrictions needed in an urbanized society. The constitutionality had previously been questioned in Smith, Constitu-
Since the New York decision in Miles, every state that has had its statute challenged has upheld the statute's constitutionality. In Atkinson v. Kish⁴⁸ the Kentucky Court of Appeals ruled that a right of entry created in 1927 ceased to exist on July 1, 1965, because its owner failed to record an intention to preserve that interest.³⁹ The court noted that rights of entry and possibilities of reverter were no more than expectancies with none of the constitutional protection of “vested rights.”⁴⁰

The constitutionality of the Massachusetts statute was upheld in Town of Brookline v. Carey.⁴¹ In this case, the town took certain land in 1864 to form part of a parcel on which a school was later built. In 1933, the land ceased to be used for educational purposes.⁴² At the time of the original taking, a Massachusetts statute provided for a reverter upon discontinuation of use as a school for one year.⁴³ In affirming a decree registering title in the town free from the statutorily created possibility of reverter, the Supreme Judicial Court of Massachusetts said that the Massachusetts termination statute was in part a statute of limitations and as such was constitutional because it provided for a reasonable time after enactment to enforce the right.⁴⁴ The statute allowed seven and one-half years to enforce a condition already broken at the time of the statute's passage or to preserve by recording a condition that had not yet been breached.

The Supreme Court of Iowa in Chicago & N.W. Ry. v. City of Osage⁴⁵ ruled upon their “non-claim statute”, so called because the right, and not merely the remedy, is extinguished. By an 1891 deed the City of Osage conveyed land to the Chicago & North Western Ry. to be used for railroad purposes. The railway ceased to use the land for railroad purposes in 1967, and sought to have title to the land quieted in its name. The Iowa statute⁴⁶ provided one year from July 1, 1964, in which to record and preserve interests created by deeds over 25 years old. The city had filed

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³⁸. 420 S.W.2d 104 (Ky. 1967).
³⁹. Id. at 109-10.
⁴⁰. Id.
⁴¹. 355 Mass. 424, 245 N.E.2d 446 (1969). The constitutionality of the statute had been suggested previously in Selectmen of Town of Nahant v. United States, 293 F. Supp. 1076 (D.C. Mass. 1968), when a possibility of reverter created in 1898 was barred on January 1, 1964, by failure to record as provided by statute.
⁴². 355 Mass. at 425, 245 N.E.2d at 446-47.
⁴⁴. 355 Mass. at 427, 245 N.E.2d at 448.
no such claim of interest. The trial court ruled the land reverted to the city. The supreme court, in reversing and quieting title in the railway, said:

In construing statutes we must look to the object to be accomplished, the evils sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.47

In the present case, the Nebraska Supreme Court was confronted with this conflict among its sister courts. Therefore, the court examined its own precedents to determine which rule was more compatible. In State v. County of Cheyenne,48 the court had said that a reverter was not an estate in land, “but only a possibility of being an estate. It cannot have a value until it can be determined that the event upon which the estate is limited will happen and when it will occur.”49 Despite this, at least one writer had asserted, prior to Hiddleston, that three possible grounds existed for holding the statute unconstitutional: (1) As a denial of due process; (2) as a taking for private purposes; and (3) as an impairment of contract.60

The Hiddleston court took advantage of her sister courts' reasoning in the Batdorf, Atkinson, Carey, and Chicago & N.W. Ry. cases,61 as well as certain decisions of the United States Supreme Court construing the contract and due process clauses.62 The court weighed the harm caused by termination of an interest against the general public policy in favor of increased utility of land and marketability of title, and found the scales tipped in favor of public policy.63 This would seem to be entirely in accord with Goldblatt v. Hempstead,64 where the Supreme Court of the United States said that interference in behalf of the public is justified if the public interest requires such interference, and the means used are reasonably necessary for accomplishment of the purpose and not unduly oppressive upon individuals.65

It is submitted that the Hiddleston decision is sound. Commentators

47. ___Iowa at ___, 176 N.W.2d at 792.
48. 157 Neb. 593, 60 N.W.2d 593 (1953).
49. Id. at 596, 60 N.W.2d at 595.
50. See Zuber, Validity of the Nebraska Reverter Act, 39 Neb. L. Rev. 757, 765-69 (1960). The latter ground was admittedly weak, however, after the Nebraska decision in Placek v. Edstrom, 151 Neb. 225, 37 N.W.2d 203, cert denied, 338 U.S. 892 (1949). In that case, chapter 11 of Nebraska Laws 1945 (commonly known as the "par-check law") was challenged as an unconstitutional restriction on contract and a violation of due process. The court denied both attacks, holding the statute to be within the fair and reasonable exercise of the police power. Id. at 232-34, 37 N.W.2d at 206-08.
53. 186 Neb. at 791, 186 N.W.2d at 907. "The Legislature may reasonably have intended the reverter act to increase utility of land and marketability of titles by methods that were certain, uniform, and inexpensive." Id.
55. Id. at 594-95. Even this rule is not applied strictly, and in debatable situations the courts are to defer to the legislature. Id.
have pointed out that statutes of the Nebraska type are much more vulnerable to attack because of the absence of recording provisions.\textsuperscript{56} Yet, given the evils that these interests cause if left unchecked for generations, it may be better from a policy standpoint to uphold a statute that terminates retroactively all interests over 30 years old than to allow an untold amount of land, increasingly needed in an urbanized society, to be burdened by the prospect of low utility and unmarketable title.\textsuperscript{57} The concurring opinion in \textit{Hiddleston} is a more lengthy discussion of the use of the police power by the legislature to impair private rights, pointing out that the benefits from land alleviated of such conditions far outweigh the loss sustained by individual holders of possibilities of reverter.\textsuperscript{58} It is fortunate that the Nebraska court was willing to confront the real issues presented by such a statute and uphold and interpret it in the spirit in which it was enacted.

\textbf{ROBERT FRANKLIN DEIS}

\textbf{TORTS—RES IPSA LOQUITUR—DEFENDANT’S RIGHT TO CONTROL AS SATISFYING THE “CONTROL” REQUIREMENT}

\textit{Niman v. Plaza House, Inc.}\textsuperscript{1}

Mr. and Mrs. Niman sued the owner and manager of the apartment house in which they were tenants for personal injuries and property damage caused by hot water escaping through a ruptured fitting on the radiator in their apartment. The building had a hot-water heating system; the water was circulated from a boiler through pipes and radiators. The radiator and fitting in question were covered by a metal cover. The Nimans could regulate the amount of heat by turning a knob, which was the only part protruding from the cover. There was no contention that the Nimans were negligent in operating the knob.\textsuperscript{2}

Plaintiffs submitted and recovered under the doctrine of res ipsa loquitur. Defendants appealed, arguing: (1) Plaintiffs were not entitled to relief under a res ipsa loquitur theory because they failed to prove that the radiator was under the exclusive control and management of the defendants; and (2) a modified instruction from the Missouri Approved Jury Instructions was given that was improper because it included elements that were confusing and misleading.\textsuperscript{3} The Missouri Supreme Court re-


\textsuperscript{57} See note 11 \textit{supra}.

\textsuperscript{58} 186 Neb. at 791-93, 186 N.W.2d at 908 (concurring opinion of Newton, J.).

1. 471 S.W.2d 207 (Mo. En Banc 1971).
2. \textit{Id.} at 208-09.
3. \textit{Id.} at 209.
jected both contentions. This note will discuss only the court's treatment of defendant's first point.4

"Res ipsa loquitur" is a term employed to describe a negligence case in which the character of the accident itself is sufficient to take the case to the jury without proof of specific negligent acts.5 The classic definition of res ipsa loquitur is found in Scott v. The London and St. Katherine Docks Co.6

[Where the [injuring instrumentality] is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.4]

4. As its second allegation of error, defendant objected to plaintiff's verdict-directing instruction, which was a modification of § 31.02, Missouri Approved Jury Instructions. Section 31.02 reads as follows:

Your verdict must be for plaintiff if you believe:
First, defendant was the driver of the automobile, and
Second, the automobile left the street and ran across the sidewalk, and
Third, such movement of the automobile was the direct result of defendant's negligence, and
Fourth, as a direct result of such negligence the plaintiff sustained damage.

The plaintiffs inserted the following as the third paragraph: "[T]he defendants possessed superior knowledge or means of information as to the cause of the occurrence and such occurrence is one that does not ordinarily happen when those in charge use due care. . . ." 471 S.W.2d at 212.

Defendant's sole criticism of the instruction was that in this modification plaintiff violated Mo. R. Civ. P. 70.01 (e) by inserting additional elements into the instruction that were confusing and misleading to the jury and should not have been so unduly emphasized. The court, citing Brown v. Bryan, 419 S.W.2d 62, 66 (Mo. 1967), acknowledged that the two res ipsa elements in the modified third paragraph were not necessary for a res ipsa instruction. The court found that the two elements inserted by the plaintiffs were matters that determine the right of a plaintiff to submit a case to the jury, and thus were for judicial determination. See Hoock v. S. S. Kresge Co., 230 S.W.2d 758 (Mo. En Banc 1950). The Nimn court did not state specifically that the modification was a violation of Mo. R. Civ. P. 70.01 (e), which requires impartial modifications. Assuming that the rule was violated, however, the court proceeded to determine whether the unnecessary inclusion of these elements was prejudicial and required a reversal. See Mo. R. Civ. P. 70.01 (c). The court found that it was not prejudicial and that "[i]f anything, plaintiffs only assumed an additional and unnecessary burden." 471 S.W.2d at 214.

On its face this seems to present a logical argument; however, the interpretation given to the res ipsa loquitur instruction by cases such as Stemme v. Siedhoff, 427 S.W.2d 461 (Mo. 1968), indicates the elements omitted in Bryan were not only unnecessary but also not allowed at all. It is improper for an instruction to submit that the facts warrant an inference of negligence in res ipsa cases, and this is why the court in Bryan omitted those elements. It remains to be seen whether their inclusion here was an intentional step by the court. If so it indicates there may be some significant changes in res ipsa loquitur instructions in the future.

5. The doctrine is a qualified exception to the general rule that the mere fact of injury creates no inference of negligence. Parlow v. Dan Hamm Drayage Co., 391 S.W.2d 315 (Mo. 1965); Maybach v. Falstaff Brewing Corp., 222 S.W.2d 87 (Mo. 1949).

7. Id. at 598, 159 Eng. Rep. at 667.
The Scott case indicates that there are certain conditions for the application of the doctrine. In most jurisdictions, these conditions are: (1) The accident must be one that would not ordinarily occur without negligence; (2) the defendant must have had exclusive control of the injuring instrumentality; and (3) the accident must not have been caused by any negligent act by the plaintiff. Missouri has adopted the general doctrine, but has modified these conditions by replacing the third requirement, that there be no evidence of contributory negligence, with the requirement that defendant possess superior knowledge or means of information as to the cause of the accident. The leading case of McCloskey v. Koplar states the Missouri requirements:

(a) the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care; (b) the instrumentalities involved were under the management and control of the defendant; and (c) the defendant possesses superior knowledge or means of information as to the cause of the occurrence.

Evidence sufficient to warrant a finding that these three conditions exist is, as a matter of law, circumstantial evidence sufficient to warrant a finding that the defendant was negligent. Thus, upon production of evidence sufficient to convince the trial court that these three conditions exist, plaintiff is able to get to the jury on the issue of defendant's negligence. Moreover, the plaintiff need not present evidence to rebut every reasonable theory of nonliability that defendant might propose.

In Niman, the trial court ruled that the plaintiffs satisfied these requirements. The defendants appealed, arguing only that the radiator was not under the exclusive management and control of the defendants. While some Missouri cases have stated, in dictum, that in order for the doctrine of res ipsa loquitur to apply it must be shown that the instrumentality causing the injury was under the exclusive control of the defendant, most have tempered this by saying "control" means exclusive control or the right to control. In the McCloskey case, the Missouri Supreme Court en banc held that "management and control of the defendant does not mean, or is not limited to, actual physical control, but refers rather to the right of control at the time the negligence was committed."

10. 329 Mo. 527, 46 S.W.2d 557 (Mo. En Banc 1932).
11. Id. at 533, 46 S.W.2d at 559.
13. Id. at 1110, 75 S.W.2d at 1008.
14. Cruce v. Gulf, M. & O.R.R., 358 Mo. 589, 216 S.W.2d 78 (1948): "If a plaintiff in such a case were required to produce evidence which would exclude every reasonable theory but that of the negligence of the defendant the doctrine would be annihilated." Id. at 594, 216 S.W.2d at 81; accord, Littlefield v. Laughlin, 327 S.W.2d 863, 866 (Mo. 1959).
15. See, e.g., Combow v. Kansas City Ground Inv. Co., 218 S.W.2d 593 (Mo. 1949); Wiedanz v. May Dept'f Stores Co., 156 S.W.2d 44 (St. L. Mo. App. 1941).
16. See McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557 (Mo. En Banc 1932); cases cited note 19 infra.
17. 329 Mo. at 535, 46 S.W.2d at 560. Likewise, in Van Horn v. Pacific Ref.

https://scholarship.law.missouri.edu/mlr/vol38/iss1/11
The Missouri courts have continually reaffirmed this view. Of 19 recent res ipsa loquitur cases surveyed, the element of control was at issue in 8. In only a single case, *Willis v. Terminal R.R. Ass'n*, the court allude to an exclusive control requirement. That case did not involve division of control between plaintiff and defendant, however; control of the injuring instrumentality was divided between two defendants, and there was no contention that plaintiff had any control whatsoever. The other 7 cases dealing with "control" defined it as including the right to control. Although the courts spoke of "exclusive" control in the cases in which control was not in issue, there was no reason for them to determine whether the word "control" might also include the right to control.

The *Niman* court followed the majority view. In determining that the plaintiffs' cause of action was properly submitted to the jury under the res ipsa loquitur theory, a majority of the court concluded that "within the legal connotation of the word 'control' as it is used in the res ipsa loquitur doctrine, the defendants had sole and exclusive control of the entire heating system...". In reaching this conclusion, the court relied on the language in *McGloskey* to the effect that "control" under res ipsa loquitur includes the right to control.

The court also relied upon a definition of control developed in suits against landlords on simple negligence theory. A landlord can be held liable for injuries received on premises that he retains under his control if he fails to exercise ordinary care in keeping them in a reasonably safe condition for their intended use. To be in control, the landlord need not be entitled to exclude persons from the premises; it is sufficient that he retain a general supervision over the premises for a limited purpose, such as making repairs or alterations. In *Gladden v. Walker and Dunlop* a federal court, in explaining this control requirement, said:

> It is familiar law that a landlord who keeps control over parts of an apartment house must use reasonable care for their

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& Roofing Co., 27 Cal. App. 105, 148 P. 951 (1915), the court stated:

> The rule... to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer to the right of control; otherwise... the doctrine of res ipsa loquitur could seldom if ever be given application.

*Id.* at 109, 148 P. at 953.

18. 421 S.W.2d 220 (Mo. 1967).

19. Crystal Tire Co. v. Home Serv. Oil Co., 465 S.W.2d 531 (Mo. 1971); Furlong v. Stokes, 427 S.W.2d 513 (Mo. 1968); Smith v. Wabash R.R., 416 S.W.2d 85 (Mo. En Banc 1967); Walsh v. Phillips, 399 S.W.2d 123 (Mo. 1966); Anderson v. Orscheln Bros. Truck Lines, Inc., 393 S.W.2d 452 (Mo. 1965); Ef-finger v. Bank of St. Louis, 467 S.W.2d 291 (St. L. Mo. App. 1971); Collins v. Stroh, 426 S.W.2d 681 (St. L. Mo. App. 1968).

20. 471 S.W.2d at 211.

21. *Id.; see text accompanying note 17 supra.*

22. Lember v. Gould, 425 S.W.2d 190 (Mo. 1968); Green v. Kahn, 391 S.W.2d 269 (Mo. 1965); Thompson v. Paseo Manor South, Inc., 331 S.W.2d 1 (K.C. Mo. App. 1959).


24. 168 F.2d 821 (D.C. Cir. 1948).
safety . . . . With regard to plumbing and heating systems, the principle extends to operative fixtures in the apartments leased to tenants and operation through them . . . . Accordingly the tenant who uses them is not usually expected to maintain them, but only to notify the landlord when they appear to be out of order . . . . The law should follow custom and convenience in classifying such fixtures among the things that the landlord controls.25

Moreover, the Missouri Supreme Court has stated:

The [tenants] actually had possession of nothing more than the rooms of their apartment and the use of the appliances, with the landlord controlling everything else. . . . [T]he [tenants] had the use, but not the control, of the bathroom gas heater and its connections.26

This definition of “control” is obviously akin to the “right to control” concept. At any rate, the majority relied on the negligence cases in which this definition had been applied in holding that plaintiffs satisfied the res ipsa loquitur control requirement by showing defendant’s right to control the heating system.

A dissenting opinion was filed in *Niman*, in which the dissenters objected to the use of these negligence cases in resolving the control issue in a res ipsa loquitur case. They stated that the definition of control applied in those cases should not be transferred to res ipsa loquitur cases,27 but offered no arguments for this position. Thus, at least for the moment, whether a landlord has sufficient control of an injuring instrumentality to be subjected to tort liability is likely to be determined in the same manner whether the plaintiff submits his case on a simple negligence theory or on a res ipsa loquitur theory.

The dissent did raise an issue that deserves close attention. It argued that because control of the radiator was divided between plaintiffs and defendant, the trial court should have directed a verdict against plaintiffs when they failed to produce evidence tending to show a greater probability that the acts of defendant, rather than those of the plaintiffs, caused the injury.28 In contrast, the majority opinion would send the case to the jury merely upon a finding that defendant had the right to control the heating system.29 Thus, the majority’s view leaves the issue of whose acts more likely caused the injury to be resolved by the jury; under the dissent’s view, the trial judge would make that determination.

The dissent’s formulation would increase the trial court’s role in a res ipsa loquitur case, while diminishing the role of the jury. In a situation where there is a division of control, the dissent would require a preponderance of evidence absolving the plaintiff of responsibility for the accident before the case could go to the jury. In this regard, the dissenters appear to be moving toward a view of res ipsa loquitur resembling the theory that obtains in most jurisdictions, where plaintiff must show

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25. *Id.* at 322.
27. 471 S.W.2d at 216.
28. *Id.*
29. *Id.* at 211.
his freedom from contributory negligence in order to be able to submit on a res ipsa loquitur theory.\textsuperscript{30}

The dissenting opinion also seems to indicate a general trend on the part of the supreme court toward a more restrictive view in res ipsa loquitur cases. Cannamore v. Bi-State Development Agency,\textsuperscript{31} decided well after Niman, illustrates this trend. In Cannamore, the plaintiff fell as she stepped from defendant's bus. Her only explanation of the accident was that she felt as if something had taken hold of her foot. On appeal, the Missouri Supreme Court dealt with the issue of what constitutes a submissible case under res ipsa loquitur. In the original dissenting opinion,\textsuperscript{32} the following language from a Missouri Court of Appeals case was quoted with favor: "[T]o make a prima facie case under the res ipsa loquitur doctrine, the evidence reasonably must exclude plaintiff's negligence as a contributing cause of the injury . . . ."\textsuperscript{33} Upon rehearing, the plaintiff's recovery at trial was reversed, with the dissenters joining the new majority. The court decided the case on the theory that this was not the type of accident that would not ordinarily happen in the absence of negligence on the defendant's part. The court spoke in terms of balancing the evidence to determine whose acts may have caused the accident:

From [plaintiff's evidence] it cannot be said that it is more likely than not that the fall resulted from negligence of the defendant. Therefore, plaintiff did not make a submissible case under the res ipsa loquitur doctrine.\textsuperscript{34}

In conclusion, the court in Niman has reiterated the doctrine of res ipsa loquitur as it stands in Missouri. The element of control continues to mean exclusive control or right to control. However, there is a dissenting view that in cases where the control of the injuring instrumentality is divided between the plaintiff and the defendant, the trial court, after balancing the evidence, must determine that it is more likely that defendant's acts caused the injury before it can submit the case to the jury on a res ipsa loquitur theory. It remains to be seen whether Missouri will join the majority of jurisdictions and require plaintiff to prove freedom from contributory negligence as an element of a res ipsa loquitur case. At any rate, the dissenting view in Niman seems to represent a trend toward restricting the availability of the res ipsa loquitur doctrine in Missouri.

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\footnotesize{\textsuperscript{30} See text accompanying note 8 supra.}
\footnotesize{\textsuperscript{31} 484 S.W.2d 308 (Mo. En Banc 1972).}
\footnotesize{\textsuperscript{32} Cannamore v. Bi-State Dev. Agency, Docket No. 57,100 (filed Apr. 10, 1972), rev'd on rehearing, 484 S.W.2d 308 (Mo. En Banc 1972).}
\footnotesize{\textsuperscript{33} Id., quoting Copher v. Barbee, 361 S.W.2d 137, 144 (Spr. Mo. App. 1962).}
\footnotesize{\textsuperscript{34} 484 S.W.2d at 311.}
WITNESSES—IMPEACHMENT—NECESSITY OF A FOUNDATION TO SHOW BIAS

State v. Dent

In December of 1968, Oscar King, Jr., was subjected to multiple beatings, both en route to and at the headquarters of the Black Liberators in St. Louis. King identified Leon Dent, a Lieutenant-General in the Black Liberators, as the chief assailant. At Dent's trial for assault with intent to do great bodily harm with malice, King's testimony was substantially the only evidence against Dent. Although the defense produced witnesses who related a different version of the assault, Dent was convicted.

The defense offered testimony that King had threatened to get even with Dent for Dent's having expelled King from the Black Liberators, but the trial court excluded it because the defense had not questioned King about this threat on cross-examination. On appeal, the defense alleged this was error on the ground that King's denial of having been a member of the Black Liberators had obviated the need for further inquiry. The Missouri Supreme Court affirmed the trial court's ruling, saying that in Missouri a proper foundation must be laid by asking a witness "whether or not he made the statement intended to be proved against him" before he can be impeached by a statement evidencing bias. The inquiry made of King as to his membership in the Black Liberators was held to be inadequate, since it did not put him on notice "that he was to be impeached by prior statements evidencing bias against the accused." This note will discuss two of the questions involved in Dent: (1) When is a foundation necessary to impeach for bias? (2) What constitutes a sufficient foundation?

The issue of the necessity of a foundation to impeach for bias was first presented in The Queen's Case in 1820. The question before the court was whether a foundation must be laid where the witness is accused of witness tampering as proof of his bias for one side. The court said a foundation must be laid to enable the witness to give explanations or exculpations for his conduct, to prevent surprise, and to avoid the situation where a party waits until a witness leaves the courtroom before attempting to discredit him. Although the court recognized that witness tampering consists of both statements and conduct, it refused to distinguish

1. 473 S.W.2d 370 (Mo. 1971).
2. This was the second version of the incident given by King. At first he told police he had been beaten by a gang of boys, a story he said Dent had told him to tell. Id. at 372.
3. The defense witnesses testified that King's first version of the incident (see note 2 supra) was correct. 473 S.W.2d at 372.
4. Id. at 378. The accuracy of this statement is questionable. See State v. Day, 289 Mo. 74, 95 S.W.2d 1185 (1936); text accompanying notes 50-54, 57 supra.
5. 473 S.W.2d at 378.
7. Id. at 313-14, 129 Eng. Rep. at 988.
8. Id. at 314, 129 Eng. Rep. at 988. The inability to lay a foundation due to the unavailability of a witness foreclosed any evidence of his bias, according to early treatises. See, e.g., 3 T. Starkie, Evidence 1755 (2d ed. 1828).
between the two. Instead, it viewed the situation as involving statements only, because the witness's statements were necessary to give meaning to his conduct. Thus, the court applied the requirement for a foundation to both statements and conduct evidencing bias.

Almost all of the earlier treatise writers supported this reasoning, apparently confusing the discrediting of a witness by contradictory statements with statements evidencing bias, and then assuming that conduct evidencing bias would be treated the same way. This agreement among treatise writers continued, with only negligible dissent until the turn of the century. The most notable break in this concurrence came in 1904 when Professor Wigmore, while acknowledging that a foundation was required for both contradictory statements and statements evidencing bias, contended that because of its inflexible application this requirement should not apply to conduct or circumstances evidencing bias.

Although the possibility of a distinction between conduct and statements showing bias had been alluded to as early as 1837, the main point of disagreement through the early 20th century was whether a foundation need be laid at all. The first Missouri case to decide whether a foundation should be laid when attempting to discredit a witness for bias, did not even discuss a possible difference in treatment of

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9. 2 Br. & B. at 315, 129 Eng. Rep. at 988. In regard to such a distinction the judges said, "Nice and subtle distinctions are avoided in our courts as much as possible..." Id.

10. Id.

11. G. Bradner, Evidence § 19 (1895); 1 S. Greenleaf, Evidence § 462 (4th ed. 1848); B. Jones, Civil Evidence §§ 850-51 (3d ed. 1924); 1 S. PHILLIPS & A. Amos, Evidence 413 (5th Amer. ed. 1899); 2 S. PHILLIPS & T. Arnold, Evidence 961 (4th Amer. ed. 1899); H. Roscoe, Digest of Criminal Evidence 97 (11th ed. H. Smith & G. Kennedy 1890); 3 T. Starkie, Evidence 1753 (2d ed. 1828); H. Underhill, Evidence § 354 n.2 (1894); F. Wharton, Criminal Evidence §§ 477, 488 (9th ed. 1894).

12. While this writer has found no 19th century writers who opposed this rule, some acknowledged that it only applied to statements and "acts done by [the witness] through the medium of declarations or words." 2 S. PHILLIPS & T. Arnold, Evidence 961 (4th Amer. ed. 1859). See also 1 S. Greenleaf, Evidence § 462 (5th ed. 1850).

13. 2 J. Wigmore, Evidence § 953 n.1 (1904). It is interesting to note that in Wigmore's first edition the contention that statements and conduct should be contrasted appeared only in a footnote. In his second edition in 1924, the sentence containing this statement was placed in the text, although no authority was cited to support it. In 1940, the third edition added a footnote in support of this contrast, which said:

It is of course erroneous to extend this rule to require prior inquiry as to an objective circumstance from which bias may be inferred: 1924, Brody v. Cooper, 45 R.I. 453, 124 A. 2 (ins. adj. as witness).

3 J. Wigmore, Evidence § 953, at 514 n.2 (3d ed. 1940).

14. See Pierce v. Gilson, 9 Vt. 216 (1837). The court upheld the necessity of a foundation to impeach in this case, but said that it could not see why it would be necessary to lay one in all cases, as in showing the existence of a violent quarrel, since it is necessary and right that the jury know of bad feeling or hostility on the witness's part.

15. See Annot., 16 A.L.R. 984 (1922), which divides the jurisdictions by whether they require a foundation or not.

utterances and conduct. Confronted with a situation of attempted witness tampering, the court in Bates relied heavily upon the *Queen's Case* in holding that a foundation must be laid in Missouri. Although conduct was not mentioned, the heavy reliance on *Queen's Case* caused the assumption that Missouri would require a foundation for both conduct and statements. A subsequent Missouri case involving a statement affirmed the foundation requirement.

Then, in *Barracloough v. Union Pac. R.R.* the Missouri court clarified its position. Stating that "it seems reasonable" and "[t]he Missouri decisions do not seem to be in conflict with this rule," the court adopted the Wigmore position that a foundation is needed for statements evidencing bias but no foundation is required for conduct or circumstances evidencing bias. The court's heavy reliance on Wigmore indicates that it also adopted his rationale for the foundation requirement. Wigmore's rationale, which is basically the one stated in *Queen's Case,* is that the witness should be afforded the opportunity to explain his statement.

Present Missouri law preserves this distinction. Moreover, Missouri courts have specifically identified at least five categories that do not require a foundation because they constitute conduct or circumstances evidencing bias: (1) assault; (2) employment; (3) relationship by blood or marriage; and (4) pending litigation or (5) the existence of a quarrel or trouble between the witness and the party against whom he is testifying.

The Missouri approach can best be illustrated by use of an example from one of the five categories—a quarrel. According to *Barracloough* a

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17. An earlier case, *State v. Downs,* 91 Mo. 19, 3 S.W. 219 (1887), had intimated that a proper foundation was necessary before bias could be proved, but a foundation had been laid so the issue was not decided.

18. In light of later Missouri decisions, it is important to note that witness tampering was said to be a statement or was treated as such in *Queen's Case,* 2 Br. & B. 284, 315, 129 Eng. Rep. 976, 988 (H.L. 1820).


20. See *Hogland v. Modern Woodmen of America,* 157 Mo. App. 15, 137 S.W. 900 (St. L. Ct. App. 1911). This is not the rule where a party is the witness; no foundation is necessary then. *Owens v. Kansas City, St. J. & C.B.R.R.,* 95 Mo. 169, 8 S.W. 350 (1888). See also B. Jones, *Evidence* § 851 (3d ed. 1924).

21. 331 Mo. 157, 52 S.W.2d 998 (1932).

22. Id. at 164, 52 S.W.2d at 1001.

23. Id. at 165, 52 S.W.2d at 1002.

24. Id. Missouri was not the first state to make this distinction between statements and conduct evidencing bias. See Sexton v. State, 15 Ala. App. 84, 69 So. 341, cert. denied, 199 Ala. 697, 70 So. 1014 (1915); People v. Mallon, 116 App. Div. 425, 101 N.Y.S. 814, aff'd, 189 N.Y. 520, 81 N.E. 1171 (1906). New York subsequently rejected this distinction. See People v. Michalow, 229 N.Y. 325, 128 N.E. 228 (1907) (admitting evidence of statements showing bias without a foundation).

25. See text accompanying notes 7-8 supra.

26. 3 J. Wigmore, *Evidence* § 1025 (2d ed. 1924). See also 28 R.C.L. Witnesses § 221 (1921).

27. See, e.g., *State v. Pigues,* 310 S.W.2d 942 (Mo. 1958); Strahl v. Turner, 310 S.W.2d 883 (Mo. 1958).

28. See *Moe v. Blue Springs Truck Lines, Inc.,* 426 S.W.2d 1, 3 (Mo. 1968); *Barracloough v. Union Pac. R.R.,* 381 Mo. 157, 165, 52 S.W.2d 998, 1002 (1932). Anything else should be presumed to be a statement evidencing bias and treated as such.
quarrel is conduct. Therefore, no foundation is needed; such conduct may always be shown as evidence of bias unless the court in its discretion decides the proof is too remote and uncertain.29 Showing a quarrel is of little value, however, unless it can be shown that the quarrel was likely to result in ill feelings that are still present.30 Thus, a showing of the character, nature, and extent of the quarrel is desirable, and at least one Missouri case has said that such a showing is permissible without a foundation.31 The attorney may also wish to prove the ultimate facts, i.e., the basis of the quarrel, in order to show that the hostility engendered by the quarrel persists. The permissible extent of this proof is once again in the discretion of the trial court, limited by the rule that details, such as statements made during the quarrel, may never be shown,32 so that the jury will not be tempted to try the merits of the former controversy.33 This is true even where, as in Barraclough, the controversy was an argument consisting only of statements. Thus, the fact that an argument occurred could be shown; the statements made during the argument could not be.

From the foregoing it can be seen that although Missouri has guidelines for a trial court to follow in exercising its discretion as to requiring a foundation for proof of bias, the Missouri standard is not as certain as it appears at first glance. There are obvious definitional problems confronting the attorney in determining whether the situation or occurrence fits within one of the five categories. Another problem of the Missouri standard is that its categorizations may lead to arbitrary application of the foundation requirement. This is illustrated by the fact that the Missouri courts treat witness tampering as statements while they treat a quarrel as conduct. Each consists of both conduct and statements; yet, a foundation is required for the former, while none is required for the latter. Although these problems may seldom cause damage, their consequences to the unwary can be disastrous.34 Is there a better way?35

29. State v. Umfrees, 433 S.W.2d 284 (Mo. En Banc 1968) (statement showing bias was too speculative); State v. Brewer, 286 S.W.2d 782 (Mo. 1956) (cannot show that the witness was the girlfriend of an employee of a party); State v. Punshon, 133 Mo. 44, 34 S.W. 25 (1896) (defacing a picture of the party testifying against is not direct enough). But see State v. Solven, 371 S.W.2d 328 (Mo. 1963) (refusal of a witness to talk to the defense attorney on the circuit attorney's advice could be shown as a "circumstance tending to support an inference of bias, if unexplained," and was for the jury to decide); State v. Horton, 247 Mo. 667, 153 S.W. 1051 (1913) (only circumstances tending to show bias).

30. State v. Pigques, 310 S.W.2d 942 (Mo. 1958).

31. Id. (dictum).

32. State v. Winn, 324 S.W.2d 687 (Mo. 1959); State v. Pigques, 310 S.W.2d 942 (Mo. 1958); State v. Rose, 339 Mo. 317, 96 S.W.2d 498 (1936); Wills v. Sullivan, 211 Mo. App. 318, 242 S.W.180 (K.C. Ct. App. 1922). In Warren v. Pulitzer Pub. Co., 336 Mo. 184, 78 S.W.2d 404 (1934), the court said that details of a controversy might sometimes be shown, although the extent of such examination would be within the trial court's discretion.

33. State v. Pigques, 310 S.W.2d 942 (Mo. 1958).

34. See State v. Dent, 478 S.W.2d 370 (Mo. 1971), where the defense's failure to lay a foundation precluded it from introducing evidence of the bias of the state's chief witness.

35. See Annot., 87 A.L.R.2d 407 (1963). Only the three most generally accepted positions will be discussed in this note. Other unique positions are as
Either expressly or by implication, a majority of states still require a foundation for the introduction of evidence of both statements and acts showing bias.\textsuperscript{36} This rule, which has historical precedent,\textsuperscript{37} avoids much of the confusion that may be involved in trying to decide what is a declaration and what is an act. It also avoids surprise and assures the witness of a chance to explain, admit, or deny his bias. However, while

follows: Florida: Davis v. Ivey, 93 Fla. 387, 112 So. 254, cert. denied, 275 U.S. 526 (1927) (distinguishing between evidence that is "secondary" and used to contradict, for which a foundation must be laid, and independent evidence of bias and hostility for which no foundation need be laid); Tennessee: Creeping Bear v. State, 113 Tenn. 322, 87 S.W. 653 (1905) (implying that no foundation is necessary for proof of conduct evidencing bias, but a foundation should be laid for statements at the discretion of the trial court); Texas: In Texas a foundation is laid for proof of both statements and conduct evidencing bias in civil cases. In criminal cases, however, a foundation need only be laid to prove statements evidencing bias. Southern Truck Leasing Co. v. Manieri, 325 S.W.2d 912, 916 (Tex. Civ. App. 1959); see Whitfield v. Traders & Gen. Ins. Co., 136 S.W.2d 626 (Tex. Civ. App. 1940); Nite v. State, 41 Tex. Crim. 340, 54 S.W. 763 (1899). But see Crockrell v. State, 60 Tex. Crim. 124, 131 S.W. 221 (1910). A foundation is not needed when conduct evidencing bias is involved in criminal cases. Burnaman v. State, 70 Tex. Crim. 361, 159 S.W. 244 (1913).

There is a division in the federal courts on this issue. Some say a foundation is necessary. See Smith v. United States, 283 F.2d 16 (6th Cir. 1960); Mc- Knight v. United States, 97 F. 208 (6th Cir. 1899); United States v. White, 225 F. Supp. 514 (D.D.C. 1963). Others say it is not. See Comer v. Pennsylvania R.R., 323 F.2d 863 (2d Cir. 1963); Ewing v. United States, 135 F.2d 633 (D.C. Cir. 1943); United States v. Schindler, 10 F. 547 (S.D.N.Y. 1880).

36. Some of these states may yet declare positions similar to Missouri's. For this reason the jurisdictions have been placed in three categories, each less likely to distinguish between acts and statements evidencing bias than the one before it. Some jurisdictions have required a foundation for statements without discussing conduct: Arkansas: Hawkins v. State, 223 Ark. 519, 267 S.W.2d 1 (1954); Dela- ware: State v. Deputty, 19 Del. 19, 50 A. 176 (1900); Idaho: State v. Goodrich, 33 Idaho 654, 196 P. 1043 (1921); Iowa: Cleophas v. Walker, 211 Iowa 122, 233 N.W. 257 (1930); Kentucky: Horner v. Commonwealth, 19 Ky. L. Rptr. 710, 41 S.W. 561 (1897); Michigan: Smith v. Hockenberry, 146 Mich. 7, 109 N.W. 23 (1906) (noting only that a proper foundation had been laid); Montana: State v. Carns, 136 Mont. 126, 345 P.2d 735 (1959); Ohio: Kunkei v. Cincinnati St. R.R., 82 Ohio App. 341, 80 N.E.2d 442 (1948); but see O'Hara v. Cincinnati St. Ry., 68 Ohio App. 7, 36 N.E.2d 828 (1941); Oregon: State v. Stewart, 11 Ore. 52, 4 P. 128 (1883); Vermont: State v. Barditti, 78 Vt. 102, 62 A. 44 (1905); but see Ellsworth v. Potter, 41 Vt. 685 (1869); Washington: State v. Harmon, 21 Wash. 2d 581, 152 P.2d 514 (1944); Wisconsin: Baker v. State, 69 Wis. 22, 33 N.W. 52 (1887); but see Martin v. Barnes, 7 Wis. 239 (1858). Some jurisdictions have stated broadly that a foundation is needed, although not expressly extending the rule beyond the facts of the case: Arizona: Ross v. State, 23 Ariz. 302, 203 P. 552 (1920); Georgia: McCauley v. State, 86 Ga. App. 509 (1932); Indiana: Singer Sewing Mach. Co. v. Phipps, 49 Ind. App. 116, 94 N.E. 793 (1911); Nebraska: Davis v. State, 51 Neb. 301, 70 N.W. 384 (1897); Rhode Island: Brody v. Cooper, 45 R.I. 453, 124 A. 2 (1924). Some jurisdictions have expressly stated that a foundation is necessary for proof of both statements and conduct that show bias: California: In re Bedford's Estate, 158 Cal. 145, 110 P. 302 (1910); Illinois: People v. Payton, 72 Ill. App. 2d 240, 218 N.E.2d 518 (1966); North Carolina: State v. Dickerson, 98 N.C. 708, 3 S.E. 687 (1887); North Dakota: State v. Malmberg, 14 N.D. 523, 105 N.W. 614 (1905); Virginia: Langhorne v. Commonwealth, 76 Va. 1012 (1882).

this rule fulfills its purpose of justice to the witness, it may work injustices to the party, especially if applied strictly, by denying him the right to show the bias of the witness because of a mere oversight in cross-examining the witness.

A minority of jurisdictions follow the rule that no foundation is necessary for the admission of any evidence showing bias. This rule assures that the jury will be informed of the hostility of the witness and thus will be able to give his testimony proper weight. The courts applying this rule apparently feel that justice to the parties overrides the possibility of surprising or offending a witness. Unfortunately, this rule allows frivolous charges of bias to be leveled against all witnesses.

A third set of jurisdictions make application of the foundation requirement discretionary with the trial court. This rule has the advantage of flexibility and protects against arbitrary exclusions when properly applied. The fact that it is so flexible probably prevents wide acceptance of this rule, however, since the lack of standards to guide opposing parties may nullify its benefits.

The question is which of these alternatives protects both the party and the witness and best serves the ends of justice. This question can be answered only in conjunction with another, however: What constitutes a sufficient foundation? If the jurisdiction's rules and procedures for laying a proper foundation do not operate to give the witness a chance to explain his conduct or statements, the foundation requirement serves

38. S. GREENLEAF, EVIDENCE § 462 (5th ed. 1850); B. JONES, CIVIL EVIDENCE § 852 (3d ed. 1924).

This rule would work an injustice to the party by preventing him from showing the bias of a witness if, for instance, the witness had not been cross-examined as to his bias and then had died or left the jurisdiction. The proof of bias would then be excluded.

39. 3 T. STARKIE, EVIDENCE 1753, 1755 (2d ed. 1828).


no positive purpose no matter when it is applied; rather, it remains only as a trap for the unwary party.

A foundation is usually laid on cross-examination of a witness, although a witness may be recalled for this purpose in most jurisdictions. It has been argued that foundation questions must be about particular facts and that questions as to the state of the witness's feelings toward the party are therefore improper. The trial court has the discretion to exclude questions it deems objectionable, and appellate courts are reluctant to overrule such rulings. Whatever form the foundation takes, it should give the witness notice that he is to be impeached. The area of most disagreement concerns what is sufficient to accomplish this objective.

In Missouri there is some question as to what constitutes a sufficient foundation. In the 1911 case of Hoagland v. Modern Woodmen of America, the St. Louis Court of Appeals said that the witness to be impeached must have his attention called to the time, place, and person to whom he made the statements. This rule is often applied strictly in all details in other jurisdictions, although some courts have allowed

44. 3 T. Starkie, Evidence 1753, 1756 (2d ed. 1828) says that the witness should be recalled as a matter of law. Some authorities state that the trial court has the discretion whether to recall the witness or not. See Ancel v. People, 134 Ill. 401, 15 N.E. 1022 (1890); State v. Schuman, 89 Wash. 9, 153 P. 1084 (1915); B. Jones, Civil Evidence § 852 (3d ed. 1924). Florida follows a more complicated rule, saying that a witness who testified in the plaintiff's case in chief may be recalled in the defendant's case in chief, or a witness in the plaintiff's case in rebuttal may be recalled in the defendant's surrebuttal, but a witness in plaintiff's case in chief may not be recalled in surrebuttal, since the judges felt that the recalling of witnesses to lay a foundation must be stopped at some point. Davis v. Ivey, 98 Fla. 387, 112 So. 264, cert. denied, 275 U.S. 526 (1927).

45. F. Wharton, Criminal Evidence § 488 (9th ed. 1884). In at least one jurisdiction, however, it is improper not to ask the witness the state of his feelings toward a party before laying a foundation. See Southern Ry. v. Harrison, 191 Ala. 436, 67 So. 597 (1914). See also McCauley v. State, 86 Ga. App. 509, 71 S.E.2d 664 (1952).

46. See State v. Curry, 372 S.W.2d 1 (Mo. 1963); State v. Gyngard, 338 S.W.2d 73 (Mo. 1960). The foundation questions may not even be allowed if the party against whom the witness is biased does something to make the unfriendly witness his own. See Brody v. Cooper, 45 R.I. 453, 124 A. 2 (1924). In this case the party had taken the witness's deposition, making the witness his own. Because of this the party was not allowed to lay a foundation for purposes of impeachment. Although the Missouri cases on this point are inconsistent, the cases that address the point most directly state that a party cannot lay a foundation for impeaching his own witness by evidence of bias. See Ross, Impeaching One's Own Witness in Missouri, 37 Mo. L. Rev. 507, 512-13 (1972).

47. State v. Dent, 473 S.W.2d 370 (Mo. 1971).

48. 157 Mo. App. 15, 137 S.W. 900 (St. L. Ct. App. 1911).

49. Id. at 18, 157 S.W. at 900. Most jurisdictions that require a foundation require as much as the Hoagland case, because that is thought necessary to give a witness proper notice. See cases cited Annot., 87 A.L.R.2d 407, 431-32 (1962). Some jurisdictions may ask for the circumstances surrounding the statements also. See, e.g., In re Craven, 169 N.C. 561, 86 S.E. 587 (1915).

Few variations have been as great as that allowed by the Missouri Supreme Court in *State v. Day*. There the court said that where the witness had denied any ill will or any feeling against the appellant, a sufficient foundation had been laid. Although this type of foundation is much easier to lay than that required by *Hoagland*, it is not as fair to the witness, since he may not recall the transaction with which he is to be impeached.

The *Dent* case, which required that the witness be asked whether he made the statements with which he is to be impeached, may be a return to the strict standards of *Hoagland* in order to give more effective notice to the witness. On the other hand, *Dent* may mean merely that the statement must be repeated to the witness and that the rest of the details of the statement (i.e., time, place, and addressee) either are unnecessary or may be required in the discretion of the trial court. In any event, the only unquestionably adequate foundation in Missouri is one that recalls the person, place, and time, for although arguments can be made that considerably less is necessary, the consequences are too severe to risk a lesser foundation.

Missouri's rule of requiring a foundation for statements evidencing bias and not for conduct is unsound. The objective of fairness to both the party and the witness is poorly served, since the rule as applied to statements is so rigid and arbitrary that it may be harmful to the party, unless the practitioner follows the wise practice of always laying a foundation. Moreover, the rule can be applied so as to give little notice of impeachment to the witness, because the foundation requirements may be so minimal that the witness may not recall the precise incident from the facts given.

Better practice would provide: (1) That a foundation be required generally for both statements and conduct; (2) that the foundation consist

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51. People v. Ye Foo, 4 Cal. App. 730, 89 P. 450 (1907) (foundation sufficient even though the parties that were present were not recalled to the witness); State v. Goodrich, 33 Idaho 654, 196 P. 1043 (1921) (time and place omitted but foundation sufficient because the witness had only one conversation with the person inquired about); State v. Ellsworth, 30 Ore. 145, 47 P. 199 (1896) (foundation included only a description of the man involved, not his name, but the court said that was sufficient).

52. 389 Mo. 74, 95 S.W.2d 1183 (1936).

53. Id. at 79, 95 S.W.2d at 1185; accord, Magill v. Boatmen's Bank, 250 S.W. 41 (Mo. 1923); Knapp v. Knapp, 183 S.W. 576 (Mo. 1916).

54. See State v. Hyder, 258 Mo. 225, 167 S.W. 524 (1914) involving a prosecution for assault with intent to kill, where the court held threats made a year before the crime were admissible to prove defendant's ill will toward the victim at the time of the crime.

55. 473 S.W.2d at 373.

56. "Notice" is the only reason given for a foundation in *Dent*. Id.

57. The *Dent* case is a good example of the consequences, because discrediting evidence against the state's main witness was never shown. Id.

58. The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820); Note, Witnesses—Impeaching for Bias—Laying Foundation, 18 Iowa L. Rev. 482 (1927): "The same reasons that require a witness to be cross-examined before proving his specific statement apply with equal force to proving specific conduct."
of enough detail to remind the witness of the statements or acts; and (3) that the foundation requirement be waived where it is impossible to lay a foundation, or otherwise at the discretion of the trial court. This practice would not be perfect, but it would cure many of the present ills. The trial judge could weigh the circumstances freely, and the result would be more fairness to both the witness and the party.

ROBERT J. BLACKWELL

WATER POLLUTION—USER OF CITY SEWER SYSTEM CREATES NUISANCE AGAINST LOWER RIPARIAN

Ratzlaff v. Franz Foods¹

Arthur Ratzlaff was a riparian landowner on Dry Creek in the state of Arkansas. He sought damages against Franz Foods for discharging certain noxious wastes into the sewer system of the City of Green Forest, thereby overloading the city’s sewage treatment plant and polluting Dry Creek to Ratzlaff’s detriment. Ratzlaff alleged in his complaint that Franz Foods was under contract with the City of Green Forest to eliminate from its deposits into the sewer system all “offensive and noxious waste products.” He further alleged that the purpose of this contract was to prevent the overloading of the city sewer system and, in turn, to prevent harm to the riparian landowners located downstream from the city sewage facilities. Ratzlaff also alleged that Franz Foods had negligently failed to determine whether the wastes were forbidden by the contract, and whether the entry of the wastes into the system would cause harm to lower riparians.² The trial court dismissed Ratzlaff’s complaint, basing its decision upon the general rule that “a user of a city sewer is clothed with immunity from liability once he lawfully deposits his sewage in the sewer system.”³ However, the Supreme Court of Arkansas reversed the trial court’s decision, reasoning that a “party who owes no obligation to third persons or the public in general may by contract assume an obligation to use due care towards such third persons or the public in general.”⁴

59. As, for instance, where the testimony consists only of a deposition.
60. What constitutes fairness must be determined in the light of all the surrounding circumstances. . . . Doing away with an arbitrary application rather than discarding the requirement will preserve all expected benefits without causing the occasional injustices on which objection to it are based.

Note, supra note 58, at 483. The practice in Connecticut (State v. Mahmood, 158 Conn. 556, 265 A.2d 83 (1969)) and Pennsylvania (Caffery v. Philadelphia & R. Ry., 261 Pa. 251, 104 A. 569 (1918)) is the closest to this standard at present.

1. 250 Ark. 1003, 468 S.W.2d 239 (1971).
2. Id. at 1004, 468 S.W.2d at 240.
3. Id. at 1005, 468 S.W.2d at 241. Accord, Carmichael v. City of Texarkana, 116 F. 845 (8th Cir. 1902); Kraver v. Smith, 164 Ky. 674, 177 S.W. 286 (1915).
I. Applicable Rights of Riparians to Relief from Water Pollution

The creator of water pollution may be liable to lower riparians and other landowners on either or both of two theories: nuisance and the reasonable use theory of riparian rights. In order to state a cause of action under the reasonable use theory, the lower riparian must show (1) a use of the water by the polluter that unreasonably interferes with his use, and (2) substantial injury. In order to state a cause of action under nuisance theory, the lower landowner, who does not necessarily have to be a riparian, must show substantial interference with the use and enjoyment of his property. The reasonableness of the polluter's activity under a nuisance theory is a less significant factor than under the reasonable use theory of riparian rights, because the focal points of the two theories differ. Private nuisance is solely aimed at the use and enjoyment of the lower landowner's land, whereas the reasonable use theory emphasizes the use of a common watercourse by both landowners under a comparative reasonableness test.

The purpose of the reasonable use theory of riparian rights is to free the riparian from unreasonable interference with his use of the water.

5. 250 Ark. at 1005, 468 S.W.2d at 241, Accord, Spartan Drilling Co. v. Bull, 221 Ark. 168, 252 S.W.2d 408 (1952); Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 422 (1942). For an excellent discussion of the nuisance and riparian rights theories, see Davis, Theories of Water Pollution Litigation, 1971 Wis. L. Rev. 738 [hereinafter cited as Davis].


The minority theory of riparian rights is the natural flow theory. It gives the riparian the right to have the watercourse maintained in its natural state, not sensibly diminished in quantity nor impaired in quality. Jessup & Moore Paper Co. v. Zeitler, 160 Md. 395, 24 A.2d 788 (1942); City of Newark v. Chestnut Hill Land Co., 77 N.J. Eq. 23, 75 A. 644 (Ch. 1910); RESTATEMENT OF TORTS 342-43 (1939) [hereinafter cited as RESTATEMENT OF TORTS]. This theory favors the downstream user and creates more certainty as to what a riparian can and cannot do. Id. at 344; Davis, supra note 5, at 745.

7. RESTATEMENT OF TORTS 344; Davis, supra note 5, at 745.


There is a conflict as to whether a person who voluntarily buys riparian land while the nuisance is in existence can recover from the upstream polluter. The majority view holds that notice does not prevent recovery. See Kraver v. Smith, 164 Ky. 674, 679, 177 S.W. 286, 292 (1915). But there is authority to the contrary. See City of Valparaiso v. Hagen, 153 Ind. 387, 34 N.E. 1062 (1899); City of Battle Creek v. Goguac Resort Ass'n, 181 Mich. 241, 148 N.W. 441 (1914); City of Cape Girardeau v. Hunze, 314 Mo. 438, 284 S.W. 471 (1926), modified, 49 S.W.2d 582 (St. L. Mo. App. 1931).

9. Davis, supra note 5, at 740.

10. RESTATEMENT OF TORTS 344.
Normally, the lower riparian must show an unreasonable discharge or diversion by an upstream riparian which substantially damages his own use of the water. Because the reasonable use theory is based upon a co-equal right to use a common watercourse, the scope of actionable interferences with the lower riparian's water uses may be broader than under private nuisance, which focuses only on an individual's right to use his land. Likewise, because the reasonable use theory emphasizes the comparative reasonableness of various water users, the scope of an upper riparian's right to use the watercourse without incurring liability may also be broader than it may be under nuisance law.

Private nuisance actions apply to situations involving non-trespassory injury to the lower riparian's "ordinary" use of the water (such as for livestock and for water supply), as well as to those involving a condition that is either destructive of physical health and comfort or causes tangible injury to the property. Pollution that does not cause these types of harm would not form the basis for a nuisance action. For example, in situations where the use of the lower riparian is deemed "artificial" (such as industrial use), the injured riparian may be forced to rely solely upon the reasonable use theory of riparian rights, with its comparative reasonableness test, rather than private nuisance. In Ratzlaff, the injury was to plaintiff's livestock, and the court characterized it as a non-trespassory injury falling within the traditional bounds of private nuisance. But, regardless of whether the injury is viewed as arising from a nuisance or an unreasonable riparian use, the harm will inevitably flow from upstream use such as industries, farms, or municipalities. A city that is the user of a watercourse has all of the obligations and rights of other riparians. And, in situations similar to Ratzlaff, the city is subject to suit for the creation of a nuisance or an unreasonable use.

II. LIABILITY FOR POLLUTION CAUSED BY DISCHARGE INTO A MUNICIPAL SEWER SYSTEM

A. Control of Discharge

When there is a nuisance created by the pollution of a watercourse

14. Id. at 745.
15. Id. at 742.
20. See supra note 5, at 747.

https://scholarship.law.missouri.edu/mlr/vol38/iss1/11
by a city sewer system, the more accepted rule is that the city itself is liable, and those who empty sewage into the city sewer system are immune.\textsuperscript{28} The rationale for this immunity is based upon the individual's loss of "control" of the polluting substance once it enters the sewer system of the city, and the city's assumption of "control" of the functioning of the system.\textsuperscript{24} But the court in \textit{Ratzlaff}, pointing to the contractual relationship between the city and the defendant, found the rationale behind his traditional immunity to be inapplicable. The court stated that "it does not logically follow that a user in violation of his contract can wrest control of the city's sewage facilities from the city and at the same time stand behind the immunity which the law accords."\textsuperscript{25} The court's reasoning took the "logical step" that previous cases concerned with this question had avoided. In holding the individual citizen immune regardless of any contractual obligation to the city, these previous cases had evoked the "control" idea in order to sidestep troublesome issues in situations where a defendant wrongfully discharged sewage into the sewer system,\textsuperscript{26} negligently disrupted the sewer system,\textsuperscript{27} or merely contributed to the cumulative overloading of the system.\textsuperscript{28} But in \textit{Ratzlaff}, where the defendant was found

\begin{itemize}
  \item 23. Kraver v. Smith, 164 Ky. 674, 177 S.W. 286 (1915).
  \item 25. 250 Ark. at 1006, 468 S.W.2d at 241. The court cited Carmichael v. City of Texarkana, 116 F. 845 (8th Cir. 1902), which held the individual user to be immune from liability, because he had no control whatsoever over the operation of the city sewer system. The court in \textit{Carmichael} stated:
    \begin{quote}
      When all of these statements are read together with the statutes which vest the rights to construct, to change, to repair, and to control this sewer exclusively in the city, there is no escape from the conclusion that the acts and omissions of the city and not those of the citizens, constituted the proximate cause of the injury to the complainants, and that the inhabitants who requested the construction and operation of the improvement are not liable for those acts and omissions, because they had \textit{no power to command or control the city in their performance}.
    \end{quote}
    Id. at 851 (emphasis added).
  \item 27. Hampton v Town of Spindale, 210 N.C. 546, 187 S.E. 775 (1936).
  \item 28. Grey \textit{ex rel.} Simmons v. City of Patterson, 58 N.J. Eq. 1, 42 A. 749 (Ch. 1899), \textit{not on other grounds}, 60 N.J. Eq. 385, 45 A. 995 (Ch. Err. & App. 1900).
\end{itemize}
to have committed all three of these wrongs, the court would have been hard pressed to find Franz Foods not liable without granting it absolute immunity.

The court in Ratzlaff was not completely without support in holding the user of a sewer system liable, notwithstanding the majority rule granting such a user immunity. In the 1946 Kansas case of Klassen v. Central Kansas Cooperative Creamery Association,29 the plaintiff brought a private nuisance action for pollution of an underground water supply which watered the plaintiff's livestock. The defendant argued loss of control because the wastes from its creamery went through the city sewer system before seeping into the underground water supply. But the court found a noncontractual duty in the defendant to prevent any harmful waste products from leaving his premises.30 Klassen thus radically departed from the majority rule, by finding a common law duty despite the intervening carrier of the polluting substance. Ratzlaff does not conflict as strongly with the individual immunity rule as does Klassen, because breach of an assumed contractual obligation was also involved. Therefore, Ratzlaff is the more viable (although more limited) result, in that it deviated to a lesser degree from the well-established rule of individual immunity.

B. Third Party Beneficiary Theory

The distinguishing factor in Ratzlaff which aided the court in overcoming the common law grant of immunity to the user of a sewer system was the existence of a contract between Franz Foods and the city. The primary obligation of Franz Foods under the contract was its promise not to overload the sewer system. The plaintiff claimed rights as a third party beneficiary to this contract, which required him to show that the intent31 of the parties in making the contract was to directly (not incidentally) benefit him.32 Also, such an intent had to be evident from the terms of the contract.33 The plaintiff's burden in establishing the third party beneficiary relationship was further complicated because one of the contracting parties was a municipal corporation. Before allowing an action against a private individual on its contract with a municipality, the RESTATEMENT OF CONTRACTS emphasizes that the "public policy" authorizing the contract should be observed.34 The presumption is against such an

34. RESTATEMENT (SECOND) OF CONTRACTS § 145 (Tent. Draft No. 3, 1967) states:

(1) The rules stated in this chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.

(2) In particular, a promisor who contracts with a government or a governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for con-
action,\textsuperscript{38} because the burden is on the third party to show either by the terms of the promise or by the existence of some potential liability to him by the city, that he was the intended beneficiary.\textsuperscript{38} Of course, the riparian’s task of rebutting the presumption is simplified if he can show on the face of the contract that he was the intended beneficiary.\textsuperscript{37} However, if there is no such express intent, he must show that the intent can be reasonably inferred, because the duty assumed by the promisor (user of sewer system) was a duty which the promisee (city) already owed to the third party. This inference of intent is not readily allowed;\textsuperscript{38} but in the water pollution situation the lower riparian’s burden of establishing the requisite intent is lessened. Because the city already owed him a common law duty to exercise its riparian rights in a reasonable manner, the individual user of the sewer, as promisor under the contract, has arguably assumed the city’s obligation in this respect by accepting limitations on his use of the system.

In \textit{Ratzlaff} the court did not quote the language of the contract between Franz Foods and the city, but the contract apparently expressed no clear intent to benefit lower riparian owners. Therefore, the third party beneficiary theory in this case could not be based upon any express promise by Franz Foods which directly obligated it to observe and protect the rights of lower riparians. Rather, the theory of recovery was based upon an implicit assumption by Franz Foods of the duty of the city to use its riparian rights in a reasonable manner. This is indeed a more distant duty owed to lower riparians, but the public policy behind the formation of the contract limiting discharges into the sewer system can reasonably encompass the protection of lower riparians against the malfunctions of an overloaded sewer system caused by the sewer user-promisor. It is at this

\begin{quote}
sequential damages resulting from performance or failure to perform unless
(a) the terms of the promise provide for such liability; or
(b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of law authorizing the contract and prescribing remedies for its breach.
\end{quote}

Section 145 may not be completely applicable, because it is geared to the situation in which the promisor provides services to the municipality. Harvey Aluminum, Inc. \textit{v.} De Chabert, 266 F. Supp. 143 (D.V.I. 1967). But section 145 does include contracts “to do an act for ... the public.” The act in \textit{Ratzlaff} would be the “act” of not overloading the system.


36. Glencoe Lime & Cement Co. \textit{v.} Von Phul, 133 Mo. 561, 34 S.W. 849 (1896); \textit{Restatement (Second) of Contracts} § 145, supra note 34.


III. POSSIBLE RECOVERY UNDER THE RATZLAFF APPROACH IN MISSOURI

There exists in Missouri the framework for applying the Ratlaff approach to allow recovery by a lower riparian against a polluter who dumps into a municipal sewer system. To enforce his rights against an upstream polluter, the downstream riparian in Missouri can use the common law actions of private nuisance and reasonable use against an upstream polluter. These rights are recognized by statute, and, while Missouri statutes do not indicate the scope and extent of these causes of action, Missouri case law takes a broad view of what constitutes an actionable nuisance and of the manner in which such a nuisance can be established.

Further, it is clear in Missouri that pollution is actionable by a riparian either as a private nuisance or as a public nuisance, because his damages are deemed different in degree and kind. Also, Missouri follows the majority position that a city cannot maintain a nuisance without compensating the injured riparian, and uses the theory of eminent domain to provide for this compensation. However, there remains slight precedent that a riparian must suffer, without remedy, the natural drainage of a city. There has been considerable litigation on the question whether a city


Smith v. City of Sedalia, 152 Mo. 288, 53 S.W. 907 (1899), expanded the permissible uses of the upstream riparian under the reasonable use theory by emphasizing a derivative theory, the "comparative convenience" doctrine. This refinement insures a balancing of the equities in determining the reasonableness of the use. See also City of Battle Creek v. Goguac Resort Ass'n, 181 Mich. 241, 148 N.W. 441 (1914); Davis, supra note 5, at 762. Thus, the economic necessities or the health needs of a region may increase the breadth of water uses afforded to its riparians.

40. § 204.081, RSMo 1972 Supp., states:

Nothing in this act alters or abridges any right of action now or hereafter existing in law or equity, civil or criminal, nor is any provision of this act construed as prohibiting any person, as a riparian owner or otherwise, from exercising his rights to suppress nuisances.


42. Smith v. City of Sedalia, 152 Mo. 288, 53 S.W. 907 (1899).

43. See generally Edmonson v. City of Moberly, 98 Mo. 523, 11 S.W. 990 (1889); Scheurich v. Southwest Mo. Light Co., 109 Mo. App. 406, 84 S.W. 1003 (St. L. Ct. App. 1905).


45. Stewart v. City of Springfield, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942).

46. See City of Cape Girardeau v. Hunze, 314 Mo. 458, 284 S.W. 471 (1926), modified, 43 S.W.2d 882 (St. L. Mo. App. 1931).
sewer system constitutes a temporary or a permanent nuisance, which can become significant both as to the running of the statute of limitations and as to the fixing of damages. In conclusion, it is clear that the creator of a nuisance is liable to lower riparians for non-trespassory injury arising from his activity.

To pierce the traditional immunity of the polluter who discharges into a city sewer system, the lower riparian could use third party beneficiary theory. Missouri accepts this theory and, in fact, provides for such an action by statute. However, Missouri courts have been reluctant to allow third party beneficiary actions against parties contracting with a municipal corporation, save in contracts for the construction of a public

47. Clark v. City of Springfield, 241 S.W.2d 100 (Spr. Mo. App. 1951), gave the first hint that a sewer system might be considered a temporary nuisance.

48. The five-year statute of limitations has been a decisive factor in Missouri nuisance actions by lower riparians. See § 516.120, RSMo 1969. The original Missouri view was that a sewer system constituted a permanent nuisance, so the statute of limitations began running with the sewer system's construction and not when the harm became apparent. Newkirk v. City of Tipton, 136 S.W.2d 147 (K.C. Mo. App. 1939); Thompson v. City of Springfield, 136 S.W.2d 1082 (Spr. Mo. App. 1939); King v. City of Rolla, 234 Mo. App. 16, 130 S.W.2d 697 (Spr. Ct. App. 1939); RESTATEMENT OF TORTS 343. However, the courts hesitated to grant the cities prescriptive rights to maintain the nuisance without compensation. See generally Smith v. City of Sedalia, 152 Mo. 283, 53 S.W. 907 (1899); Fansler v. City of Sedalia, 189 Mo. App. 454, 176 S.W. 1102 (K.C. Ct. App. 1915); But cf. Luckey v. City of Brookfield, 167 Mo. App. 161, 151 S.W. 201 (K.C. Ct. App. 1912). Then, with new emphasis on the reasonable use theory, the courts began to wait until substantial harm became apparent to the lower riparian before running the statute of limitations. Lewis v. City of Potosi, 317 S.W.2d 629 (St. L. Mo. App. 1958); Person v. City of Independence, 114 S.W.2d 175 (K.C. Mo. App. 1938); RESTATEMENT OF TORTS 345. The question of when the harm becomes apparent is one of fact for the jury. Hillhouse v. City of Aurora, 316 S.W.2d 883 (Spr. Mo. App. 1958).

If the nuisance created by the sewer system is permanent, Missouri allows for one recovery under eminent domain theory. But with scientific advancements in the treatment of sewage, the courts have been more willing to recognize that pollution is abatable and, therefore, temporary in nature. See Newman v. City of El Dorado Springs, 292 S.W.2d 314, 318 (Spr. Mo. App. 1956). This would allow the lower riparian to recover damages each time the harm occurs. The temporary-permanent question is also one of fact for the jury. The factors to be considered in deciding whether the nuisance is temporary are: (1) the type of treatment plant which would abate the nuisance; (2) whether such treatment is scientifically approved; (3) the probable cost and economic feasibility of employing such a process; (4) the financial ability of the municipality (but not the willingness of its citizens) to provide the funds required for the abatement of the nuisance. Hillhouse v. City of Aurora, supra, at 890.


51. Silton v. Kansas City, 446 S.W.2d 129 (Mo. 1969).
building. 52 But, because there is statutory authority extending the power of the municipality to prevent or abate water pollution, 53 public policy might dictate broader contractual liability in this area. In particular, section 250.230, RSMo 1989, grants the municipality the power to contract “in the public interest” with any industrial concern to establish adequate facilities to cope with its discharges and to receive due compensation for this service. When this section is combined with section 204.081, 54 which preserves all common law rights and actions of riparians, there is support in Missouri for a riparian’s action against an industry when it has entered into a sewage disposal contract with a city. Furthermore, because the riparian has specific rights to the flow of the water, as opposed to those of the general public, 55 he is the proper party to assert the public’s interest in such a situation.

Another alternative open to the lower riparian would be to act against the city first and then reach the individual through the joinder statutes. 56 There can be no joint liability in the city and the individual if they are acting independently, 57 but the joinder statutes may require the lower riparian to join both in an action, because of the contractual relationship, before damages will be awarded. 58 However, even though third party beneficiary recovery in pollution cases like Ratzlaff will not provide an automatic cause of action (even with a favorable construction of the statutes) the framework for formulating such an action exists in Missouri.

IV. CONCLUSION

In order for the lower riparian in Ratzlaff to recover, he had to fashion his position within three rules of law. First, he had to fit the confines of private nuisance, which only protects his “ordinary” uses. For the lower riparian whose use is “artificial” (such as an industry), only the reasonable use theory of riparian rights may be available; this, however, broadens the scope of reasonableness of the upstream riparian’s use. Finally, the lower riparian had to overcome the traditional immunity of the user of the city sewer system. This immunity is not substantially diminished by this case, because it hinged upon the third party beneficiary theory of recovery. The establishment of this theory of recovery has usually encountered significant judicial

52. In construction contracts for public buildings, because a lien cannot be taken on the building itself, third party beneficiary recovery is more often allowed on the contract. See generally School Dist. ex rel. Koken Iron Works v. Livers, 147 Mo. 550, 49 S.W. 507 (1899); Corrington v. Kalicak, 319 S.W.2d 888 (St. L. Mo. App. 1959).
53. § 250.240, RSMo 1969.
56. See §§ 73.940, 75.850, 507.230, RSMo 1969.
57. Johnson v. City of Fairmont, 188 Minn. 451, 247 N.W. 572 (1933).
58. Joint liability of the city and its contracting partner has been upheld in several related situations. See Somerset Villa, Inc. v. City of Lee’s Summit, 426 S.W.2d 658 (Mo. 1968); State ex rel. Fed. Lead Co. v. Dearing, 244 Mo. 25, 148 S.W. 618 (1912); Corrington v. Kalicak, 319 S.W.2d 888 (St. L. Mo. App. 1959).