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## Notes on Recent Missouri Cases

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## NOTES ON RECENT MISSOURI CASES

ADVERSE POSSESSION—MISTAKEN BOUNDARY LINE. *Bartlett v. Boyd*.<sup>1</sup>—Two difficult questions arise in boundary line disputes where one person claims to have acquired title to his neighbor's land under the statute of limitations. First, what sort of claim must accompany the possession in order to set the statute into operation? Second, what must be proved by the claimant in order to make out a *prima facie* case against the owner?

Mere possession by one person of another's land is insufficient to set the statute of limitations into operation. It was early established that acts done on another's land will be taken to have been done in subordination to the will of that other unless the contrary is shown.<sup>2</sup> It is frequently said that an actual disseisin is necessary to make possession adverse and the requirements of a possession which will satisfy the statute have been moulded on the early common law requirements for a disseisin. But the analogy is not to be pushed too far, for in many places it breaks down, as for instance where there is no wrongful entry which was necessary to a disseisin.<sup>3</sup> Dis-

1. (1915) 175 S. W. 947.

2. *Blunden v. Baugh* (1832) Croke Car. 302.

3. *Doe d. Parker v. Gregory* (1834) 2 A. & E. 14; *Tiffany, Real Property*, § 436.

seisin involved a hostile claim and to this extent possession must amount to a disseisin in order to be adverse.<sup>4</sup> This does not mean, however, that the hostile claim must be asserted by the possessor with a knowledge of the rights of the true owner and an intent to subvert them. A claim is hostile if it cannot be justified alongside the rights of the owner.

In several early cases the Missouri Supreme Court seems to have taken the position that there could be no disseisin by unconscious mistake.<sup>5</sup> In *Knowlton v. Smith*,<sup>6</sup> it was held that the statute did not run in favor of one who had "no intention of asserting an adverse title." Such a rule would place a premium on dishonesty and reward conscious wrongdoing for persons who were conscious of no wrongdoing would derive no benefit from long continued possession. The consequence of such a rule has been recognized in Missouri in at least boundary line cases, and in *Walbrunn v. Ballen*<sup>7</sup> and many subsequent decisions<sup>8</sup> it has been held that a hostile claim may be made by one who believes himself to be the owner of the land which he is claiming.

The adverse possessor must make an unequivocal claim to the land possessed. If for instance a boundary fence is located merely for the purposes of convenience, it is clear that no claim at all is made.<sup>9</sup> If it is located upon what is supposed to be the true line and if title is claimed to all of the land up to the boundary fence, then the possession is clearly adverse;<sup>10</sup> but if the fence is located by one who believes it to be on the true line but whose assertion of title to the land possessed up to what is believed to be the true line is made only with intent to change the location of the line whenever the error is ascertained, then clearly the possession is not adverse.<sup>11</sup> Color of title does not seem to be necessary for the claimant never relies upon constructive possession where a boundary line has actually been established.<sup>12</sup>

4. *St. Louis University v. McCune* (1859) 28 Mo. 481; *Kincaid v. Dor-mey* (1871) 47 Mo. 337; *McCabe v. Bruere* (1899) 123 Mo. 255, 54 S. W. 450.

5. *Cf. Gutter v. Waddingham* (1855) 22 Mo. 206.

6. (1865) 36 Mo. 507.

7. (1878) 68 Mo. 164.

8. *Cole v. Parker* (1879) 70 Mo. 372; *Golterman v. Schiermeyer* (1892) 111 Mo. 404, 19 S. W. 484; *Hamilton v. West* (1876) 63 Mo. 93; *Flynn v. Wacker* (1890) 151 Mo. 545, 52 S. W. 545; *Davis v. Brawell* (1904) 185 Mo. 576, 84 S. W. 870; *Rattner v. Baker* (1891) 108 Mo. 311, 18 S. W. 911.

9. *Hilgedick v. Gruebbel* (1912) 246 Mo. 140, 151 S. W. 731.  
10. *Tamm v. Kellogg* (1871) 121 Mo. 482, 26 S. W. 341; *Handlan v. McManus* (1889) 100 Mo. 124, 13 S. W. 207; *Hedges v. Pollard* (1899) 149 Mo. 216, 50 S. W. 889; *Muligan v. Fritts* (1909) 226 Mo. 189, 125 S. W. 1101.

11. *Keen v. Schmiedler* (1886) 92 Mo. 516, 2 S. W. 312; *Finch v. Ullman* (1890) 105 Mo. 255, 16 S. W. 863; *McWilliams v. Samuel* (1894) 123 Mo. 659, 27 S. W. 550; *Roecker v. Haperla* (1897) 138 Mo. 33, 39 S. W. 454.

12. *Mather v. Walsh* (1891) 107 Mo. 121, 17 S. W. 755; *Golterman v. Schiermeyer* (1892) 111 Mo. 404, 19 S. W. 484; *Hedges v. Pollard* (1899) 149 Mo. 216, 50 S. W. 889; *Gloyd v. Franck* (1912) 248 Mo. 468, 154 S. W. 744.

The difficulty arises in determining what is the nature of the claim which is made. Mere possession does not of itself establish a claim of title for without more it should be taken to be in subordination to the rights of the true owner. If the parties have agreed upon a location for the boundary line there is no room for saying that the possession of one is in subordination to the title of the other, hence no further proof of claim of title is necessary.<sup>13</sup> It would seem that cultivation of the land beyond the true line is not in itself sufficient to establish a claim of title,<sup>14</sup> tho it is probably evidence of a claim. So with the payment of taxes. The evidence of the erection of a substantial and permanent building on the land is probably sufficient proof of a claim of title.<sup>15</sup> Declarations by the possessor are most frequently relied on, but it would seem that they are only evidence of the character of the possession which might in some instances be held to have been in subordination to the will of the owner in spite of the declaration by the possessor that he claimed title.

One who claims land by adverse possession has the burden of proving that the possession was adverse, i.e., that he or his predecessor was in actual, notorious and continuous possession under claim of title for the statutory period.<sup>16</sup> But in *Hedges v. Pollard*,<sup>17</sup> an exception was engrafted on this rule to the effect that the claimant's burden is to show only that he has possessed under an apparent claim of title; and that he need not show his possession was not subject to subsequent ascertainment of the true line, the burden being on the owner to go ahead with such proof after the claimant's burden is discharged. This exception would seem to involve relieving the claimant of the necessity of full proof that his possession was under an unequivocal claim of title. When the claimant has discharged the burden of showing that the circumstances of the possession established an apparent claim of title, the owner has the duty of showing that the claimant's possession was subject to the ascertainment of the true line. This exception seems to have been accepted by the court in *Lemmons v. McKinney*,<sup>18</sup> but it does not seem to have been involved because of an agreement as to the boundary line in that case. In *Gloyd v. Franck*,<sup>19</sup> the defendant had erected a building on part of the plaintiff's lot, which being of a substantial and permanent nature was sufficient

13. *Turner v. Baker* (1876) 64 Mo. 218; *Schad v. Sharp* (1888) 95 Mo. 574, 8 S. W. 549; *Krider v. Milner* (1889) 99 Mo. 145, 12 S. W. 461; *Brummell v. Harris* (1901) 162 Mo. 397, 63 S. W. 497.

14. *Craicford v. Aherns* (1890) 103 Mo. 88, 15 S. W. 341; *Ford v. McAnnelly* (1908) 215 Mo. 371, 114 S. W. 990.

15. *Hamilton v. West* (1876) 63 Mo. 93; *Mather v. Walsh* (1891) 107 Mo. 121, 17 S. W. 755; *Handlan v. McManus* (1889) 100 Mo. 124, 13 S. W. 207; *Gloyd v. Franck* (1912) 248 Mo. 468, 154 S. W. 744.

16. *Bradley v. West* (1875) 60 Mo. 33; *Lumber Co. v. Craig* (1912) 248 Mo. 319, 154 S. W. 73 and cases cited.

17. (1899) 149 Mo. 216, 50 S. W. 889.

18. (1901) 162 Mo. 525, 63 S. W. 82.

19. (1912) 248 Mo. 468, 154 S. W. 744.

to establish a claim to title. The court said that the burden of showing that the defendant intended to claim only to the true line wherever that should be ascertained to be, rested on the plaintiff. The reversal of the judgment in that case was placed on an instruction which was erroneous with reference to another part of the lot which was not thus possessed.

As an exception to the general rule that the claimant has the burden of showing that his possession was adverse, there would seem to be no good reason for this doctrine. Perhaps what the court actually means in these cases is not that the burden of proof is on the owner to show that the claimant held subject to an ascertainment of the true line, but that the evidence in each of the cases in which the exception is stated was sufficient to establish the claim of right which would make the possession adverse unless the true owner could offer further evidence which would impugn the unconditional nature of the claim of right. The claimant has the burden of showing by preponderance of evidence that he claims title to the strip possessed at all events. It would seem under the Missouri doctrine that he ought to be held not to have discharged this burden until he has shown that his claim was in no wise subject to a future ascertainment of the true line. But the courts have not consistently held that a possession is not adverse until it is shown not to have been subject to the ascertainment of the true line, and have held that possession may be shown to be adverse, at least sufficiently for a recovery by the claimant, as a result of ordinary proof of a claim of right. It would seem to follow that any suggestions in the evidence of the owner that the claim was subject to a future ascertainment of the true line should be sufficient to enlarge the claimant's duty to include a showing that his possession was not subject to a future ascertainment of the true line. Logically, therefore, if any burden is to be put on the owner, it should be a burden of going forward and not a burden of proof.

In the recent case of *Bartlett v. Boyd*,<sup>20</sup> the Supreme Court relied on *Hedges v. Pollard* and *Lemmons v. McKinney* and re-stated the exception that when the possession of either of two adjoining landowners has been held under an apparent claim of exclusive ownership for the statutory period, the burden is upon the other to show that such holding was subject to a future ascertainment of the correct line. But the evidence in *Bartlett v. Boyd* tended very strongly to show that the claimant's possession was adverse, for he had refused to abide by any survey which did not recognize his fence as the true line. It seems clear that he was claiming to own to the fence, so it was unnecessary to hold that the burden of proof that the claim was conditional was upon the owner of the land. The court seems inclined

20. (1915) 175, S. W. 947.

to continue the exception, however, without any recognition of its logical effect in forcing the owner to assist an adverse claimant in proving the adverse character of his possession.

LAURANCE M. HYDE.

EVIDENCE—REPUTATION OF DECEASED. *State v. Ross*.<sup>1</sup> Evidence as to the reputation of the deceased in cases of homicide is usually irrelevant and therefore inadmissible. To this rule there are two exceptions. First, where the issue is self-defense and the character of the killing is doubtful, evidence of the reputation of the deceased as a violent and dangerous man is competent for the purpose of determining whether the deceased was the aggressor.<sup>2</sup> In these cases, it is immaterial whether the reputation of the deceased was known to the defendant, "for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do." For the same reason, uncommunicated threats are admissible when there is doubt as to whether the deceased was the aggressor.<sup>3</sup> The second exception also arises in cases where the plea is self-defense, and evidence of the reputation of the deceased as a violent and dangerous man may be introduced as bearing upon the reasonableness of defendant's apprehension of danger at the time of the killing, provided that the defendant is shown to have been familiar with the reputation at the time.<sup>4</sup>

Thus only in cases where self-defense is pleaded is evidence of the reputation of the deceased admissible. Accordingly, where the slaying is done with a felonious intent such evidence is not relevant and is therefore inadmissible.<sup>5</sup> But even in the cases where the deceased's reputation is admissible under a plea of self-defense it seems that the defendant must first put it in issue.<sup>6</sup> After the defense has attacked the character of the deceased, then the state may rebut by showing his good reputation.<sup>7</sup> It is often difficult to tell when the defendant has put the deceased's reputation in issue. It seems clear that the

1. (Mo., 1915) 178 S. W. 475.

2. 1 Wigmore, Evidence, § 63; *State v. Hensley* (1886) 94 N. C. 1021, 1032; *De Arman v. State* (1882) 71 Ala. 351, 361. See *State v. Rider* (1886) 90 Mo. 54, 61; 3 L. R. A. (N. S.) 361. But cf. *State v. Feeley* (1905) 194 Mo. 300; *State v. Barrett* (1912) 240 Mo. 161.

3. *State v. Smith* (1901) 164 Mo. 567.

4. 1 Wigmore, Evidence, § 246; *State v. Downs* (1886) 91 Mo. 19 and cases cited; *Horback v. State* (1875) 43 Tex. 242; *Commonwealth v. Tircinski* (1905) 189 Mass. 257, 75 N. E. 261; *Marta v. State* (1875) 26 Ohio St. 162; *Franklin v. State* (1856) 29 Ala. 17.

5. *State v. Jackson* (1853) 17 Mo. 544; *State v. Byrd* (1897) 121 N. C. 684, 28 S. E. 353 and cases cited; *Commonwealth v. Straesser* (1893) 153 Pa. 451, 26 Atl. 17; *Abbott v. People* (1881) 86 N. Y. 460.

6. *State v. Potter* (1874) 13 Kan. 310, cited with approval in *State v. Reed* (1913) 250 Mo. 379, but in the latter case the deceased was admitted as a witness thru his dying declaration. *Moore v. State* (1904) 46 Tex. Crim. App. 54, 79 S. W. 565; *Jimmerson v. State* (1902) 133 Ala. 18, 32 So. 141.

7. *State v. Feeley* (1906) 194 Mo. 300; *State v. Woodward* (1905) 191 Mo. 617; *Pettis v. State* (Tex. Crim. App., 1904) 81 S. W. 312; *Mitchell v. State* (1902) 133 Ala. 65, 32 So. 132.

state need not wait until the defendant has introduced a witness who specifically testifies that the deceased's reputation was bad.<sup>8</sup> It has been held sufficient if the defendant attacks deceased's reputation by showing that he was a quarrelsome and dangerous man,<sup>9</sup> or that he was the aggressor<sup>10</sup> or that he had made threats against the defendant.<sup>11</sup> Proof that the deceased was a quarrelsome and dangerous man when drinking was held to warrant the admission of evidence in rebuttal that deceased was a peaceable and law-abiding citizen.<sup>12</sup> But an allegation that deceased tried to rob the defendant at the time of the slaying is not such an attack upon his reputation as to justify the admission of testimony by the state to show deceased's good reputation.<sup>13</sup>

In *State v. Ross*,<sup>14</sup> recently decided by the Missouri Supreme Court, a woman charged with the murder of her husband pleaded insanity. In the lower court the state was allowed, over the objection and exception of the defendant who had not attacked the deceased's reputation, to introduce evidence of the husband's good reputation "as a peaceable, law-abiding, upright, honest, hard-working man". The defense later introduced testimony as to the deceased's bad treatment of the defendant. It is clear from the preceding cases that the state's evidence was clearly inadmissible at the time it was introduced, was "especially so in this case, by reason of the fact that there was no claim by the defendant that the killing was in self-defense, but insanity was relied upon as the sole defense." The Supreme Court held the admission of this evidence reversible error because "such evidence tends to detract the minds of the jury from the principal question."

While there are no cases exactly in point, the principal case seems in line with the following analogous cases. It is reversible error to show the defendant's reputation for violence and turbulence when he has not put his character in issue.<sup>15</sup> It is also fatal error when the testimony is conflicting to show the trustworthiness of a witness before his reputation for truth and veracity has been attacked.<sup>16</sup> Again it is reversible error when the deceased has become a witness through his dying declaration to introduce testimony as to his reputation for peace and quietude when it has not been attacked by the defendant.<sup>17</sup> In the principal case, the court probably treated the defend-

8. *State v. Vaughan* (Nev., 1895) 39 Pac. 733, 735.

9. *Pettis v. State* (1904) 47 Tex. Crim. App. 66, 81 S. W. 312; *State v. Vaughan* (1895) 22 Nev. 285, 39 Pac. 733; *People v. Gallagher* (1902) 78 N. Y. Supp. 5.

10. *Thrawley v. State* (1899) 153 Ind. 375, 55 N. E. 95.

11. *Russel v. State* (1881) 11 Tex. App. 288; *Sims v. State* (1898) 38 Tex. Crim. Rep. 637.

12. *State v. Feeley* (1906) 194 Mo. 300.

13. *State v. Reed* (1913) 250 Mo. 379.

14. (Mo., 1915) 178 S. W. 475.

15. *State v. Beckner* (1905) 194 Mo. 281.

16. *State v. Thomas* (1883) 78 Mo. 327.

17. *State v. Reed* (1913) 250 Mo. 379.

ant's evidence as insufficient to put the deceased's character in issue, in which case the state's evidence was wholly irrelevant and therefore its admission was reason for reversal. Nor was the error cured by the defendant's evidence if it was introduced only for the purpose of rebutting what the state had already erroneously introduced. In *State v. Beckner*,<sup>18</sup> it was held that the error of the state in proving defendant's reputation for violence and turbulence was not cured by the defendant's later introduction of testimony to disprove the same. But the defendant's testimony was introduced for the purpose of putting deceased's reputation in issue and really was sufficient to put it in issue, then there would seem to be no reason for a reversal, because it would then be only a change in the order of proof and probably would not affect the issues.

J. P. HANNIGAN.

**HUSBAND AND WIFE—RECOVERY AGAINST SPOUSE FOR TORT COMMITTED DURING COVERTURE.** *Rogers v. Rogers*.<sup>1</sup>—This was an action for damages for false imprisonment in causing the plaintiff to be committed to, and for several months confined in, an insane asylum. At the time of the commission of the tort, and when the suit was brought the plaintiff was the wife of the defendant. The court denied recovery on the ground that the married women's act does not give such a right of action.

At common law the identity of the wife became merged in that of her husband upon her marriage. In general they were regarded as one person, and that person was the husband.<sup>2</sup> As a consequence neither could contract with nor sue the other.<sup>3</sup> The wife's contracts and conveyances were void. In equity, however, the duality of the husband and wife was recognized and whenever the interests of the two were conflicting the wife was allowed to maintain an action against her husband<sup>4</sup>; but only actions relating to property could be maintained. The husband could restrain the liberty of his wife or chastise her at will so far as the non-criminal law was concerned,<sup>5</sup> tho she could institute criminal prosecution against him.<sup>6</sup>

The identity theory of husband and wife has been restricted by the various married women's acts. These acts<sup>7</sup> usually allow suits to be brought by and against a married woman with the same force

18. (1905) 194 Mo. 281.

1. (1915) 177 S. W. 382.

2. *Frissell v. Rozier* (1854) 19 Mo. 448; *Lindsay v. Archibold* (1895) 65 Mo. App. 117.

3. *Countz v. Markling* (1875) 30 Ark. 17; *Jennie v. Marble* 37 Mich. 319; *Lindsey v. Archibold* (1896) 65 Mo. App. 117.

4. *Smith v. Smith* (1882) 18 Fla. 789; *Randall v. Randall* (1879) 37 Mich. 573.

5. 1 Blackstone, Commentaries, p. 444.

6. *Fulgham v. State* (1871) 46 Ala. 143; *Lawson v. State* (1902) 115 Ga. 578, 41 S. E. 993.

7. Revised Statutes 1909, §§ 1735, 8304.



and effect as if she were a *feme sole*, and provide that a married woman shall be deemed a *feme sole* so far as to enable her to transact her own business, contract and be contracted with, sue and be sued. Under such statutes the disability to contract with her husband as well as with third persons is removed, and she may maintain an action against her husband in her own name on all contracts entered into with him.<sup>8</sup> Not only is this true of contracts, but the rule is also the same whenever the husband unlawfully interferes with his wife's property.<sup>9</sup> Thus she may bring replevin,<sup>10</sup> detinue,<sup>11</sup> trover,<sup>12</sup> and ejectment<sup>13</sup> to protect her property rights. It is interesting to note in this connection that when a statute gives a wife a remedy against her husband at law, the remedy in equity is not superseded.<sup>14</sup>

If under the enabling acts a cause of action arises in the wife's favor from wrongful infliction of injury upon her by another, why does not the wrongful infliction of such an injury by her husband give her a cause of action against him? The right to bring such an action is usually denied on the ground of public policy, that it would tend to invade the sanctity of the home and shatter the sacred relations of marriage. The denial of the right is sometimes based on the construction of the married women's acts. These acts vary in different jurisdictions. Some have been held to change the legal status of husband and wife, abolishing their legal identity.<sup>15</sup> Under such an interpretation it is clear that the wife should be able to maintain an action against her husband for personal torts inflicted during coverture and in several recent cases such an action was allowed.<sup>16</sup> The married women's acts are usually interpreted as leaving the marriage status unchanged and as merely providing exceptions to the necessary consequences of the status. This was, in effect, the view taken by the Supreme Court in *Rogers v. Rogers*<sup>17</sup> where the statute was considered as one of procedure, and being in derogation of the common law could not be held to grant any greater power than its terms express. The husband never having had a similar right against the

8. *Montgomery v. Montgomery* (1910) 142 Mo. App. 481, 127 S. W. 118; *Abbott v. Fidelity Trust Co.* (1910) 149 Mo. App. 511, 130 S. W. 1120.

9. *Bruce v. Bruce* (1892) 95 Ala. 563, 11 So. 197; *Cook v. Cook* (1900) 125 Ala. 583, 27 So. 918; *Gillespie v. Gillespie* (1896) 64 Minn. 381, 67 N. W. 206.

10. *Howland v. Howland* (1880) 20 Hun 472; *White v. White* (1885) 58 Mich. 546; *Jones v. Jones* (1865) 19 Ia. 236.

11. *Bruce v. Bruce* (1892) 95 Ala. 563, 11 So. 197.

12. *Ryerson v. Ryerson* (1890) 8 N. Y. Supp. 738; *Whitney v. Whitney* (1867) 49 Barb. 319; *Mason v. Mason* (1892) 21 N. Y. Supp. 306, conversion by wife of husband's property.

13. *Wood v. Wood* (1881) 83 N. Y. 575; *Cook v. Cook* (1900) 125 Ala. 583, 27 So. 918.

14. *Woodward v. Woodward* (1899) 148 Mo. 241, 49 S. W. 1001.

15. *Brown v. Brown* (1914) 88 Conn. 42, 89 Atl. 889; *Fiedeer v. Fiedeer* (Okla., 1914) 140 Pac. 1022.

16. *Schultz v. Schultz* (1882) 63 How. Prac. 81; *Brown v. Brown* (1914) 88 Conn. 42, 89 Atl. 889; *Fiedeer v. Fiedeer* (Okla., 1914) 140 Pac. 1022.

17. (1915) 177 S. W. 382.

wife, the statute was construed to confer on her no greater rights than those possessed by the husband. The result reached is in accord with the prevailing view in other states. Thus no recovery was allowed a wife in assault and battery,<sup>18</sup> slander,<sup>19</sup> malicious prosecution<sup>20</sup> and false imprisonment.<sup>21</sup> Nor is the result different when the action is brought after divorce.<sup>22</sup>

The idea that public policy is so opposed to allowing a wife to maintain an action against her husband for personal torts harps back to the worn and hackneyed theory of invading the sanctity of the home and to the favorite bugaboo of increased litigation. It is difficult to perceive how any home in which personal injuries are inflicted can have any tone of sanctity. The denial of a recovery will not prevent the injuries. On the contrary it may conduce to the infliction of them. It is true that the rule prevents an exposure of domestic dissensions, but will they not be as fully exposed in a divorce action or a criminal proceeding? That to allow the wife an action for damages against her husband for personal injuries would increase litigation is a weak and unavailing argument. Such an increase can produce no harm if the litigation is necessary for the redress of real injuries. The Supreme Court in *Rogers v. Rogers*<sup>23</sup> did not base its decision on public policy, but upon the ground that the statute<sup>24</sup>, whether construed as a declaration of substantive rights or as a rule of procedure should not be construed to grant any greater power than its terms express. Another section<sup>25</sup> expressly declares what actions a married woman may maintain. It refers to contracts and property rights but not to torts. The court in construing this section held that it conferred no greater rights upon the wife than those possessed by the husband, and since he never had the right to recover from his wife for personal torts, she cannot maintain such an action against him.

It is clear that the married women's acts in Missouri are not broad enough to confer upon the wife the right contended for in *Rogers v. Rogers*. These acts are the result of the changed economic and social

18. *Peters v. Peters* (1875) 42 Ia. 182; *Libby v. Berry* (1883) 74 Me. 286; *Strom v. Strom* (1906) 98 Minn. 427, 107 N. W. 1047; *Logendyke v. Logendyke* (1863) 44 Barb. 367; *Abbe v. Abbe* (1897) 48 N. Y. Supp. 25; *Sykes v. Speer* (1908) 102 Tex. 451, 112 S. W. 422; *Thompson v. Thompson* (1910) 218 U. S. 611.

19. *Freethy v. Freethy* (1865) 42 Barb. 641; *Mink v. Mink* (1895) 16 Pa. Co. Ct. 189; *Young v. Young* (Scotland, 1903) 5 Faculty Decisions 330.

20. *Tinkley v. Tinkley* 24 Times L. R. 691.

21. *Abbott v. Abbott* (1877) 67 Maine 304; *Main v. Main* (1891) 46 Ill. App. 106. *Contra: Brown v. Brown* (1914) 88 Conn. 42, 89 Atl. 889; *Fiedeer v. Fiedeer* (Okla., 1914) 140 Pac. 1022.

22. *Phillips v. Barnett* (1876) 1 Q. B. D. 436; *Peters v. Peters* (1875) 42 Ia. 182; *Abbott v. Abbott* (1877) 67 Me. 304; *Libby v. Berry* (1883) 74 Me. 286; *Bandfield v. Bandfield* (1898) 117 Mich. 80, 75 N. W. 287; *Strom v. Strom* (1906) 98 Minn. 427, 107 N. W. 1047. *Freethy v. Freethy* (1865) 42 Barb. 641; *Logendyke v. Logendyke* (1863) 44 Barb. 366; *Nickerson v. Nickerson* (1886) 65 Tex. 281.

23. (1915) 177 S. W. 382.

24. Revised Statutes 1909, § 1735.

25. Revised Statutes 1909, § 8304.

conditions under which a married woman is no longer to be restricted in the use of her property. The common law rule denying the wife a tort action against her husband is as much unsuited to present conditions as the disabilities which prevailed before the adoption of the married women's acts, and it would seem that a change is desirable. But the statute has not made it, and the rule of the common law is too plain for it to be made except by the legislature. The question then arises whether, if the change be made, any present rules of evidence would so restrict the right as to render it of little or no value.

From early times a husband and wife have been incompetent to testify for or against each other. The rule rests on the common law theory of identity and on the ground of public policy that to allow one to testify in favor of or against the other would conduce to family discord and dissension destroying the sanctity of the home. Whatever may be the reason for the rule, it prevails in Missouri notwithstanding the statute removing the disqualification of interest.<sup>26</sup> Thus in civil actions a wife or husband is incompetent to testify either in behalf of or against the other in cases in which either is a party to the record, or not being a party, has some beneficial interest in the result.<sup>27</sup> This rule was not followed in two instances where public policy was altered by the necessities of justice. In a civil action against a dramshop keeper for selling plaintiff's husband liquor, the husband was allowed to testify.<sup>28</sup> A wife was held competent to testify in behalf of her husband in an action by him against a doctor for producing an abortion on her.<sup>29</sup> By statute<sup>30</sup> a wife cannot testify concerning admissions or conversation made by her husband either to her or to third persons. Nor are declarations made by a wife to third persons admissible against her husband.<sup>31</sup> In divorce proceedings, of course, the incompetency does not exist. In any case in which both husband and wife are interested either may testify tho it inures to the benefit of the other.<sup>32</sup>

The rule is different in criminal cases. By statute<sup>33</sup> the disqualification by reason of being husband or wife is removed to the extent that either may testify in favor of the other at the option of the one accused. Without the defendant's consent, however, the

26. Revised Statutes 1909, § 6354.

27. *Smoot v. Judd* (1901) 161 Mo. 673, 61 S. W. 854; *Orchard v. Collier* (1902) 171 Mo. 390, 71 S. W. 677; *Layson v. Cooper* (1903) 174 Mo. 211, 73 S. W. 472; *Berst v. Moxom* (1911) 157 Mo. App. 342, 138 S. W. 74; *Conn. Fire Ins. Co. v. Chester etc. Ry. Co.* (1913) 171 Mo. App. 70, 153 S. W. 544.

28. *Pettis County v. DeBold* (1909) 136 Mo. App. 265, 117 S. W. 88.

29. *Cramer v. Hurt* (1900) 154 Mo. 112, 55 S. W. 258.

30. Revised Statutes 1909, § 6359; *State v. Loutz* (1905) 186 Mo. 122, 84 S. W. 906.

31. *State v. Richardson* (1905) 194 Mo. 326, 92 S. W. 649.

32. *Toovey v. Baister* (1894) 59 Mo. App. 470; *Layson v. Cooper* (1902) 174 Mo. 223; 73 S. W. 472; *Pace v. St. Louis S. W. Ry. Co.* (1913) 124 Mo. App. 227, 156 S. W. 746.

33. Revised Statutes 1909, § 5242.

other is incompetent.<sup>34</sup> This is true as to offenses committed before the marriage takes place<sup>35</sup> and as a result the prosecuting witness has occasionally been rendered incompetent to testify by reason of her marriage to the accused. There is an exception to the rule of incompetency of husband or wife as witnesses in criminal cases. As has been pointed out above, one spouse cannot maintain an action against the other for personal injuries, but the injured one could gain relief in a criminal prosecution. Thus for all personal injuries criminal in their nature inflicted by one spouse upon the other a criminal prosecution may be maintained in which either is competent to testify against the other.<sup>36</sup> This exception represents an attempt to escape the rigor of the rule denying the wife a recovery for such injuries in a tort action, and is allowed by reason of the necessity that otherwise the wife would be without protection. It is extended no further than that necessity requires, hence it is confined to cases of personal violence endangering bodily safety or liberty.<sup>37</sup> Desertion, however, is considered such a crime against the wife as to admit her testimony against the husband.<sup>38</sup>

Divorce does not entirely remove the disqualification. In *Toovey v. Baxter*,<sup>39</sup> the court held that a divorced wife was a competent witness in a civil action in which her former husband was a party, except as to communications between them while the marital relations existed. On the other hand, a divorced wife is not a competent witness against her former husband in a criminal prosecution for a crime committed on third persons during the marriage. This is true not only of conversation had between them, but of any facts witnessed by her.<sup>40</sup> It appears from the decisions that the wife of a deceased husband is a competent witness in an action against her husband's estate concerning all knowledge derived wholly by the exercise of her sense of sight, but not as to conversations or admissions made by her husband either to her or to third persons.<sup>41</sup>

This summary of the existing law leaves it clear that no change of the rules of evidence is necessary in order to clothe the wife with an effective right of recovery against her husband for a personal tort. It is submitted that public policy necessitates such action by the legisla-

34. *State v. Willis* (1893) 119 Mo. 485, 24 S. W. 1008; *State v. Burlingame* (1898) 146 Mo. 207, 48 S. W. 72; *State v. Wooley* (1908) 215 Mo. 620, 115 S. W. 417.

35. *State v. Evans* (1896) 138 Mo. 117, 39 S. W. 462.

36. *State v. Arnold* (1874) 55 Mo. 89; *State v. Willis* (1893) 119 Mo. 485, 24 S. W. 1008; *State v. Pennington* (1894) 124 Mo. 388, 27 S. W. 1106. Cf. *State v. Witherspoon* (1910) 231 Mo. 706, 133 S. W. 323. But see *State v. Berlin* (1868) 42 Mo. 572.

37. *State v. Pennington* (1894) 124 Mo. 388, 27 S. W. 1106.

38. *State v. Newberry* (1869) 43 Mo. 429; *State v. Bean* (1904) 104 Mo. App. 255, 78 S. W. 640.

39. (1894) 59 Mo. App. 470.

40. *State v. Kodat* (1900) 158 Mo. 125, 59 S. W. 73.

41. *Shanklin v. McCracken* (1897) 140 Mo. 348, 41 S. W. 898; *Brown v. Patterson* (1909) 224 Mo. 639, 124 S. W. 1.

ture and that a simple addition to the statute<sup>42</sup> can accomplish this result effectually.

G. L. DOUTHITT.

**LOST CHATTELS—FINDER'S RIGHT TO POSSESSION.** *Foster v. Fidelity Safe Deposit Co.*<sup>1</sup>—The distinction between lost and misplaced chattels seems to have attained a fixed place in our law, tho it has little in principle to support it. Goods are not lost if they have been put in a place intentionally tho the place has been forgotten by all who had anything to do with putting them in it. To be lost, goods must be so situated as to justify the assumption that they have been unintentionally and involuntarily permitted to be where they are.<sup>2</sup> Direct proof as to whether a chattel is lost is in most cases impossible and the determination must usually rest upon the inference to be drawn from the location and position of the chattel at the time it is found. A pocket book<sup>3</sup> or a whip<sup>4</sup> discovered upon a counter in a shop, or a pocket book placed on a table in a shop by a customer<sup>5</sup> or a pocket book discovered on a customer's desk in a banking room<sup>6</sup> has been treated as misplaced property, not lost. In *State v. McCann*<sup>7</sup> it was held that a pocketbook discovered on a counter in a store was not lost but misplaced property and as such, even tho the owner was unknown, it could be feloniously taken. It is assumed in such cases that the articles were voluntarily and intentionally placed and it has been uniformly held that the owner of the realty on which the article is misplaced has a better right to it than the one who discovers it,<sup>8</sup> because of his prior possession.

At common law the finder of lost property has no right as against the owner and he is liable only for gross negligence in the care of it.<sup>9</sup> But as to the rights of a finder against a third person, it is often broadly stated that the former is entitled to the lost chattels as against all persons except the true owner.<sup>10</sup> When the finder gives the found chattel to a third disinterested party for safe keeping until the owner is traced, the finder may recover possession of it from the third party.<sup>11</sup> Lost property found in a public or quasi-public place goes to the finder

42. Revised Statutes 1909, § 8304.

1. (Mo., 1915) 174 S. W. 376.  
 2. *Laurence v. State* (1839) 1 Humphrey (Tenn.) 228; *Loucks v. Gallogly* (1892) 23 N. Y. Supp. 126. See *Kuykendall v. Fisher* (1906) 61 W. Va. 87, 56 S. E. 48.  
 3. *McAvoy v. Medina* (1866) 11 Allen (Mass.) 548.  
 4. *People v. McGarren* (1857) 17 Wend. (N. Y.) 460.  
 5. *Laurence v. State* (1839) 1 Humphrey (Tenn.) 228.  
 6. *Kincaid v. Eaton* (1867) 98 Mass. 139.  
 7. (1835) 19 Mo. 249.  
 8. *Loucks v. Gallogly* (1892) 23 N. Y. Supp. 126; *McAvoy v. Medina* (1866) 11 Allen (Mass.) 548; *Kincaid v. Eaton* (1867) 98 Mass. 139.  
 9. *Dougherty v. Posegate* (1856) 3 Iowa 88.  
 10. *Pinkham v. Gear* (1826) 3 N. H. 484; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875.  
 11. *Tancil v. Seaton* (1877) 28 Grattan (Va.) 601; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875; *Amory v. Delamirie* (1822) 1 Str. 505.

instead of the owner of the place in which it is found. To illustrate, money found on the floor of a barber shop<sup>12</sup> or a pocketbook found by a servant of a hotel in one of the parlors,<sup>13</sup> goes to the finder rather than to the person on whose premises it is found. The finder's right is based on his possession of the chattel and on the fact that no one else at the moment of finding had possession of it.

When, however, the lost property is found on private premises there is a conflict of authority as to whether the owner of the *locus in quo* or the finder is entitled to it. In *Burdick v. Cheseborough*,<sup>14</sup> it was held that altho the finder is rightfully on the private premises, the owner of the premises is entitled to the found goods. It appeared that the article was found embedded in the realty. The owner of the land was given the property on the ground that it had become a part of the realty. Like facts appeared in *South Staffordshire Water Co. v. Sharman*<sup>15</sup> and in *Ferguson v. Ray*<sup>16</sup> and in *Elwes v. Briggs Gas Co.*,<sup>17</sup> but the decision in favor of the owners of the *locus in quo* was rested on the ground that their possession of the realty gave them possession of everything on it and not because the found chattels had become a part of the realty. *McDowell v. Ulster Bank*,<sup>18</sup> in which the porter of defendant found some bank notes on the floor while sweeping out after closing hours, did not allow the finder to recover, but this was because finding articles on the floor in such a way was an incident to his employment. The decision in *South Staffordshire Co. v. Sharman* could be rested on this ground but such an explanation was not suggested in the opinion.

There are several cases denying that the owner of private premises is entitled to the chattel found thereon as against the finder. In *Bowen v. Sullivan*,<sup>19</sup> an employee in defendant's paper mill found an envelope of bills in a bundle of papers bought by the defendant and was held to be entitled to them as against the defendant. *Danielson v. Roberts*,<sup>20</sup> *Weeks v. Hackett*<sup>21</sup> and *Robertson v. Ellis*<sup>22</sup> hold that a person who is rightfully on private premises and who finds treasure trove thereon, is entitled to it as against the owner of the *locus in quo*. These cases, however, are to be distinguished on the ground that they deal with treasure trove, and the common law rule is that in the event the owner is not found, treasure trove goes to the crown. *Weeks v. Hackett* holds that the distinction between treasure trove and lost goods has been abolished. Only one of the cases, however, cited as

12. *Bridges v. Hawkesworth* (1852) 7 Eng. L. & Eq. 425.

13. *Hamaker v. Blanchard* (1879) 90 Pa. St. 377.

14. (1904) 94 N. Y. App. Div. 532, 88 N. Y. Supp. 13.

15. (1896) 2 Queen's Bench 44.

16. (1904) 44 Oregon 557, 77 Pac. 600.

17. (1886) 33 Ch. Div. 562.

18. (1899) 33 Irish Law Times 225.

19. (1878) 62 Ind. 281.

20. (1904) 44 Oregon 108, 74 Pac. 913.

21. (1908) 104 Me. 264, 71 Atl. 858.

22. (1911) 58 Oregon 219, 114 Pac. 100.

sustaining this contention is in point. This case is *Danielson v. Roberts*, where it is expressly said that this question has never been decided in this country and that it is not necessary to decide it in this case. *Roberson v. Ellis* is the only case which squarely holds that this distinction has been abolished. Dicta in these last three cases indicate that the same rule would apply even tho the goods found were lost property instead of treasure trove. Certainly the cases holding that the finder under such circumstances is entitled to the property are not correct according to principle. His rights are based solely on his possession, and start from the absence of any *de facto* control at the moment of finding.<sup>23</sup> Possession or *de facto* control in some one else at the time of finding should, therefore, defeat the finder's right resulting from his possession.

The question of a finder's right to possession as against the owner of the premises on which a chattel is found does not seem to have squarely arisen in Missouri. *Hoagland v. Highland Park Amusement Co.*<sup>24</sup> is frequently cited for the proposition that the finder is entitled to possession against the owner of the premises; but the action was for a personal injury inflicted on the finder by the owner of the park and his servants, in arresting him and ejecting him from the park. An erroneous instruction was given by the trial court, in reviewing which the court intimated that the finder was entitled to possess the chattel found on the ground. But the decision may be rested on the ground that the treatment of the finder was not justified even tho he was not entitled to the possession and the instruction was erroneous apart from the statement as to the duty on the owner of the premises to exercise reasonable care to protect the chattel for the owner.

As regards the finder's rights, the distinction between lost and misplaced goods is wholly arbitrary. His right to possession depends upon whether any person other than the owner can show a prior possession. This was the real basis for the decision in *South Staffordshire Water Co. v. Sharman* and the line of cases cited in accord with it. Whether goods are lost or misplaced, the right to possession would seem to depend on the absence of a prior possession in some one else than the owner. And if this distinction were followed logically, there would seem to be no reason for the distinction between lost and misplaced chattels.

In Missouri the rights of a finder of a chattel, the value of which is ten dollars or more have been enlarged by statute.<sup>25</sup> In addition to providing a statutory method by which notice of the finding must be given and to fixing a penalty for failure to give such notice, the statute also provides that if the owner does not appear within one year from

23. Pollock & Wright, Possession in the Common Law, p. 40.

24. (1902) 170 Mo. 335.

25. Revised Statutes 1909, §§ 8268-8273.

the date of publication in the newspaper and if the value of the found chattel exceeds twenty dollars, "the same shall vest in the finder" and the owner shall have no right to it thereafter. But no statutory period is set for the acquisition of title as against the owner when the value is between ten dollars and twenty dollars. The statute does not in terms deal with the rights of finders against other persons than the owner.

In *Foster v. Fidelity Safe Deposit Co.*,<sup>26</sup> the plaintiff, a customer of defendant, discovered an envelope of paper bills, on the corner of a table in one of defendant's private rooms, the door to which was always kept locked and to which only certain customers had access. The court held that the envelope being found on the table was not lost property, that it was in defendant's possession and under the protection of its house and hence the defendant had a better right to its possession than did the plaintiff. In this holding the decision is in accord with the cases above cited on this point. But the court further says that "if the money was lost in a legal sense, the defendant has no sort of possession of it" and admits in such a case the finder would be entitled to it. It is difficult to understand why the defendant's possession of the chattel should depend on whether it was involuntarily or voluntarily placed on its premises. Altho the location of the envelope was unknown to the bank, "the intent to exclude others from it may be contained in the larger intent to exclude others from the place where it is."<sup>27</sup>

It is to be hoped that this dictum in *Foster v. Fidelity Trust Co.*, in line with the court's clear intimation in *Hoagland v. Forest Park Amusement Co.*, will not be followed when a case arises in which it is actually involved. It is submitted that the holding of the English court in *South Staffordshire Water Co. v. Sharman* is better founded in reason and in public policy.

GARDNER SMITH.

PROCESS—EFFECT OF MISNOMER IN SERVICE BY PUBLICATION. *Brown v. Peak*.<sup>1</sup>—If a person has used an adopted or a fictitious name by which he can be sufficiently identified as a consequence of his user, he may be sued by that name.<sup>2</sup> An improper or insufficient naming of a defendant in service of process presents little difficulty where the defendant is served personally. He is thereby informed that he is the person intended to be sued and unless he takes advantage of the defect

26. (Mo., 1915) 174 S. W. 376.

27. Holmes, Common Law, p. 222.

1. (1915) 177 S. W. 645.

2. *Sparks v. Dispatch Transfer Co.* (1891) 104 Mo. 531, 15 S. W. 417; *Radley v. Meek* (1914) 178 Mo. App. 238, 165 S. W. 1192; *Tuggle v. Bank of Cave Spring* (1910) 8 Ga. App. 291, 68 S. E. 1070; *Clark v. Clark* (1878) 19 Kan. 522; *Union Brewing Co. v. Interstate Bank Co.* (1909) 240 Ill. 454, 88 N. E. 997; *Gilligan v. Casey* (1912) 205 Mass. 26, 91 N. E. 124; *Robbins v. Midkiff* (1907) 46 Tex. Civ. App. 272, 102 S. W. 430; *Gotthelf v. Shapiro* (1909) 136 App. Div. 1, 120 N. Y. Supp. 210.



in the service by plea in abatement, a judgment rendered against him will be valid.<sup>3</sup> The jurisdiction in such a case depends upon the actual service of the process and a slight inaccuracy in naming a party becomes immaterial.

But where the only notice is by publication and the defendant does not appear personally, the naming of the defendant is the life of the notice and the jurisdiction of the court depends upon its sufficiency. Unless the name is fully and correctly set forth the published notice is ineffectual,<sup>4</sup> with certain exceptions to be hereafter noted. For this purpose the full name consists of the first Christian or given name and the surname or patronymic, both of which taken together constitute the legal name of a person. The middle name or initial is no part of a legal designation and may therefore be omitted. Even the insertion of a wrong middle name or initial is harmless. Accordingly, in *Beckner v. McLinn*<sup>5</sup> where a defendant named Mary Ann Byers had been described in the order of publication as "Mary E. Byers", it was held that she was properly notified. But in *Steinmann v. Strimple*<sup>6</sup> it was held that an order of publication in an action to foreclose a mechanic's lien was void because the defendant Joab Strimple was named as "J. Strimple". So in *Vincent v. Means*,<sup>7</sup> it was held that a judgment against "M. C. Vincent" was void as against Minos C. Vincent. Nor will a nickname serve in the place of a Christian name, even tho it is unmistakable, for in *Ohlmann v. Clarkson Sawmill Company*<sup>8</sup> it was held that notice directed to "Mike Ohlmann" was insufficient to give the court jurisdiction against Michael Ohlmann. *Cruzer v. Stephens*<sup>9</sup> seems to be out of line with these cases. There in a suit for taxes, notice by publication had been directed to "Etta R. Fisher and ——— Fisher, her husband," and the judgment against the husband was held to be good against collateral attack. It would be difficult to justify such a decision if direct attack had been made on the judgment and in view of the cases above cited, *Cruzer v. Stephens* seems to stand by itself.

3. *Parry v. Woodson* (1836) 33 Mo. 347; *Skelton v. Sackett* (1886) 91 Mo. 377, 5 S. W. 874; *Corrigan v. Schmidt* (1895) 126 Mo. 304, 311, 28 S. W. 874; *State ex rel. Ziegenhein v. Burr* (1898) 143 Mo. 209, 44 S. W. 1045; *Roberts v. Stone* (1903) 99 Mo. App. 425, 431, 73 S. W. 388; *Pond v. Ennis* (1873) 69 Ill. 341; *Lyon v. Crew Levick Co.* (1896) 63 Ill. App. 329; *Lindsey v. Delano* (1889) 78 Iowa 350, 43 N. W. 218; *First National Bank v. Jaggers* (1869) 31 Md. 38, 100 Am. Dec. 53; *Alabama v. Vicksburg Ry. Co.* (1891) 69 Miss. 262, 13 So. 844. Cf. *Howard v. Brown* (1906) 197 Mo. 36, 95 S. W. 191.

4. *Gillingham v. Brown* (1905) 187 Mo. 181, 85 S. W. 1113; *Evarts v. Missouri Lumber Co.* (1906) 193 Mo. 453, 92 S. W. 373; *White v. Gramley* (1911) 236 Mo. 647, 139 S. W. 127. Cf. *Proctor v. Smith* (1909) 220 Mo. 104, 119 S. W. 409.

5. (1891) 107 Mo. 277, 17 S. W. 819. See also *Morrison v. Turnbaugh* (1905) 192 Mo. 427, 91 S. W. 152; *Howard v. Brown* (1906) 197 Mo. 36, 95 S. W. 191.

6. (1888) 29 Mo. App. 478, 484.

7. (1904) 184 Mo. 327, 82 S. W. 96.

8. (1909) 222 Mo. 62, 120 S. W. 1155.

9. (1894) 123 Mo. 337, 27 S. W. 557. Cf. *Root v. Fellowes* (1850) 6 Cush. 29.

On account of the arbitrary orthography and pronunciations given to proper names and the variant spellings in common use the courts have formulated the doctrine of *idem sonans* in dealing with this question of misnomer. In *Graton v. Holliday-Klotz Land Co.*,<sup>10</sup> the Supreme Court stated the "accepted doctrine" to be "that names are *idem sonans* if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long continued usage has by corruption or abbreviation made them identical in pronunciation." Where there is a doubt as to the applicability of the doctrine of *idem sonans*, the identity of pronunciation becomes a question of fact to be determined by evidence of the pronunciation.<sup>11</sup> Since the method of attaining jurisdiction by substituted or constructive service is exceptional, a few jurisdictions have taken the position that if service by publication is made under the wrong name it will not be validated by resort to the doctrine of *idem sonans*.<sup>12</sup> Generally, no such exception prevails for the service is upheld without any discussion as to the applicability of the doctrine in such cases.<sup>13</sup>

It is well settled that the use of the initials of the Christian name is not sufficient for the purpose of notice by publication. But in *McDermott v. Gray*<sup>14</sup> the court admitted the possibility of exceptions to this general rule based on what may be termed a loose estoppel, and it was held that where a man had secured a marriage license which described him as "A. H. Gray" and had been married by the same initials and had cashed checks and transacted other business as "A. H. Gray," such designation in a suit for divorce was sufficient. And so in *Elting v. Gould*<sup>15</sup> a judgment in a tax suit was held valid tho based upon service by publication which designated the owner by the initials of his given name, where his name was so written in the recorded deeds to the land. The statute<sup>16</sup> which provides that suits for delinquent taxes "shall be prosecuted against the owner of the property, if known, and if not known, then against the last owner of record", was not referred to in this early case; but in later cases<sup>17</sup> it seems to have influenced the court in sustaining the theory of estoppel there advanced.

10. (1905) 189 Mo. 322, 87 S. W. 37. Cf. *Williams v. Grudier* (1915) 264 Mo. 216, 174 S. W. 213.

11. *Gorman v. Dierkes* (1834) 3 Mo. 576; *Geer v. Missouri Lumber Co.* (1896) 134 Mo. 85, 34 S. W. 1099; *Munkers v. State* (1899) 87 Ala. 94, 6 So. 357; *Galveston H. & S. A. Ry. Co. v. Sanchez* (1901) 26 Tex. Civ. App. 536, 65 S. W. 893.

12. *Habner v. Reickhoff* (1897) 103 Iowa 368, 72 N. W. 540; *Schoenfeld v. Bourke* (1909) 159 Mich. 139, 123 N. W. 537.

13. *Graton v. Holliday Land Co.* (1905) 189 Mo. 322, 87 S. W. 37; *Davison v. Banker's Life Assn.* (1912) 166 Mo. App. 625, 150 S. W. 713; *Grober v. Clements* (1903) 71 Ark. 568, 75 S. W. 555.

14. (1906) 198 Mo. 266, 95 S. W. 431.

15. (1888) 96 Mo. 535, 9 S. W. 922. Cited with approval in *Turner v. Gregory* (1899) 151 Mo. 100, 52 S. W. 234; *Ohlman v. Clarkson Sawmill Co.* (1909) 222 Mo. 52, 120 S. W. 1155; *White v. Himmelberger-Harrison Lumber Co.* (1912) 240 Mo. 13, 139 S. W. 535; *Brown v. Peak* (1915) 177 S. W. 645.

16. Revised Statutes 1909, § 11498.

17. *Stevenson v. Brown* (1915) 264 Mo. 182, 188, 174 S. W. 414.

In *Turner v. Gregory*<sup>18</sup> the leading case on this question, it is laid down that in constructive service the real record name of the land owner in which he took title, as distinguished from the colloquial name he was known by in the neighborhood of the land and to which he answered among those who knew him, must be used in designating him in an order of publication in a tax suit. Turner's record name was "Singleton V. Turner"; the "V" in his name stood for "Vaughn". Where he lived, he was usually called "Vaughn". He was sued for taxes as "Vaughn Turner". It was held that "where resort is had to this method, a substantial even rigid, observance of the law is required, otherwise the judgment is void." In *White v. Himmelberger-Harrison Lumber Co.*,<sup>19</sup> the grantee was designated as "O. H. P. Williams"; the recorder in copying the deed, by mistake wrote the initials "O. N. P.", changing the middle initial from "H." to "N". Thereafter in a suit for delinquent taxes upon notice by publication to "O. N. P. Williams" it was held that as the owner "Williams" took the deed by his initials, the rule that a mistake in the middle initial is immaterial applied. In *Stevenson v. Brown*,<sup>20</sup> where land recorded in the name of "Martha E. Stevenson" was sold under judgment predicated upon service by publication directed to "M. E. Stevenson", it was proved that she had at other times taken land by her initials, but the court unanimously held that while a person whose recorded deed designated her by her initials only is estopped to deny the validity of a judgment in a proceeding in which she is designated by such initials, no such estoppel arises from the fact that she has taken title to other land by deeds describing her by her initials only. It was held that the tax judgment was void for want of jurisdiction and that "the tax deed falls with the judgment." When, therefore, the question of the sufficiency of an order of publication directed to "W. G. Easley" was recently presented to the Supreme Court in *Russ v. Hope*,<sup>21</sup> the latest case on this subject, it looked to the record and found that the record owner was "William G. Easley", and held that such publication did not confer jurisdiction upon the court, and that the sheriff's deed based upon a sale under judgment rendered would not convey the title of "William G. Easley."

*Mosely v. Reiley*<sup>22</sup> stands alone and in striking contrast with the decisions above noted. There notice by publication was directed to "C. T. Clements" in a suit for taxes on land which was recorded in the name of "Charles T. Clements," and a sheriff's deed given under the judgment in the suit purported to convey the title of "C. T. Clements". The plaintiff who claimed under a quit-claim deed signed

18. (1899) 151 Mo. 100, 103, 52 S. W. 234.

19. (1912) 240 Mo. 13, 139 S. W. 553.

20. (1915) 264 Mo. 182, 187, 174 S. W. 414.

21. (1915) 178 S. W. 447.

22. (1894) 126 Mo. 124, 28 S. W. 895.

"C. T. Clements" brought ejectment against one who claimed under the sheriff's deed and judgment was given for the defendant.<sup>23</sup> In the opinion of the court the judgment was, however, based upon the ground that service by publication directed to "C. T. Clements" was a sufficient notice, inasmuch as if he had appeared personally and defended an action in which he was served by an improper Christian name judgment would have bound him. The court failed to draw the distinction between service by publication and personal service which is noted above, and the argument of the court in *Mosely v. Reiley* would have necessitated a different result in *Elting v. Gould* and in the numerous cases which have followed it. In the subsequent references to *Mosely v. Reiley*,<sup>24</sup> the case has invariably been distinguished from cases of the *Elting v. Gould* type on the ground that by executing a deed in the same initials which were employed in the service by publication in the tax suit, the defendant in the tax suit had estopped himself from denying the validity of the judgment in the tax suit and the deed executed in compliance with it and that this estoppel was effectual against such defendant's grantees. This is the explanation of *Mosely v. Reiley* which is given in the opinion of the court in *Brown v. Peak*,<sup>25</sup> but it is manifestly unsound in view of the fact that in *Mosely v. Reiley* the court had no jurisdiction at the time the judgment was rendered and no later act of the defendant in the tax suit could validate the void judgment and deed given in compliance with it.

In the recent case of *Brown v. Peak*,<sup>25</sup> the question of the effect of misnomer in service by publication was again before the Supreme Court. Certain land was conveyed by a deed duly recorded, in which the grantee was designated as "A. Willard Humphreys". Thereafter suit for taxes was commenced against Humphreys, a non-resident, based upon service by publication which, altho the fact does not clearly appear in the report of *Brown v. Peak*, was probably directed to "A. W. Humphreys" and under a judgment for taxes rendered in that suit, a sheriff's deed was executed which purported to convey the title of "A. W. Humphreys". The plaintiff in *Brown v. Peak* claimed under the grantee named in the sheriff's deed and sought to quiet title against the defendant who claimed under a quit-claim deed executed by "A. W. Humphreys" subsequently to the execution of the sheriff's deed. *Brown v. Peak*, therefore, differs from *Mosely v. Reiley* in that the record title was in the name of A. Willard Humphreys, whereas in *Mosely v. Reiley* the record title was in the name of Charles T.

23. As precedent for its holding the court cited *Martin v. Barron* (1866) 37 Mo. 300, in which it appears that the defendant was personally served, which distinguishes it from the case the court was then considering.

24. *Turner v. Gregory* (1899) 151 Mo. 100, 106, 52 S. W. 234; *Burkham v. Manevall* (1906) 195 Mo. 500, 507, 94 S. W. 520; *Ohlmann v. Clarkson Sawmill Co.* (1909) 222 Mo. 62, 67, 120 S. W. 1155. But see *Rifle v. Ozark Land & Lumber Co.* (1902) 93 Mo. App. 41, 45, 46.

25. (1915) 177 S. W. 645.

*Clements*. In the opinion by BOND, J., which was adopted as the opinion of the court, *Mosely v. Reiley* was said to be "directly in point" and was made the chief basis for holding that the sheriff's deed conveyed a good title against one claiming under the quit-claim deed. But a majority of the court stated very clearly that *Mosely v. Reiley* is wrong and ought to be overruled. It would seem, therefore, that *Brown v. Peak* offers no strength to the doctrine of *Mosely v. Reiley* and the actual judgment in *Brown v. Peak* may be justified wholly independently of *Mosely v. Reiley* on the ground that since the middle name and initial can be entirely neglected, following the principle behind the decisions of *Elting v. Gould*,<sup>26</sup> *Turner v. Gregory*,<sup>27</sup> *Morrison v. Turnbaugh*,<sup>28</sup> and *White v. Himmelberger-Harrison Lumber Co.*,<sup>29</sup> the initial A. was a sufficient designation in the sheriff's deed since that initial appears in the recorded deed to Humphreys in place of the first Christian name. It is surprising that this point was not noticed in the opinion adopted by the court for it seems to have been the basis of the concurring opinion by BROWN, J. The majority of the court seems to have endeavored to bolster up the result with the suggestion that the letter A may have been the full first Christian name of Humphreys either because no evidence of any other full Christian name was offered or because Humphreys had substituted it for some other full Christian name by reason of his user. This suggestion is entitled to less weight because it is not shown that Humphreys had used the letter A instead of his first name in any other instance than in taking the title to the land in question and in executing the quit-claim deed under which the defendant claims. It should also be noted that a period was used after the letter A, which clearly indicates that it was used by Humphreys as an initial, tho of course it would be possible for one to adopt both a letter and a period as his name. It is to be regretted that *Mosely v. Reiley* was not overruled in *Brown v. Peak* in view of the fact that the latter case may be rested on an independent ground; but since four of the seven judges have indicated their disapproval of *Mosely v. Reiley* and their willingness to overrule it, the way should now be clear to a complete repudiation of the doctrine that the execution of a quit-claim deed subsequently to the execution of a sheriff's deed based on a judgment which is void because of a defect in the service of publication which renders the court without any jurisdiction, estops the defendant in a tax suit from setting up what would otherwise be a good title.

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26. (1888) 96 Mo. 535, 9 S. W. 922.

27. (1899) 151 Mo. 100, 52 S. W. 234.

28. (1905) 192 Mo. 427, 81 S. W. 152.

29. (1912) 240 Mo. 13, 139 S. W. 553.

SEALS—EFFECT OF STATUTE ABOLISHING USE OF PRIVATE SEALS. *State ex rel Spellman v. Parke-Davis & Co.*<sup>1</sup>—By the early common law, a seal was an impression upon wax or some other tenacious substance.<sup>2</sup> But the tendency has long been toward a relaxation in the requirements for a seal. An impression of a seal made on the paper of an instrument which purports to be under seal makes the instrument a specialty.<sup>3</sup> If a piece of paper is cut out and affixed to a wafer or mucilage on the deed, that is by common law a sufficient sealing of the instrument. The impression is not required to be apparent.<sup>4</sup> When a commissioner empowered to execute a deed to county land under his hand and seal is authorized by the county court to execute such a deed, the instrument is sealed if he affixes the seal of the county court and acknowledges it as his seal.<sup>5</sup>

By statute, a scroll may be a seal under certain circumstances. The statute provides that "every instrument in writing expressed on the face thereof to be sealed and to which the person executing the same shall affix a scroll by way of a seal shall be declared and adjudged to be sealed."<sup>6</sup> If a writing purports on its face to be under seal but there is no scroll or common law seal affixed, it is not a sealed instrument.<sup>7</sup> On the other hand, if a statutory scroll is affixed but there is no expression in the body of the instrument that the writing is under seal, it is not a sealed instrument.<sup>8</sup> The scroll must be identified as a seal in the body of the instrument. A mere writing of the word *seal* within the scroll is not of itself sufficient.<sup>9</sup> Even where the instrument is in the body thereof described as an *indenture*, that is not a sufficient identification of the scroll affixed below.<sup>10</sup> When in a sheriff's deed the word *seal* is enclosed in a scroll or brackets and is referred to or adopted, that is a sufficient sealing.<sup>11</sup> The statutory scroll, however, does not operate as a seal on public records. Altho a public official is authorized to use his private seal in executing any public document or record in case no seal is provided, yet he cannot use a scroll as his private seal. He must use a common law seal which is an impression on wax or other tenacious substance.<sup>12</sup>

As to corporations, the early common law doctrine was that they could express their assent only by their common seal and that they

1. (1915) 177 S. W. 1070.

2. 4 Kent, Commentaries (11th ed.) p. 523.

3. *Allen v. Sullivan R. R. Co.* (1855) 32 N. H. 446.

4. *Pease v. Lawson* (1862) 33 Mo. 35; *Turner v. Field* (1869) 44 Mo. 382.

5. *Alt v. Stoker* (1894) 127 Mo. 466, 30 S. W. 132.

6. Revised Statutes 1835, p. 118, § 3.

7. *Grimsley v. Riley* (1837) 5 Mo. 280; *State ex rel. West v. Thompson* (1872) 49 Mo. 188.

8. *Boynton v. Reynolds* (1831) 3 Mo. 47.

9. *Glasscock v. Glasscock* (1844) 8 Mo. 577.

10. *Walker v. Keile* (1843) 8 Mo. 218.

11. *Samuels v. Shelton* (1871) 48 Mo. 444; *Groner v. Smith* (1872) 49 Mo. 318.

12. *Gates v. State* (1850) 13 Mo. 11.

could only bind themselves by deed or special contract.<sup>13</sup> The idea was that a corporation being an invisible body could manifest its intentions only by its common seal.<sup>14</sup> Such a doctrine however is unworkable in modern life, so it has been greatly relaxed in Missouri both by statute and decisions. The Missouri statute provides that "parol contracts may be binding upon corporations if made by an agent duly authorized by a corporate vote or under the general regulations of the corporation."<sup>15</sup> As to conveyances of land, it is provided that "it shall be lawful for any corporation to convey lands by deed sealed with the common seal of said corporation and signed by the president, vice-president or presiding member or trustee of said corporation."<sup>16</sup> A corporation is also authorized to make and use a common seal and to alter the same at pleasure.<sup>17</sup> This power, however, is permissive, not mandatory. So a corporation can make a binding parol contract. Even where the contract recites that it is sealed, the absence of the corporate seal will not be fatal to it.<sup>18</sup> The assignment of notes to which the corporate seal is not attached is also valid.<sup>19</sup> If a deed of conveyance is not signed in the name of the corporation but is signed by the president in his name as president of the corporation and if the corporate seal is affixed, it is the deed, not of the president, but of the corporation.<sup>20</sup> The corporate seal evidences that the deed is a corporate deed. The seal of the corporation is taken as the only proper evidence of its act in all cases where a seal would be required if the instrument were executed by an individual.<sup>21</sup> But in most states and also in England, the common law doctrine that corporations can do no act or execute no writing unless the corporate seal is affixed is almost wholly repudiated.<sup>22</sup> The tendency is to require the corporate act or writing to be sealed only when sealing would be essential to its validity if executed by an individual.<sup>23</sup>

Another question in this connection is as to the appointment of an agent to execute a sealed instrument. The common law doctrine is that authority to execute an instrument necessarily under seal could only be conferred by a sealed instrument.<sup>24</sup> If the agent, however, unnecessarily attaches a seal to a sealed contract, parol authority of the agent will be sufficient as the contract will be allowed to operate

13. Angell and Ames, Corporations (9th ed.) § 228.

14. 1 Blackstone, Commentaries (Lewis's ed.) § 475.

15. Revised Statutes 1845, p. 232, Revised Statutes 1909, § 2993.

16. Revised Statutes 1845, p. 236, Revised Statutes 1909, § 3001.

17. Revised Statutes 1845, p. 231, Revised Statutes 1909, § 2990.

18. *Stevens v. Modern Maccabees* (1910) 153 Mo. 196, 132 S. W. 757.

19. *Buckley v. Briggs* (1860) 30 Mo. 452.

20. *Shewalter v. Pirner* (1874) 55 Mo. 218.

21. See *Sandford v. Tremlett* (1868) 42 Mo. 384.

22. Taylor, Landlord and Tenant (5th ed.) § 127.

23. See *Sandford v. Tremlett* (1868) 42 Mo. 384; *Sears, Corporations in Missouri*, § 212; Morawetz, Private Corporations (2d ed.) § 338.

24. 1 Mechem, Agency, § 212; *St. Louis Dairy Co. v. Sauer* (1894) 16 Mo. App. 1.

as a simple contract.<sup>25</sup> But when a corporation is a principal, a somewhat different doctrine prevails. The early common law doctrine that the appointment of a corporate agent must be under the corporate seal has been greatly relaxed. When the authorization of a corporate agent is not under seal and when the instrument by law is not required to be sealed, the agent can execute an instrument binding on the corporation,<sup>26</sup> even if the corporate seal is affixed.<sup>27</sup> His authority may be shown in other ways. The court, in absence of proof to the contrary, will presume from the fact that the corporate seal is affixed; that the agent did not exceed his authority in executing the instrument.<sup>28</sup> The presence of the corporate seal will raise the same presumption when the instrument is by law required to be sealed.<sup>29</sup> There is no Missouri case, however, deciding whether an agent can be authorized to execute a corporate sealed instrument by an instrument not under seal when his lack of authority is shown by the other parties to the suit. The chief purpose of the corporate seal is to manifest the corporate intent.<sup>30</sup> But a vote or resolution by the board of directors of a corporation as clearly manifests the corporate intent as does a corporate seal; so an agent authorized by such a vote or resolution should on principle be able to execute a deed or bond as binding as if his appointment were evidenced by a corporate seal.<sup>31</sup>

The law of sealed instruments has been greatly changed by statute. The statute provides that "the use of private seals in written contracts, conveyances of real estate and all other instruments of writing heretofore required by law to be sealed (except the seals of corporations) is hereby abolished, but the addition of a private seal to any such instrument shall not in any manner affect its force, validity, or character or in any way change the construction thereof."<sup>32</sup> This section makes unnecessary the use of a private seal on a private instrument. In *State v. Tobie*<sup>33</sup> where the defendant was indicted for forging a deed, it was held that *deed* no longer imports a sealed instrument. In a covenant to release one of the joint tortfeasors, a seal no longer imports a satisfaction of the claim.<sup>34</sup> Furthermore,

25. *Schuetze v. Bailey* (1867) 40 Mo. 69.

26. *Southgate v. Atlantic & P. R. Co.* (1875) 61 Mo. 89; *Emmons v. Hecelstor Distilling Co.* (1881) 9 Mo. App. 578 memorandum.

27. *Sandford v. Tremlett* (1868) 42 Mo. 384.

28. *Musser v. Johnson* (1867) 42 Mo. 74; *Eppwright v. Nickerson* (1883) 78 Mo. 482; *Brownell & Wight Car Co. v. Barnhard* (1893) 116 Mo. 667, 22 S. W. 503.

29. *Foster v. Pacific Railroad Co.* (1877) 3 Mo. App. 566, memorandum; *Missouri Fire Clay Works v. Ellison* (1888) 30 Mo. App. 67.

30. 1 Blackstone, Commentaries (Lewis's ed.) § 475.

31. 1 Morawetz, Private Corporations (2d ed.) § 338; See *Bank of Columbia v. Patterson* (1813) 7 Cranch (U. S.) 299; *Mechanics Bank of Alexandria v. Bank of Columbia* (1827) 5 Wheaton (U. S.) 326; *Fleckner v. Bank of the United States* (1823) 8 Wheaton (U. S.) 338.

32. Revised Statutes 1909, § 2773. This section was first enacted Feb. 21, 1893.

33. (1897) 141 Mo. 547. 42 S. W. 1076.

34. *Judd v. Walker* (1911) 158 Mo. App. 156, 138 S. W. 655.



courts of equity will look behind the seal to see if there is any consideration, and will not enforce a sealed contract<sup>35</sup> or sealed release of judgment<sup>36</sup> unless there is an actual consideration. There appears to be no Missouri case deciding whether a court of law will also look behind the seal to see if there is any consideration.

The effect of the statute abolishing seals on gifts of chattels presents a question of some nicety. It is generally recognized that the gift of chattels may be effective when evidenced by a deed tho there is no delivery of the chattel.<sup>37</sup> This is sometimes said to rest on estoppel,<sup>38</sup> but in truth it is nothing more than the statement of the formality of the transfer of title. The seal does not in any sense take the place of consideration for consideration is not required. The seal is merely a formal substitute for delivery of the chattel itself. It would seem that the effect of the statute abolishing seals has been to abolish the strict requirement of the seal in an instrument which evidences a gift of the chattel. It can hardly be contended that it has been the effect of the statute to make gifts of chattels without delivery impossible. Just as land can be conveyed by an instrument which need no longer be sealed it would seem a gift of a chattel may now be evidenced by an instrument which is not under seal.

As the use of private seals (except the seals of corporations) in all instruments of writing heretofore required by law to be under seal has been abolished, it would seem that an agent can execute an instrument to which private seals are affixed, altho he has no authority under seal to do so. Even when a corporation having a seal conveys land, it seems that the officer or agent executing the sealed writing may be authorized other than by a sealed instrument. In *Donham v. Hahn*,<sup>39</sup> the director and secretary of a corporation executed a deed of trust on certain land held by the corporation. The secretary had no direct authority either by deed or by vote of the directors, but from the fact that he had on several other occasions executed the instruments without protest the court assumed that this was the approved custom of the corporation. When the acknowledgment of the deed of conveyance states that the corporate seal is attached and that the deed was signed by the proper officers, the acknowledgment does not have to state that the officers were authorized to execute the deed by the

35. *Bosley v. Bosley* (1900) 85 Mo. App. 424.

36. *Winter v. K. C. Cable Ry. Co.* (1900) 160 Mo. 159, 61 S. W. 606.

37. *McCutcheon's Admrs. v. McCutcheon* (1839) 9 Porter (Ala.) 650; *Horn v. Gartman* (1846) 1 Fla. 63; *Newman v. James* (1847) 12 Ala. 29; *Gordon v. Wilson* (1856) 49 N. C. 64; *Green v. Goodal* (1860) 41 Tenn. 404; *Hogue v. Bierne* (1871) 4 W. Va. 658; *Walker v. Crews* (1882) 73 Ala. 412; *Tarbox v. Grant* (1898) 56 N. J. Eq. 199, 39 Atl. 378; *Ruiz v. Dow* (1896) 113 Cal. 490, 45 Pac. 867.

38. *McWillie v. Van Vactor* (1858) 35 Miss. 428; *McCutcheon's Admrs. v. McCutcheon* (1839) 9 Porter (Ala.) 650; *Tarbox v. Grant* (1898) 56 N. J. Eq. 199; 2 Schouler, Personal Property (3d ed.) § 88; Thornton, Gifts and Advancements, § 190.

39. (1894) 127 Mo. 439, 30 S. W. 134.

board of directors. The deed is *prima facie* sufficient.<sup>40</sup> The general doctrine seems to be that an agent of a corporation may be appointed without the use of a seal, whatever may be the purpose of the agency.<sup>41</sup> If a corporate seal is affixed to an instrument not required by law to be sealed, as for example an assignment of a claim by a corporation, the seal is *prima facie* evidence that the instrument was the act of the corporation.<sup>42</sup> But if the corporate seal is not affixed to the assignment, the presumption carried with the seal that the officer had authority to execute the instrument does not arise and his authority must be gathered from other sources.<sup>43</sup> Hence this section in no way affects the construction of an instrument bearing a corporate seal.

It remains to be pointed out what corporate instruments must bear the corporate seal. If the instrument is required by law to bear the corporate seal, as in the conveyance of real estate<sup>44</sup> or if a statutory bond is required, such an instrument must still be sealed. But if the corporation has no corporate seal, its deed conveying real estate is binding notwithstanding that no corporate seal is affixed.<sup>45</sup> Further, if a corporation does have a corporate seal and if it gives an appeal bond, such a bond on the ratification of its imperfect execution becomes binding even tho the corporate seal is not attached.<sup>46</sup>

In *State ex rel. Spellman v. Parke-Davis & Co.*<sup>47</sup> a question arose as to the validity of an attachment bond executed by an agent of defendant corporation. The corporation had a common seal but it was not affixed to the instrument. No attachment bond was required by statute, since the person against whom the attachment was levied was a non-resident.<sup>48</sup> Altho the corporate seal was not affixed, the bond was held to be binding. This decision is in accord with the principles above set forth with regard to corporate instruments and corporate agents. It illustrates how far the law has departed from the old common law requirement that all corporate instruments be sealed.

GARDNER SMITH.

40. *Strother v. Barrow* (1912) 246 Mo. 241, 151 S. W. 960.

41. 1 Morawetz, *Private Corporations* (2d ed.) § 338.

42. *Roth v. Continental Wire Co.* (1902) 94 Mo. App. 236, 68 S. W. 594.

43. *Degnan v. Thoroughman* (1901) 88 Mo. App. 62.

44. Revised Statutes 1909, § 3001.

45. *Pullis v. Pullis Bros. Iron Co.* (1900) 157 Mo. 565, 57 S. W. 1095.

46. *Campbell v. Pope* (1888) 96 Mo. 468, 10 S. W. 187.

47. (Mo., 1915) 177 S. W. 1070.

48. Revised Statutes 1909, § 2298.

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