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NOTES ON RECENT MISSOURI CASES

CONSTITUTIONAL QUESTION—HOW RAISED TO CONFER JURISDICTION ON SUPREME COURT. *Donoho* v. *Missouri Pac. Ry. Co.*[1]—Section 12, Article VI of the Constitution of Missouri provides, among other things, that the Supreme Court shall have appellate jurisdiction "in cases involving the construction of the Constitution of the United States or of this State." This language is general, and, as there is no statute declaring how such questions must be raised in the trial court so as to confer jurisdiction on the Supreme Court, much litigation has gone to the appellate courts involving this point of practice.

The Supreme Court has ruled that it will not take jurisdiction on the ground that a constitutional question is involved unless the record of the case in the trial court affirmatively shows that the protection of the Constitution was expressly invoked by one of the parties in some method recognized in pleading and practice, that it was decided adversely to the party appealing, and that he saved his exceptions to the adverse ruling of the court.[2] The question is not properly presented to the Supreme Court unless it is imbedded in the record of the trial

*Absent on leave 1916-17. During Professor Hudson's absence the Law Series will be in charge of Dean James.

1. (Mo., 1916) 184 S. W. 1149.

2. *Bennett* v. *Mo. Pac. Ry. Co.* (1891) 105 Mo. 642, 16 S. W. 947. See *Turley* v. *Bates* (1895) 131 Mo. 548, 33 S.W. 172; *Parlin & Orendorff Co.* v. *Hord* (1898) 145 Mo. 117, 46 S. W. 753; *Ash* v. *City of Independence* (1898) 145 Mo. 120, 46 S. W. 749; *State* v. *Raymond* (1900) 156 Mo. 117, 56 S. W. 894; *Coleman* v. *Cole* (1900) 162 Mo. 516, 63 S. W. 89; *Hardin* v. *City of Carthage* (1902) 171 Mo. 442, 71 S. W. 673; *Brown* v. *M. K. & T. Ry.* (1903) 175 Mo. 185, 74 S. W. 973; *State ex rel.* v. *Smith* (1903) 176 Mo. 44, 75 S. W. 468; *City of Tarkio* v. *Loyd* (1903) 179 Mo. 600, 78 S. W. 797;

below.[3] The jurisdiction of the Supreme Court does not depend upon the validity of the constitutional question, that is whether a constitutional right has actually been violated; it is enough if a clear and substantial claim is involved.[4] But if only a sham question is raised, for example, if appellant in the court below has invoked the protection of the Constitution merely to have the Supreme Court instead of the court of appeals try his appeal, the Supreme Court will transfer the case to the court of appeals. The Supreme Court will consider it a sham question if appellant in his brief merely mentions the constitutional question without specification or argument.[5]

The constitutional question generally must be raised during the trial at the earliest possible moment that good pleading and orderly procedure will admit. Otherwise it will be waived.[6] Where possible, it should be raised in the pleadings. The case of *Dudley* v. *Wabash R. R. Co.*,[7] goes so far as to hold that where the question could have been raised in the answer, it is too late, after all the evidence is in, for defendant to amend his answer so as to raise the constitutional question. Many cases decide that it is too late to raise the point in a motion for a new trial, except where there has been no previous opportunity.[8] *Saxton National Bank* v. *Bennett*[9] seems to conflict somewhat with this principle. In this case the constitutionality of two statutes was raised for the first time in an amended motion for a new trial. It did not appear whether there had been an earlier opportunity to raise the question. The court however did not discuss the point, but held that it had jurisdiction. Altho the court seemed to ignore the point as to when the constitutional question might be raised during the trial, it must be assumed, as no contrary facts appear, that it could not have been raised earlier than in the amended motion for a new trial. But later cases, as indicated by those cited, remove all doubt on this point by holding that the constitutional question must be raised at the earliest possible moment during trial.

A few cases hold that in raising the constitutional question a specific reference to the provision of the Constitution violated is not necessary.[10] *State* v. *Smith*[11] goes so far as to decide that even

Hutchinson & Co. v. *Morris Bros.* (1905) 190 Mo. 673, 89 S. W. 820; *Shell* v. *Mo. Pac. Ry. Co.* (1906) 202 Mo. 339, 100 S. W. 617; *Municipal Securities Corp.* v. *Kansas City* (Mo. 1916) 186 S. W. 989; *Riley Penn., Oil Co.* v. *Symonds* (Mo. App. 1916) 190 S. W. 1038.

3. *City of Tarkio* v. *Clark* (1904) 186 Mo. 285, 85 S. W. 329.

4. *Ellis Investment Co.* v. *Jones* (Mo., 1916) 187 S. W. 716.

5. *Brookline Canning & Packing Co.* v. *Evans* (1911) 238 Mo. 599, 142 S. W. 319; *Botts* v. *Wabash Ry. Co.* (1913) 248 Mo. 56, 154 S. W. 53.

6. *Lohmeyer* v. *Cordage Co.* (1908) 214 Mo. 685, 113 S. W. 1108.

7. (1911) 238 Mo. 184, 142 S. W. 338.

8. *Barber Asphalt Paving Co.* v. *Ridge* (1902) 169 Mo. 376, 68 S. W. 1043; *Lohmeyer* v. *Cordage Co.* (1909) 214 Mo. 685, 113 S. W. 1083; *Hartzler* v. *Metropolitan Ry. Co.* (1908) 218 Mo. 562, 117 S. W. 1124; *George* v. *Quincy Ry. Co.* (1913) 249 Mo. 197, 155 S. W. 453; *Whitsett et al.* v. *City of Carthage* (Mo., 1915) 184 S. W. 1185.

9. (1897) 138 Mo. 494, 40 S. W. 97.

10. *State* v. *St. Louis Court of Appeals* (1888) 97 Mo. 276, 10 S. W. 874. See *Baldwin* v. *Fries* (1890) 103 Mo. 286, 15 S. W. 760.

11. (1897) 141 Mo. 1, 41 S. W. 906.

tho the appellant makes no reference during the trial to the violation of any constitutional right, yet, if a constitutional question is necessarily involved in the decision of the case, the Supreme Court will take jurisdiction. The court admits the general rule to be that the protection of the Constitution must be expressly invoked but distinguishes the case on the ground that it was submitted to the trial court on an agreed statement of facts. The prevailing view, however, is that in invoking the protection of the Constitution, the exact provision alleged to be violated must be stated. A general reference is not sufficient.[12] *Shaw* v. *Goldman*[13] decides that even tho the substance of the constitutional provision alleged to be violated is stated in the objection, that is not sufficient. Tho this seems to be the weight of authority elsewhere,[14] such a requirement seems nevertheless to be unduly technical. The court gives as a reason against allowing a general objection to the constitutionality of a legislative enactment, that such an objection makes it "possible to contend in the trial court it offended against one provision of the Constitution, while in the appellate court it might be claimed it violated a totally different provision of the Constitution, and in this way the trial court might be adjudged guilty of error in respect to a matter that was never called to its attention and upon which it never ruled." But it is obvious that this reason does not exist when the substance of the constitutional provision alleged to be violated is set forth. The appellate court could under such circumstances as easily determine whether the appellant relies on the same constitutional provision in both the trial and the appellate court as when he in the lower court gives in his objection the exact section and article. In fact an objection that a certain statute deprived the appellant of his property without due process of law is more definite than for him to say that by reason of said statute his rights under Sec. 1 of the Fourteenth Amendment of the Constitution of the United States are infringed, because this section secures many rights other than those involving security of property. But under the weight of authority an objection that the appellant is being deprived of his property without due process of law does not raise a constitutional question. There are, however, a few cases which hold that it is sufficient to set forth in the objection the substance of the constitutional provision alleged to be violated.[15]

12. *Ash* v. *City of Independence* (1902) 169 Mo. 77, 68 S. W. 888; *State* v. *Smith* (1903) 176 Mo. 44, 75 S. W. 468; *St. Joseph* v. *Life Insurance Co.* (1904) 183 Mo. 1, 81 S. W. 1080; *Excelsior Springs* v. *Ettenson* (1904) 188 Mo. 129, 86 S. W. 255; *State* v. *Kuehner* (1907) 207 Mo. 605, 106 S. W. 60; *Lohmeyer* v. *Cordage Co.* (1908) 214 Mo. 685, 113 S. W. 1108.

13. (1904) 183 Mo. 461, 81 S. W. 1223.

14. *Anderson* v. *State* (1907) 2 Ga. App. 1, 58 S. E. 401, and cases cited therein; *Rose* v. *State* (1908) 171 Ind. 662, 87 N. E. 103; 3 Corpus Juris 712.

15. *State ex rel* v. *St. Louis Court of Appeals* (1888) 97 Mo. 276, 10 S. W. 874; *Adkins* v. *City of Richmond* (1900) 34 S. E. 967.

Where the decision of the constitutional question is not essential to the disposition of the appeal, there is some confusion in the cases as to whether the supreme court will take jurisdiction. The rule supported by the weight of authority is that jurisdiction will be taken even tho the appeal can be disposed of on other grounds.[16] This is a sound doctrine in view of the principle that supreme courts will not decide constitutional questions presented in the record if the appeal can be disposed of on other grounds.[17] If the Supreme Court should say it will not take jurisdiction unless a ruling on the constitutional question is essential to the disposition of the case, it would in effect be saying to the court of appeals that the other points in the case should be decided in appellant's favor. However LAMM, J., in a strong *dictum* in *Ranney* v. *Cape Girardeau*,[18] states that "in order to bring an appeal within our jurisdiction on a constitutional ground it must appear that a constitutional question is essential to the determination of the case." A line of cases is cited as sustaining this principle, but they decide only that to confer jurisdiction on the Supreme Court, it must appear that the determination of a constitutional question was essential to the disposition of the case by the trial court.[19]

There are certain constitutional rights which cannot be expressly waived. A defendant indicted for a felony cannot agree to be tried by a jury of less than twelve, which right is guaranteed to him under Art. II, Sec. 22 of the Missouri Constitution.[20] If the general doctrine laid down in the Missouri cases that a party waives his constitutional right by failing to object at the earliest opportunity to its violation applies to all cases, it becomes an interesting question as to what becomes of the doctrine that certain constitutional rights cannot be waived by agreement. There seems to be no case involving an alleged waiver of such a constitutional right because of a failure to object at the proper time.

In *Donoho* v. *Mo. Pac. Ry. Co.*, *supra*, the plaintiff sued because of an injury to his race horse while in transit over defendant's railroad. The defendant pleaded that it was not liable because the plaintiff had not fulfilled the terms of the shipping contract and objected to a certain instruction granted by the court claiming that it impaired the obligation of the shipping contract in violation of Section 15, Article 2 of the Constitution of Missouri, and also in violation of the provisions of the Fourteenth Amendment to the Federal Constitution. This case

16. *Dorrance* v. *Dorrance* (1912) 242 Mo. 625, 148 S. W. 94; *Skinner* v. *St. Louis Ry. Co.* (1914) 254 Mo. 228, 162 S. W. 327; *Stanley* v. *St. Louis Ry. Co.* (1914) 254 Mo. 237, 162 S W. 240.

17. *Ex parte Randolph* (1833) 2 Brock 447; *Elliott* v. *Oliver* (Ore., 1892) 29 Pac. 1.; Cooley, Constitutional Limitations p. 163.

18. (1914) 255 Mo. 514, 164 S. W. 582.

19. *State ex rel.* v. *Smith* (1897) 141 Mo. 1, 41 S. W. 906; *Kirkwood* v. *Meramac Highlands Co.* (1900) 160 Mo. 111, 60 S. W. 1072; *State ex rel.* v. *Smith* (1903) 176 Mo. 44, 75 S. W. 468; *City of Tarkio* v. *Boyd* (1903) 179 Mo. 600, 78 S. W. 797.

20. *State* v. *Mansfield* (1867) 41 Mo. 471.

was transferred from the Kansas City Court of Appeals to the Missouri Supreme Court on the ground that a constitutional question was involved. The Supreme Court properly ruled that if a constitutional question existed, it was properly presented, but that none existed because an erroneous construction of a contract does not impair the obligation of the contract or deprive the defendant of his property without due process of law as guaranteed by the Missouri and Federal Constitutions. As pointed out in the opinion, the Supreme Court will not assume for jurisdictional reasons that the court of appeals will misconstrue a contract. Any contrary assumption would amount to saying that the court of appeals either does not know the law or that it would decide contrary to the law. So the case was properly remanded to the court of appeals.

GARDNER SMITH

EVIDENCE—ADMISSION OF PAROL EVIDENCE IN THE CONSTRUCTION OF WILLS—AMBIGUITIES—DECLARATIONS OF THE TESTATOR. *Mudd* v. *Cunningham.*[1]—George Cunningham in his will purported to devise to his daughter Mary "the south half of the south half of the northeast quarter of section 26." However, it appeared that the testator did not own, and had never claimed, the land above described. In another paragraph of the will he gave the southwest fourth of the northeast quarter of section 26, which he did own, to four other children. The south half of the south half of the northwest quarter had been owned by the testator and was not disposed of by the will. Mary Cunningham had conveyed this land in the northwest quarter to the plaintiff, Mudd, who brought this action to determine title. The defendants, children of the testator, claimed an interest in the land upon the ground that as to it their father had died intestate. Evidence was admitted that the scrivener in drawing up the will had by mistake written northeast instead of "northwest" before the words "quarter of section 26" in the devise to Mary, but the trial court rejected evidence offered by the plaintiff of declarations made by the testator as to lands intended to be conveyed by the will. However, upon the other evidence the plaintiff was adjudged to be owner of the land involved. This judgment the Supreme Court affirmed[2] upon the ground that the misdescription of the land in the will was a latent ambiguity and the Missouri rule "permits the use of extrinsic evidence to explain the said latent ambiguity after it had been made to appear."

The pole star of construction of wills is the intention of the testator,[3] and a statute[4] in Missouri requires courts to have due regard to the

1. (1915) 181 S. W. 386.
2. BOND, J., dissented but gave no opinion.
3. *Hall* v. *Stephens* (1877) 65 Mo. 577; *Nichols* v. *Boswell* (1890) 103 Mo. 151, 15 S. W. 343; *Meiners* v. *Meiners* (1903) 179 Mo. 614, 78 S. W. 795.
4. Revised Statutes 1909, § 583. This act is declaratory, merely, of the common law. *Yocum* v. *Siler* (1900) 160 Mo. 281, 61 S. W. 268; *Gannon* v. *Park* (1906) 200 Mo. 75, 98 S. W. 471.

true intent of the testator in all matters. This intention is not subject to technical rules of construction[5] and when found will be enforced if not inconsistent with some rule of law.[6] Testamentary dispositions of property are, however, required to be in writing, and formally executed and attested[7] and the testator's intention must be found in the will itself or these requirements will be defeated.[8]

To be effectuated, then, the intention of the testator must appear in the formal instrument. But in interpreting a will courts are not limited to a consideration of words alone. "It was a part of the stiff formalism of earlier interpretation, not only that the law should fix the meaning of words and phrases but also that all aids to the meaning must be found in the document itself."[9] However, courts have been reluctantly forced to realize that words can never be absolute and fixed in meaning,[10] but are necessarily relative to the person using them, the circumstances by which he is surrounded, and the persons or objects to which they are applied. Thus "the true intent and meaning of the testator can be best ascertained by the courts. . . . putting themselves, as far as may be, in the place of the testator and reading all his directions therein contained in the light of his environment at the time it was made."[11] But this is not a negation of the requirement that the intention of the testator must be found in the will. In *Nichols* v. *Boswell*[12] it is pointed out that extrinsic evidence cannot be "resorted to to ascertain the *intention* of the testator; to do so would be to defeat the requirement that all wills shall be in writing." The court here voices the distinction between admitting parol evidence to show the testator's *intention* and to show the *meaning* of the intention he has expressed in his will,[13] and while the Missouri decisions do not generally use the word "meaning" and often use "intention" in its place, they recognize a distinction between the testator's intention generally and the meaning of that intention as expressed in the will.[14] The admission of evidence of extrinsic circumstances in aid of interpretation is necessary in order to give the court seeking the meaning of the written words the standard of the individual maker, and it is well

5. *Kendrick* v. *Cole* (1876) 61 Mo. 572; *Burnet* v. *Burnet* (1912) 244 Mo. 491, 148 S. W. 872; *State ex rel. Gordon* v. *McVeigh* (1914) 181 Mo. App. 566, 164 S. W. 673.

6. *Small* v. *Field* (1890) 102 Mo. 104, 14 S. W. 815; *O'Day* v. *O'Day* (1905) 193 Mo. 62, 91 S. W. 921.

7. Revised Statutes 1909, § 537.

8. *Hall* v. *Stephens* (1877) 65 Mo. 677; *Nichols* v. *Boswell* (1890) 103 Mo. 151, 15 S. W. 343; *Meiners* v. *Meiners* (1903) 179 Mo. 614, 78 S. W. 795.

9. Wigmore, Evidence § 2470.

10. For the history of this principle, see Wigmore, Evidence § 2462.

11. *Murphy* v. *Carlin* (1892) 113 Mo. 112, 117, 20 S. W. 786.

12. (1890) 103 Mo. 151, 157, 15 S. W. 343.

13. See Wigmore, Evidence § 2459.

14. See *Gregory* v. *Cowgill* (1854) 19 Mo. 415; *Mersman* v. *Mersman* (1896) 136 Mo. 244, 37 S. W. 909; *Hurst* v. *Von de Veld* (1900) 158 Mo. 239, 58 S. W. 1056; *Willard* v. *Darrah* (1902) 168 Mo. 660, 68 S. W. 1023; *Missouri Baptist Sanitarium of St. Louis* v. *McCune* (1905) 112 Mo. App. 332, 87 S. W. 93; *Griffith* v. *Witten* (1913) 252 Mo. 641, 161 S. W. 708.

settled in this state that some parol evidence is, in general, admissible when the problem before the court is the construction of a will.[15]

To what extent such evidence is admissible is not clear from the Missouri decisions. In language the courts have adhered to the rules that "extrinsic evidence cannot be given to add to or vary the terms of the written instrument"[16] and that "the plain meaning of the will cannot be disturbed."[17] The first is based upon the requirement that the intention of the testator must be incorporated in a formal instrument, and the validity of this reason cannot be questioned. Courts, as pointed out in *Mudd* v. *Cunningham*,[18] have no power to reform a will, no matter how clear it may appear that a mistake has been made.[19] Extrinsic evidence is not admissible to show an intent which the testator has not in some manner embodied in his will.[20] But it is also a rule in this state that in construing a will in the light of surrounding circumstances, terms may be omitted, changed, or even added to effectuate the intention of the testator.[21] Thus the result prohibited by the rule against varying the terms of the will is reached in the process of interpretation, and it would seem that the rule against varying the terms of the instrument survives only in those cases in which the testator's real intention cannot be effectuated by construction, as where there is nothing in the will into which the real intention can be read or where the language used in the will shows that the testator was not himself certain of his intention.

The rule against disturbing a plain meaning is based upon the theory that the words used by a given testator are fixed and absolute in meaning. This rule often appears in the Missouri decisions but has in fact little force today. When the courts adopted the principle

15. See *Clotilde v. Lutz* (1900) 157 Mo. 439, 57 S. W. 1018; *Tebow* v. *Dougherty* (1907) 205 Mo. 315, 103 S. W. 985. In *Gregory* v. *Cowgill* (1854) 19 Mo. 415; *McQueen* v. *Lilley* (1895) 131 Mo. 9, 17, 31 S. W. 1043; *Roberts v. Crume* (1902) 173 Mo. 572, 579, 73 S. W. 662; *Missouri Baptist Sanitarium of St. Louis* v. *McCune* (1905) 112 Mo. App. 332, 338, 87 S. W. 93, the rule is stated negatively,—that is such evidence must not be looked to unless the terms are not clear or an ambiguity has arisen from its clear terms. These *dicta* are clearly erroneous as it is impossible to declare the meaning of any provision, no matter how clear in statement and unambiguous in fact without a knowledge of facts *dehors* the instrument. Inconsistent statements of the rules naturally result from the refusal of the courts to recognize the "parol evidence rule" as a principle of the substantive law of wills and not a rule of evidence. See Wigmore, Evidence § 2400.

16. *Hall* v. *Stephens* (1877) 65 Mo. 670; *Small* v. *Field* (1890) 102 Mo. 104, 14 S. W. 1815; *Krechter* v. *Grofe* (1901) 166 Mo. 385, 66 S. W. 358; *Brown* v. *Tuschoff* (1911) 235 Mo. 499, 138 S. W. 497.

17. *Bradley* v. *Bradley* (1857) 24 Mo. 311; *Drake* v. *Crane* (1894) 127 Mo. 85, 29 S. W. 990; *Missouri Baptist Sanitarium of St. Louis* v. *McCune* (1905) 112 Mo. App. 332, 87 S. W. 93.

18. (1915) 181 S. W. 386.

19. *Goode* v. *Goode* (1856) 22 Mo. 518; *Mudd* v. *Cunningham* (1915) 181 S. W. 386. But see *Thomson* v. *Thomson* (1892) 115 Mo. 56, 21 S. W. 1085.

20. *Lehnhoff* v. *Theine* (1904) 184 Mo. 386, 83 S. W. 469. See also *Asten* v. *Asten* (1894) 3 Ch. 260.

21. *Prosser* v. *Hardesty* (1890) 101 Mo. 593, 14 S. W. 628; *Thomson* v. *Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *Briant* v. *Garrison* (1899) 150 Mo. 655, 52 S. W. 361; *Mudd v. Cunningham* (1915) 181 S. W. 386.

of construing a will in the light of surrounding circumstances, they accepted the standard of the particular testator in interpreting the terms used by him, and recognized that the "plain meaning" of words differs with different writers.[22] The Missouri courts have, however, refused to apply this principle where the terms of the will are definite and capable of being enforced and no ambiguity arises upon their application.[23] But with the exceptions noted, it seems that the rules against varying the terms of the will, and against disturbing the plain meaning do not in fact operate against the admission of parol evidence in this state, but are in effect avoided and exist only in the *dicta* and loose language of the decisions.

When the court in the principal case states that an established Missouri rule permits the explanation of latent ambiguities by extrinsic evidence, it but echoes the classical distinction between latent and patent ambiguities,[24] which has been repeatedly voiced by the courts of this state. According to this classification,[25] a patent ambiguity is an inconsistency or a doubtful expression in the language of the will, and a latent ambiguity an uncertainty as to the testator's meaning arising in the attempted application of apparently clear and definite terms of the will.[26] Evidence of extrinsic circumstances is rejected in the former case and admitted in the latter upon the following theory: that since the intention must be found in the will, if the ambiguity is patent, the evidence would show an intention different from that expressed, and hence, the inconsistent provisions must fail for uncertainty unless they can be explained by an interpretation of the will itself. But if the ambiguity is latent, the intention disclosed by extrinsic evidence only shows which of a number of apparent meanings, all consistent with the terms of the will, is the true one. As a latent ambiguity cannot be found except by looking at circumstances *dehors* the will, the distinction between parol evidence to show and parol evidence to explain the latent ambiguity must be recognized.[27]

Where there is a latent ambiguity the uncertainties as to the testator's meaning are of two kinds; either the terms are applicable equally, or substantially so,[28] to two or more persons or objects, or the property or person has been so mistakenly described that according to

22. See Wigmore, Evidence § 2461.
23. See *Mersman* v. *Mersman* (1896) 136 Mo. 244, 37 S. W. 909.
24. See 6 L. R. A. (N. S.) 946.
25. *Jennings* v. *Brizeadine* (1869) 44 Mo. 332. In the early case of *Davis* v. *Davis* (1843) 8 Mo. 56, the court does not distinguish between patent and latent ambiguities but says "some patent ambiguities allow a resort to extrinsic evidence and others do not." In *Riggs* v. *Myers* (1855) 20 Mo. 239, the distinction between an inaccuracy and an ambiguity in language is made clear.
26. *Mudd* v. *Dillon* (1901) 166 Mo. 110, 120, 65 S. W. 973; *Robards* v. *Brown* (1901) 167 Mo. 447, 67 S. W. 245; *McMahan* v. *Hubbard* (1908) 217 Mo. 624, 118 S. W. 481.
27. See *Willard* v. *Darrah* (1902) 168 Mo. 660, 68 S. W. 1023.
28. This seems to be the rule in Missouri. *Willard* v. *Darrah* (1902) 168 Mo. 660, 68 S. W. 1023. But see *Hardy* v. *Matthews* (1866) 38 Mo. 124.

the exact terms of the will there is no property given or no person to take. The first of these is an equivocation, the second a misdescription. Where description has both the elements of equivocation and misdescription, i. e., where as to each of two persons or objects[29] it is partially correct and partially incorrect, the case is generally regarded as one of misdescription.[30] But in *Willard* v. *Darrah*[31] the testator had devised land to his "well beloved nephews John and William Willard," and two sets of brothers by these names claimed the land under this provision, viz., grandsons who had been intimate with the testator, and grandnephews whom the testator scarcely knew. Saying "the description of the person is partly correct and partly incorrect, leaving something equivocal," the court regards as an equivocation what is generally said to be a misdescription, and on principle, the view of the court seems the proper one as the description applies substantially to two or more persons. In the language of a few of the Missouri cases the distinction between an equivocation and a misdescription is noticed,[32] but usually the cases are disposed of as was the principal case, by merely calling the uncertainty a latent ambiguity.[33] And as the basis of this distinction between the forms of latent ambiguity is the admission in one case, and the rejection in the other, of declarations made by the testator, and in Missouri, as will be pointed out, this evidence is admissible upon proof of a latent ambiguity—regardless whether such ambiguity is equivocation or misdescription, the courts have not, except by way of a few *dicta*, preserved the useless distinction between the kinds of latent ambiguity.

In the construction of wills in which there are latent ambiguities, the principle of the maxim *falsa demonstratio non nocet*[34] is often followed by the Missouri courts, and where the extrinsic evidence shows that a mistake has been made in describing the beneficiary or the property intended, the excessive or false part of the description is rejected in the interpretation, and enough remaining to identify the object

29. The Missouri cases have not recognized the unsound distinction sometimes made between persons and objects. See *Bradley* v. *Bradley* (1857) 24 Mo. 311. See also *Thomson* v. *Thomson* (1892) 115 Mo. 56, 21 S. W. 1085.

30. See Wigmore, Evidence § 2474.

31. (1902) 168 Mo. 660, 68 S. W. 1023.

32. *Riggs* v. *Myers* (1855) 20 Mo. 239; *McMahan* v. *Hubbard* (1908) 217 Mo. 624, 118 S. W. 481.

33. No case of equivocation in the construction of a will has been found excepting *Willard* v. *Darrah* (1902) 168 Mo. 660, 68 S. W. 1023, as above explained. Equivocations in deeds are latent ambiguities. *Hardy* v. *Matthews* (1866) 38 Mo. 124; *Goff* v. *Roberts* (1880) 72 Mo. 570. The contra decision in *Mudd* v. *Dillon* (1901) 166 Mo. 110, 65 S. W. 973, is clearly erroneous.

Misdescriptions in wills are latent ambiguities. *Hockensmith* v. *Slusher* (1858) 26 Mo. 237; *Thomson* v. *Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *McMahan* v. *Hubbard* (1908) 217 Mo. 624, 118 S. W. 481; *Murphy* v. *Clancy* (1913) 177 Mo. App. 428, 163 S. W. 915. But the rule seems otherwise in the case of deeds. *Hardy* v. *Matthews* (1866) 38 Mo. 124; *Jennings* v. *Brizeadine* (1869) 44 Mo. 332; *King* v. *Finley* (1873) 51 Mo. 209.

34. See Wigmore, Evidence § 2476.

or party meant by the testator, this meaning will be effectuated.[35] Thus in *Thompson* v. *Thompson*,[36] where there was a devise of "land upon which I now reside," followed by a particular description erroneous in part, the court rejected the false part upon the principle of the maxim. This decision was approved and the maxim again followed in *Board of Trustees of Methodist Episcopal Church, South* v. *May*,[37] where the testatrix devised her "Kansas City property on Olive Street, numbers 705 and 1489," and these numbers were rejected as excessive when it appeared that the only property in Kansas City owned by the testatrix was numbers 1705 and 1914 Olive Street. The maxim is as applicable to persons as to objects,[38] and from the Missouri decisions it appears that the courts have applied the maxim in a very liberal manner.[39] The result reached in the principal case, viz., that the testator intended to devise the land in the northwest quarter instead of that described as in the corresponding part of the northeast quarter, might well have been based upon a rejection of the word "east," the false part of the description in the devise to Mary; then the remaining part, "the south half of the south half of the north . . . quarter of section 26", would have indicated the land in the northwest quarter owned by the testator and not otherwise devised in the will instead of the corresponding land in the northeast quarter, half of which he did not own and the other half of which he had devised to the other children in the third paragraph of the will.

While a number of the cases admit the evidence of extrinsic circumstances upon the ground that there is a latent ambiguity, the more favored authority is Mr. Wigram's fifth proposition relating to the admission of parol evidence in the interpretation of wills:[40] "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given under the will, a court may inquire into every material fact . . . as to the circumstances of the testator . . . for the purpose of

35. See *Riggs* v. *Myers* (1855) 20 Mo. 239.

36. (1892) 115 Mo. 56, 21 S. W. 1085. GANTT, J., dissented upon the ground that a definite, tho erroneous, particular description must control over a sufficient general description. See *Rutherford* v. *Tracy* (1871) 48 Mo. 325; *Calloway* v. *Henderson* (1895) 130 Mo. 77, 32 S. W. 34.

37. (1906) 201 Mo. 360, 368, 99 S. W. 1093.

38. *Skinker* v. *Haagsma* (1889) 99 Mo. 208, 12 S. W. 659. See *Thomson* v. *Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *Gordon* v. *Burris* (1897) 141 Mo. 602, 43 S. W. 642; *Willard* v. *Darrah* (1902) 168 Mo. 660, 68 S. W. 1023.

39. *McMahan* v. *Hubbard* (1908) 217 Mo. 624, 118 S. W. 481. The mistake in the description was similar to the error in the will in *Mudd* v. *Cunningham* and the land intended was identified by the rejection of the false part. As the erroneous description was the only allusion to the land in the will it appears that the narrow doctrine of *Kurtz* v. *Hibner* (1870) 55 Ill. 514, is not law in Missouri, and " my land" or the equivalent of these words is not necessary as an identification of the land erroneously described. In *King* v. *Fink* (1873) 51 Mo. 209, the court refused to apply the maxim in construing a deed which contained an error similar to that in the will in *McMahan* v. *Hubbard*.

40. Quoted from Wigram, Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills, in Thayer, Cases on Evidence, 2d ed., p. 917.

enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of the testator's words."[41] In *Small* v. *Field*[42] and *McMahan* v. *Hubbard*,[43] this doctrine is said to be well settled law in this state. However, most of the decisions which apply this rule are cases in which the terms of the will are clear on their fact but uncertainty is produced by extrinsic evidence, and by *dicta* the cases embraced within the proposition are impliedly classed as latent ambiguities.[44] But the language of the doctrine quoted is equally as applicable to cases in which the doubt as to the testator's meaning is created by obscure or inconsistent language in the will, and it appears that extrinsic evidence is admissible to explain such indefinite language,[45] tho no case has been found which expressly holds that a patent ambiguity may be resolved by evidence *dehors* the instrument. Hence, in admitting extrinsic evidence it seems to be immaterial whether the ambiguity is patent or latent. But even under this doctrine extrinsic evidence of intention could not be given where the will itself shows the testator was not himself certain as to his intention, because to do so would be to make a new will for the testator and violate the requirement that the intention must be found in the will.[46] But, since words may be changed, omitted, or even added in interpreting a will which contains on its face obscure or inconsistent provisions,[47] it is submitted that the classical distinction between patent and latent ambiguities has in effect been abandoned,[48] and, with the one exception, as a matter of fact no longer controls the admission of parol evidence in this state.

But there is one kind of extrinsic evidence which is suspiciously regarded by courts generally, viz., parol declarations by the testator regarding the disposition of his property by the will. The objection to this direct evidence of intention, as it is often called, is this: that the testator is required by law to declare his intention in a formal

41. *Riggs* v. *Myers* (1855) 20 Mo. 239; *Creasy* v. *Alverson* (1868) 43 Mo. 13; *Small* v. *Field* (1890) 102 Mo. 104, 14 S. W. 1815; *Willard* v. *Darrah* (1902) 168 Mo. 660, 68 S. W. 1023; *McMahan* v. *Hubbard* (1908) 217 Mo. 624, 118 S. W. 481.

42. (1890) 102 Mo. 104.

43. (1908) 217 Mo. 624, 118 S. W. 481.

44. *McMahan* v. *Hubbard* (1908) 217 Mo. 624, 118 S. W. 481; *Mudd* v. *Cunningham* (1915) 181 S. W. 386.

45. *Nichols* v. *Boswell* (1890) 108 Mo. 151, 15 S. W. 343; *Garth* v. *Garth* (1897) 139 Mo. 456, 41 S. W. 238; *Rothwell* v. *Jamison* (1898) 147 Mo. 601, 49 S. W. 503; *Roberts* v. *Crume* (1902) 173 Mo. 572, 73 S. W. 662; *Missouri Baptist Association of St. Louis* v. *McCune* (1905) 112 Mo. App. 332, 87 S. W. 93.

46. *Asten* v. *Asten* (1894) 3 Ch. 260.

47. *Thomson* v. *Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *Briant* v. *Garrison* (1899) 150 Mo. 655, 52 S. W. 361.

48. In *Thomson* v. *Thomson* (1892) 115 Mo. 56, 21 S. W. 1085, counsel for appellant submitted this question in his brief but it was not passed upon by the court.

will, and to give effect to any of his declarations not made in this will would be an evasion of this requirement.[49] Thus oral declarations cannot be given to show an intention not referred to in any way in the will,[50] or where the will itself shows that the testator was not himself certain as to his intention.[51] But where this rule[52] is not involved, the reason for the prohibition is gone, and declarations of the testator are not only highly convenient, but often necessary to the court seeking the meaning of the testator's words.[53] Some of the Missouri cases seem to distinguish between the oral declarations of the testator and evidence of the testator's feelings toward persons affected by his will,[54] and the courts are apparently drawing the line between evidence of extrinsic circumstances generally and direct evidence of intention. In other cases, however, no distinction is made between declarations and other evidence of intention *dehors* the will.[55]

In England, declarations are admissible only in cases of strict equivocation.[56] Or rather it should be stated that where the declarations are admitted there is an equivocation, and where rejected a misdescription, as the basis of this classification of latent ambiguities seems to be the admissibility of this direct evidence of intention, tho there is no valid reason for this distinction.[57] No rule can be stated for the United States generally as the question has been seldom raised, and in Missouri declarations of intention made by the testator have been admitted in evidence in cases of misdescription without reference to any distinction between the kinds of latent ambiguity.[58] And while it is often stated that declarations of intention are admissible when there is a latent ambiguity,[59] the language of the Missouri decisions does not limit the admission of such evidence to such cases but extends the principle to any case of doubtful meaning, even where the uncertainty is patent.[60] This strengthens the conclusion that, as a matter of fact, the distinction between patent and latent ambiguities is no longer of any importance in this state.

In the principal case the uncertainty as to the testator's meaning was created by a misdescription which the court calls a latent ambigu-

49. *Davis* v. *Davis* (1843) 8 Mo. 56; *Lehnhoff* v. *Theine* (1904) 184 Mo. 386, 83 S. W. 469.
50. *Lehnhoff* v. *Theine* (1904) 184 Mo. 386, 83 S. W. 469.
51. *Asten* v. *Asten* (1894) 3 Ch. 260.
52. See Wigmore, Evidence § 2425.
53. *Hurst* v. *Von de Veld* (1900) 158 Mo. 239.
54. *McQueen* v. *Lilley* (1895) 131 Mo. 9, 31 S. W. 1043; *Snyder* v. *Taler* (1914) 179 Mo. App. 381, 166 S. W. 1059.
55. *Gregory* v. *Cowgill* (1854) 19 Mo. 415; *Bradley* v. *Bradley* (1857) 24 Mo. 311.
56. *Doe d. Hiscocks* v. *Hiscocks* (1839) 15 M. & W. 363.
57. See Wigmore, Evidence § 2474.
58. *Gordon* v. *Burris* (1897) 141 Mo. 602, 43 S. W. 642.
59. *Thomson* v. *Thomson* (1892) 115 Mo. 56, 31 S. W. 1085, Judge Gantt dissenting. But see *Davis* v. *Davis* (1843) 8 Mo. 56; *Lehnhoff* v. *Theine* (1904) 184 Mo. 386, 83 S. W. 469.
60. *Mersman* v. *Mersman* (1896) 136 Mo. 244, 37 S. W. 909; *Hurst* v. *Von de Veld* (1900) 158 Mo. 239, 58 S. W. 1056; *Webb* v. *Hayden* (1901) 166 Mo. 39, 65 S. W. 760.

ity explainable by extrinsic evidence, but the declarations of the testator were rejected. If in this state declarations of the testator are merely a part of the extrinsic circumstances, if all latent ambiguities may be resolved by this direct evidence, and, finally, if misdescriptions may be explained by parol statements made by the testator, it would seem that the court should have admitted in evidence the declarations of George Cunningham that he intended Mary to take the land so mistakenly described.

While there is much confusion and conflicting authority in the Missouri cases involving the admission of parol evidence in the construction of wills, the chief source of uncertainty lies in the loose, general language of the courts. It seems that, regardless of the confusing language with which they are clothed, uniform tendencies exist, and that there are definite principles which are applied by the courts in fact in the guise of old rules and apparently upon the basis of distinctions no longer really in force. It is believed that the Missouri courts have developed and generally recognize the following principles: extrinsic evidence, including declarations of the testator, is always admissible to ascertain the meaning of the terms of the will, except where its provisions show either that the testator has not incorporated his intention in the will, or that a definite and clear provision capable of being carried out as expressed is not the testator's real intention. Or stated in terms of the law of wills rather than as a rule of evidence, the real intention of the testator will be effectuated if possible by reading it into the terms of the will by liberal construction, except that the provisions of the instrument will not in substance be added to or omitted.

L. C. LOZIER

EQUITABLE RELIEF AGAINST DEFAMATION. *Wolf* v. *Harris*.[1]—A reputable physician sought to restrain an insolvent defendant from continuing to publish libelous matter charging the plaintiff with malpractice. The Supreme Court held that an injunction could not be granted. This result, following the decisions in *Life Ass'n of America* v. *Boogher*,[2] *Consumer's Gas Co. of Kansas City* v. *Kansas City Gaslight and Coke Co.*,[3] and *Flint* v. *Hutchinson Smoke Burner Co.*,[4] seems justifiable under our Bill of Rights[5] which declares "that no law shall be passed impairing the freedom of speech;[6] that every person

1. (1916) 184 S. W. 1139.
2. (1876) 3 Mo. App. 173.
3. (1890) 100 Mo. 501, 13 S. W. 874.
4. (1892) 110 Mo. 492, 19 S. W. 804.
5. Constitution, Article II, § 14.
6. This does not prohibit the imposition of liability after publication in certain cases, even tho it interferes in a measure with the freedom of speech. It is constitutional (1) to punish by statute the publication of immoral and indecent matter. *State* v. *Wye* (1896) 136 Mo. 227, 37 S. W. 938. (2) To punish scandal about the courts. *State* v. *Shepherd* (1903) 177 Mo. 205, 76 S. W. 79. (3) And to punish matter dangerous to the conduct of military operations in time of war. *Ex parte Vallandingham* (1863) 1

shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

But this general rule that equitable relief will not be given against defamation seems to be modified in Missouri to this extent: an injunction will be allowed where the writing or publication is part of a wrong which would be enjoined of itself. Thus in *Hamilton Brown Shoe Co.*, v. *Saxey*[7] the court enjoined the defendant from interfering with plaintiff's employees by threats, personal violence, intimidation or other means calculated to terrorize or alarm them.[8] It seems that a growing number of decisions allow injunctions in these cases.[9]

The constitutional requirement of a trial of questions of defamation by a jury presents the greatest obstacle to jurisdiction in equity. The Missouri courts, for instance, cannot direct a verdict for the plaintiff in these cases.[10] It would be unduly narrow to attack the probably sound policy of allowing jury trials in these cases by arguing that the jury was only required in criminal cases or civil cases for damages, and not in proceedings in equity. But when the publication is admitted, and most cases do arise on demurrer, why should a jury be required? Why could not the court grant an injunction just as it does in certain cases of trespass,[11] disturbances of easements[12] or nuisances.[13] Professor Pound[14] after pointing out the effort made in the early English cases to allow an injunction, shows that the practice first arose of allowing an injunction in cases where the libel was repeated or the publication continued after a jury had found the matter

Wall (U. S.) 243. (4) Our Constitution probably does not guarantee the liberty to intimidate by speech or writing, but the decisions are not very consistent. In *State* v. *McCabe*, (1896) 136 Mo. 450, 37 S. W. 123, a statute was upheld which made it a misdemeanor to compel a debtor to pay a just debt by threatening to publish his name as a bad debtor—even tho it were true. In *Marx, etc., Co.* v. *Watson*, (1902) 168 Mo. 133, 67 S. W. 391, a similar injury to credit was involved altho perhaps not so directly, and an injunction was refused. Assuming that the latter court would have followed the first case if this had been a prosecution under the statute, why would it not grant an injunction—the injury appearing to be an irreparable one? Even tho an act is a misdemeanor equity may enjoin its commission if the remedy at law is inadequate for altho the fact that a particular act is a crime or misdemeanor is no basis for relief in equity, it is also no basis for denying relief.

7. (1895) 131 Mo. 212, 32 S. W. 1109.

8. *Cf. Lohse, etc., Co.* v. *Fuelle* (1908) 215 Mo. 421, 114 S. W. 997.

9. *Spinning Hed Co.* v. *Riley* (1868) L. R. 6. Eq. 651; Seattle *Brewing and Malting Co.* v. *Hansen* (1905) 144 Fed. 1011 (notices incidental to a boycott); *Coeur D'Alene Co.* v. *Miners Union* (1892) 51 Fed. 260, 19 L. R. A. 382; *Sherry* v. *Perkins* (1888) 147 Mass. 212; *Jordahl* v. *Hayde* (1905) 1 Cal. App. 696, 82 Pac. 1079; *Emack* v. *Kane* (1888) 34 Fed. 46.

10. *Heller* v. *Pulitzer Pub. Co.* (1899) 153 Mo 205, 54, S. W. 457.

11. *Miller* v. *Lynch* (1892) 149 Pa. St. 460, 24 Atl. 80; *Hart* v. *Leonard* (1886) 42 N. J. Eq. 416, 7 Atl. 865.

12. *Selby* v. *Nettleford* (1872) 9 Ch. App. 111; *Newell* v. *Lass* (1892) 142 Ill. 104.

13. *Hayden* v. *Tucker* (1866) 37 Mo. 215; *Carpenter* v. *Gresham* (1875) 59 Mo. 247; *Turner* v. *Stewart* (1883) 78 Mo. 480.

14. 24 H. L. R. 665.

libelous.[15] *Flint* v. *Hutchinson Smoke Burner Co.*,[16] has a *dictum* to the same effect. Later it came to be held that if the libel was clearly established, an injunction would be granted without plaintiff going to a court of law.[17] He says further that the Common Law Procedure Act (1873) affords very slight foundation for this result, and that the courts strained a point to grant equitable relief. Today the English courts will grant an interlocutory injunction against a libel if it is clearly shown to be one,[18] exactly as in the case of any other tort. The American cases have not gone so far, and have only enjoined the publication as incidental to an unlawful boycott or unlawful intimidation of employees.

Probably in Missouri the modern English rule will only be reached by legislation. If the *dictum* in *Flint* v. *Hutchinson Smoke Burner Co.*, be adopted, and an injunction granted after verdict, it will afford more adequate relief, but when the facts are admitted and the case is reduced to a matter of pleadings, why should not one's business or reputation be protected from an insolvent, malicious defamer without the delay of a jury trial?

J. P. HANNIGAN

RAPE ON INSANE WOMAN—DEFENDANT'S KNOWLEDGE OF INSANITY. *State* v. *Helderle*.[1]—The defendant was tried and convicted for rape. The woman was eighteen years of age and of unsound mind at the time. It was shown that she had given her actual consent and that defendant did not know of her mental condition, nor had he knowledge of any facts from which his knowledge of her insanity could be inferred. Upon this state of facts the Supreme Court held defendant's lack of knowledge a defense, three judges dissenting. FARIS, J., for the majority based his opinion on the authority of previous Missouri decisions[2] and on the theory that a conviction under such circumstances would destroy the presumption of innocence and establish instead a presumption of guilt merely upon proof of the woman's insanity. WOODSON, C. J., in a concurring opinion held that as defendant had no felonious intent he was not guilty. REVELLE, J., dissenting, contended that, owing to the woman's insanity there was no consent sufficient in law to prevent the act from being rape.

15. *Saxby* v. *Easterbrook* (1878) 3 C. P. D. 339; *Halsey* v. *Brotherhood* (1880) 15 Ch. D. 514, 19 Ch. D. 386.
16. (1892) 110 Mo. 492, 19 S. W. 804.
17. *Liverpool Ass'n* v. *Smith* (1887) 37 Ch. D. 170; *Bonnard* v. *Perryman* (1891) 2 Ch. 269.
18. *Collard* v. *Marshall* (1892) 1 Ch. 571. For the present practice, see *James* v. *James* (1872) 13 Eq. 421; *Thorley's Cattle Food Co.* v. *Massam* (1880) 14 Ch. D. 763; *Thomas* v. *Williams* (1880) 14 Ch. D. 864; *Herman Loog* v. *Bean* (1884) 26 Ch. D. 306; *Hayward* v. *Hayward* (1886) 34 Ch. D. 198; *Walter* v. *Ashton* (1902) 2 Ch. 282.
1. (1916) 186 S. W. 696.
2. *State* v. *Cunningham* (1889) 100 Mo. 382, 12 S. W. 376; *State* v. *Warren* (1910) 232 Mo. 185, 134 S. W. 376; *State* v. *Schlichter* (1913) 263 Mo. 274, 173 S. W. 1072.

The crime of rape is defined in the statute,[3] so far as it affects the case under consideration, as the forcible ravishment of any woman of the age of 14 or upward. Absence of consent is a necessary element of the crime under this part of the statutory definition.[4] Under certain conditions unlawful sexual intercourse may be rape even tho the woman consents to the act. This is true in cases where she is deemed incapable, either in law or in fact, of giving a valid consent. If she is below the statutory age her consent is immaterial.[5] If she is under the influence of drugs[6] or intoxicants[7] she may be incapacitated in fact. An insane woman is deemed by the law incapable of consenting and for that reason intercourse with her may be rape if the defendant knew of her insanity, even if no force is used and she does not resist.[8]

In the case of rape upon a woman under the age of consent a bona fide and reasonable belief that the girl was above such age is no defense.[9] In such cases, however, this result seems to be required by the terms of the statute and the question presented by *State* v. *Helderle* is whether a similar doctrine can be applied as a matter of common law in cases where defendant has intercourse with an insane woman not knowing of her insanity. The result of the Missouri decisions on the question, as above cited, is that if defendant had at the time of intercourse no knowledge and no means of knowledge of the insanity he cannot be convicted of rape if the woman appears to consent. Authorities are not numerous but in *People* v. *Griffin*[10] which was an indictment under a California statute in which rape was defined as illicit sexual intercourse with a female of unsound mind, thus differing materially from the Missouri statute, a conviction was sustained. The court held that the defendant acted at his peril and his ignorance was no defense. This conclusion seems to have been required by the terms of the statute.

The principal argument against a conviction in those cases in which defendant had no knowledge of the insanity is that he labored under a reasonable mistake and had not therefore the necessary *mens rea* to make him guilty of a crime.[11] However it is not necessary in Missouri that a specific intent to violate the law or to do a particular act must invariably be present in order that a crime can be committed. The man who shoots at A with intent to kill him and accidently kills

3. Revised Statutes 1909, § 4471.
4. *State* v. *Cunningham, supra*; *State* v. *Murphy* (1893) 118 Mo. 7, 25 S. W. 95.
5. *State* v. *Day* (1905) 188 Mo. 359, 87 S. W. 465.
6. *Harlan* v. *People* (1904) 32 Colo. 397; *State* v. *Green* (1860) 2 Ohio Dec. (Rep't.) 255.
7. *State* v. *Hairston* (1897) 121 N. C. 579; *Territory* v. *Edie* (1892) 6 N. M. 555; *Regina* v. *Camplin* (1845) 1 Cox C. C. 220.
8. *State* v. *Cunningham* (1889) 100 Mo. 382, 12 S. W. 376; *State* v. *Williams* (1899) 149 Mo. 496, 51 S. W. 88.
9. *State* v. *Houx* (1891) 109 Mo. 661, 19 S. W. 35; *State* v. *Basket* (1892) 111 Mo. 272, 19 S. W. 1097; *State* v. *Johnson* (1893) 115 Mo. 480, 22 S. W. 463.
10. (Cal., 1897) 49 Pac. 711.
11. *State* v. *Schlichter* (1913) 263 Mo. 274, 173 S. W. 1072.

B is guilty of the murder of B.[12] One who brandishes a weapon in public, with no intent to injure, and in doing so kills another is guilty of manslaughter because he had the intent to do a dangerous act.[13]

In the application of this doctrine should a difference be made between cases where the facts show an intent to commit an indictable act and where the intent is to do an act not indictable yet recognized as morally wrong or detrimental to society? If the act to the accomplishment of which the defendant's intention is immediately directed is morally wrong and anti-social, regardless of its prohibition by law, there is at least a *dictum* in Missouri to the effect that he takes his chances of the criminality of consequences he did not contemplate.[14]

A single act of fornication or of illicit sexual intercourse between unmarried persons is not indictable in Missouri. It is however universally recognized as an act highly immoral in its very nature and against the best interests of society. The defendant here intended the commission of this immoral act and it is submitted that tho he was ignorant of the woman's insanity he acted at his peril and if in the course of the commission of such an act he actually has intercourse with a woman or because of her insanity is not capable of giving an adequate consent, his ignorance of her mental condition should be no defense.

Altho it is doubtless possible to draw a distinction between the cases involving questions of the age of consent and insanity cases, inasmuch as the former cases seem to depend upon the terms of the statute, it will be noticed that the courts not infrequently base their conclusion that knowledge of the woman's age is immaterial on reasoning which could be readily applied in such cases as *State* v. *Helderle*. Such convictions are almost invariably justified on the ground that defendant had the intent to do an act which was wrong in its very nature tho he had no intent to do an act which was indictable. The same process of reasoning might well lead to a conclusion different from that reached by the majority of the court in *State* v. *Helderle*.

PAUL G. KOONTZ

CONTRACTS—WHEN IS A LIFE INSURANCE CONTRACT COMPLETE? *Tainter* v. *Central States Life Insurance Co.*[1]—The plaintiff's husband made an application for life insurance to the defendant's soliciting agent and gave him as payment for the first premium his note due in six months. The applicant was subsequently examined by the defendant's local physician who forwarded his report to the home office. A day later the applicant was killed. The defendant learning of this, refused to issue a policy and wired its

12. *State* v. *Montgomery* (1886) 91 Mo. 52, 3 S. W. 379.
13. *State* v. *Emery* (1883) 78 Mo. 77.
14. *State* v. *Houx* (1891) 109 Mo. 654, 661, 19 S. W. 35.
1. (Mo., 1916) 185 S. W. 1185.

agent to return the note. Two months later the plaintiff made a demand for a policy, and upon defendant's refusal to issue one asked for the note. This was also refused, the secretary stating that it was in the agent's possession. After about eight months the plaintiff tendered the agent the amount due on the note but he refused to accept it, and failed to offer to return the note. Afterwards an action was brought. The company procured the note and offered it in court for cancellation. A judgment for the defendant was affirmed by the Kansas City Court of Appeals.

An application for life insurance is to be regarded only as an offer.[2] To complete the contract an acceptance by the insurer is necessary, and as there are always certain express or implied conditions performance of these by the insured is also necessary before the contract is deemed operative. The usual conditions are the issuance of a policy, the delivery to the insured and the acceptance thereof by him and payment of the first premium, while in good health. The validity of such conditions precedent to the formation of the contract has been sustained by the courts.[3] Since these conditions are for the benefit of the insurer he may waive them. When the waiver arises by implication courts have often called it an estoppel, and in the cases we find the two used interchangeably.[4]

In the principal case there was no acceptance in fact of the application, and the theory upon which the action was brought, as viewed by the appellate court, was that the insurance company had impliedly waived the requirements necessary to an acceptance, viz., the approval of the application and the issuance of a policy.

The giving of the note as payment for the first premium before the application had been forwarded to, and acted upon by, the insurer, in no way bound the company as this is the customary proceeding. The giving of the note was subject to the agreement, implied if not express, that it was to be returned if the company did not accept the offer made in the application.

Counsel for the plaintiff sought to bring the principal case within the decision in *Rhodus* v. *Kansas City Life Insurance Co.*[5] The application in that case contained the provision that the contract was not to b deemed operative until the policy had been delivered to, and accepted by, the applicant while in good health. Previous to the issuance of a policy the applicant died, but after his death the defendant's agent collected the sum due on a note given by the deceased at the time the application was made. After deducting his commission the agent forwarded the balance to the defendant who, after gaining knowledge

2. *McCracken* v. *Travelers' Ins. Co.* (Ore., 1916) 156 Pac. 640.
3. *Kohen* v. *Mutual Reserve Fund Ins. Co.* (1888) 28 Fed. 705; *Cravens* v. *New York Life Ins. Co.* (1898) 148 Mo. 583, 50 S. W. 519.
4. *Central Life Ins. Co.* v. *Roberts* (Ky., 1916) 176 S. W. 1139, citing *Kiern* v. *Dutchess County Mutual Ins. Co.*, (1896) 50 N. Y. 190, and *Globe Mutual Life Ins. Co.* v. *Wolff*, (1877) 95 U. S. 326.
5. (1911) 156 Mo. App. 281, 137 S. W. 907.

of all the facts, failed to tender a return of the money even after suit was filed. The court of appeals held that the retention of the premium was a waiver of the conditions in the application. The language of the opinion indicates that the defendant became liable by virtue of its ratification of the agent's act in collecting the note with knowledge of the applicant's death. The court says that the defendant "adopted the agent's acts as consummating a contract without a formal approval of the application on the issuance of a policy."

As regards the power of a soliciting agent of life insurance to waive conditions, or consummate contracts, the authorities are not uniform. The better rule seems to be that he is without such power.[6] Two recent cases have taken opposite views.[7] The Supreme Court of the United States has inclined to the one limiting the agent's authority.[8] The Missouri courts take the position that such an agent may not waive conditions. In *Bell* v. *Missouri State Life Ins. Co.*,[9] the agent delivered the policy with knowledge that the applicant was not in good health. The premium was sent to the defendant who learned in September that the condition had been violated. The offer to return the premium was not made until the following January. In affirming the judgment for the amount of the policy in the plaintiff's favor the court conceded the fact that the agent had not the power to waive the condition, and based its decision on the ground of a ratification of the agent's act by the defendant, evinced by its failure to tender return of the premium for a period of four months.

In an earlier case, *Norman* v. *United Commercial Travellers*,[10] the failure of the insurer to refund the premium was termed "conclusive evidence" of an acceptance where that failure had continued after he had gained knowledge of all the facts. But in that case the premium had been sent to the defendant's home office, and there retained. Two years after this decision the Springfield Court of Appeals in *Porter* v. *Loyal Americans*[11] did not deem the failure of the agent to return the premium "conclusive evidence" of an acceptance by the company where the company had expressly directed a return and where it at all times denied liability to the plaintiff.

If the agent in the principal case had no authority to complete the contract by retaining the premium note the company became liable, if at all, either by virtue of a ratification of his act, or because it is

6. See Richards, Insurance Law (3d ed.) p. 198.
7. The agent with authority to solicit, accept premiums, and deliver policies has authority to waive condition of delivery to insured while in good health. *McClelland* v. *Mutual Life Ins. Co.* (1916) 217 N. Y. 336, 111 N. E. 1062. *Contra, American Bankers Ins. Co.* v. *Thomas* (Ore., 1916) 154 Pac. 44.
8. *Northern Assurance Co.* v. *Grandview Bldg. Ass'n.* (1901) 183 U. S. 308.
9. (1912) 166 Mo. App. 390, 149 S. W. 33.
10. (1912) 163 Mo. App. 175, 145 S. W. 853.
11. (1914) 180 Mo. App. 538, 167 S. W. 578.

estopped from denying the existence of a contract thru his failure to tender return of the note.

The defendant did nothing which may be construed as an adoption of the agent's act. It did not adopt by retention as the note never came into its possession. Its express direction to the agent, also, negatives the idea of adoption.

The defendant does not seem to be estopped as it expressly took the position that no contract existed. The plaintiff had knowledge of this attitude at the outset. As stated in *Porter* v. *Loyal Americans*, at p. 546, "no one was lulled or lured into nonaction by the defendant's conduct." The plaintiff cannot be heard to say that she relied on the agent's failure to return the premium as leading her to believe the contract was in existence because the principal had previously expressly repudiated any contractual relation. Assuming even that the agent's knowledge of the non return of the premium was imputable to the defendant the situation as between it and the plaintiff remains unchanged. The defendant still denies the existence of a contract altho it knows that the agent, contrary to his orders, has failed to refund the premium. The defendant remains liable for the premium because it was received by its agent in an authorized capacity, but as the defendant has unequivocally informed the plaintiff that no contract has arisen the plaintiff may not rely on the agent's conduct, and urge that the defendant is estopped.[12]

The Missouri courts, it is submitted, have taken a desirable course in restricting the doctrine of implied waiver, or so-called estoppel, to cases in which the defendant's own conduct has been clear as to the recognition of a contract of insurance. From this point of view the principal case has been properly distinguished from *Rhodus* v. *Kansas City Life Ins. Co.*[13]

S. H. LIBERMAN

ASSAULT AND BATTERY—DEFENSE OF A THIRD PERSON—RIGHT OF A PARENT TO DEFEND A CHILD. *State* v. *McNail.*[1]—Two boys, A and B, engaged in a fight. A was the son of the defendant. C, the brother of B, a boy fifteen years old, interfered and attempted to hold A so that B could beat him. When the defendant saw the added peril in which his son was placed, he interfered and pushed C away and struck at him, for which interference defendant was convicted of assault and battery. There was substantial evidence that defendant used no more force than was reasonably necessary to protect his son. The court below declined to instruct the jury as to the right of the defendant to protect his son. The St. Louis Court of Appeals, in reversing the case, held that the "defendant had the same right to act in defense of his

12. *Conn. Mutual Life Ins. Co.* v. *Rudolph* (1876) 45 Tex. 454.
13. (1911) 156 Mo. App. 281, 137 S. W. 907.
1. (1916) 182 S. W. 1081.

son in the circumstances of the case that the son engaged in the affray had to act in defense of himself."

The question involved in this case is as to the existence of a right in the father to act in defense of his son. *State* v. *Foley*[2] lays down the rule flatly, that "whatever one may do for himself he may do for another." This statement does not accurately represent the law of Missouri for it fails to distinguish between the right of one to defend another standing in a family relation and the right to defend a stranger. Neither does it attempt to set apart those cases in which the interference of the third party is for the purpose of defending the one assailed from an apparent battery not involving a felonious attempt, from those cases in which the intervention of the third person is to prevent the commission of a felony, or to protect the assailed from what reasonably appears to be a felonious attack.

A stranger may intervene to preserve the peace where there is nothing but a simple assault and battery but he cannot actively defend either the assailant or the one assailed.[3] In cases where there is reasonable apprehension that a felony is about to be committed he may justify an intervention on the grounds that he did it in "lawfully keeping and preserving the peace."[4] Altho the right of the stranger to intervene is based on the same reason in each case, yet in the latter case, because of the serious nature of the attack, the law generally permits him to enter actively in the lawful defense of the one attacked in the same right that the one attacked has to defend himself and to the same extent. Substantially, then, a stranger in such cases has the same right to defend another that the other has to defend himself,[5] while in cases of assault and battery not involving a felonious attempt, he may intervene only to preserve the peace. There is some authority to the effect that a stranger in defending against a felonious attack must proceed with greater caution than one standing in a mutual family relation,[6] but the cases in Missouri do not seem to have followed this distinction.

One may defend husband,[7] wife,[8] parent,[9] child,[10] master, or servant,[11] with the same right that the other would have to defend

2. (1882) 12 Mo. App. 431.
3. *Commonwealth* v. *Cooley* (1856) 72 Mass. 350; *Spicer* v. *People* (1882) 11 Ill. App. 294; *Morrison* v. *Commonwealth* (1903) 24 Ky. Law Rep. 2493, 74 S. W. 277; Wharton, Crim. Law, § 825; Kelley, Crim. Law and Practice, § 585; 3 Blackstone, Commentaries *3.
4. Revised Statutes 1909, § 4451.
5. *State* v. *Foley* (1882) 12 Mo. App. 431; *State* v. *Totman* (1899) 80 Mo. App. 125; *Brouster* v. *Fox* (1906) 117 Mo. App. 711, 93 S. W. 318.
6. *State* v. *Harper* (1899) 149 Mo. 514, 51 S. W. 89; *Conner* v. *State* (1833) 4 Yerg. (Tenn.) 137; Kelley, Criminal Law and Practice, § 523.
7. *Cokely* v. *State* (1857) 4 Iowa 477.
8. *State* v. *Bullock* (1889) 91 N. C. 614.
9. *State* v. *Linney* (1873) 52 Mo. 40; *Commonwealth* v. *Malone* (1873) 114 Mass. 295; *State* v. *Herdina* (1878) 25 Minn. 161; *Smith* v. *State* (1911) 61 Tex. Crim. App. 349; *Cox* v. *State* (1911) 99 Ark. 90.
10. *State* v. *Harper* (1899) 149 Mo. 514, 51 S. W. 89; *State* v. *Hickam* (1888) 95 Mo. 322, 8 S. W. 252; *State* v. *Johnson* (1876) 75 N. C. 174.
11. *Orton* v. *State* (1853) 4 Greene (Iowa) 140.

himself regardless of whether the assault is felonious or not. The reasons given are that one owes a duty to defend those standing in such relations; that one has the same interest in defending them as he has in defending himself and that the basis of the active protection and defense of such is just as instinctive as in the case of self-preservation.

The right of one to defend another standing in a mutual relation is generally held to be no greater than the right that other has to defend himself.[12] In *State* v. *Melton*[13] the court held that an instruction to the effect that the defendant had no greater right to defend his brother than his brother had to defend himself was correct. In this case the evidence indicated that the defendant knew his brother was the aggressor. *State* v. *Harper*[14] holds that a son is justified in killing his father's aggressor if there is reasonable apprehension of an apparent felony, regardless of whether the father was the aggressor or had entered the fight voluntarily, provided that the father did not enter the affray with a felonious intent, and, further, that the son did not know who began the assault. *State* v. *Harper* may be distinguished from *State* v. *Melton* in that, in the latter case, there was substantial evidence that the defendant knew of his brother's fault; and that brothers do not stand in the category of mutual relations according to the common law. *State v. Harper* is difficult to justify and is opposed to the overwhelming weight of authority in other jurisdictions.

In *State* v. *Harper* the defendant interfered to prevent a felony or the infliction of serious bodily injury upon his father, and in *State* v. *Hickam*,[15] which was an indictment for assault with intent to kill, it was held that the defendant, coming upon the scene without knowing who was the aggressor, had the right to defend his mother, sister and servant against what was probably no more than a simple assault and battery. The defendant in *State* v. *McNail* interfered to protect his son from an impending battery. It appears from the facts stated that the prosecuting witness was the aggressor, and that the doctrine of *State* v. *Hickam* is not involved. The case is sound and is thoroughly in accord with previous decisions in Missouri and the great weight of authority elsewhere.

ROSCOE E. HARPER

PERPETUITIES—EFFECT OF REMOTENESS. *Riley* v. *Jaeger*.[1]—A testator devised all of his property to his eight children "intending each to have a full and equal share," and providing for a deduction

12. *State* v. *Brittain* (1889) 89 N. C. 481; *State* v. *Herdina* (1878) 25 Minn. 161; *Crowder* v. *State* (1881) 8 Lea (Tenn.) 669. See *State* v. *Melton* (1890) 102 Mo. 683, 15 S. W. 139; *Waddell* v. *State* (1877) 1 Tex Crim. App. 720.

13. 102 Mo. 683, 15 S. W. 139.

14. (1899) 149 Mo. 514, 51 S. W. 89. Accord, *State* v. *Linney* (1873) 52 Mo. 40; *State* v. *Hickam* (1888) 95 Mo. 322, 8 S. W. 252. See *State* v. *Turner* (1914) 246 Mo. 598, 152 S. W. 313.

15. (1888) 95 Mo. 322, 8 S. W. 252.

1. (1916) 189 S. W. 1168.

of advancements. He stipulated that real estate which had been advanced to four of the children should be held by them for life, without power of alienation, with remainder as to the share of each to his descendant. He further declared "that in event of the death of any of my said eight children without issue, or in case the direct descendants of any one of such children aforesaid shall all die, that in either such case the share of such child shall revert to the survivor of the eight direct legatees named and to the descendants of such as may be deceased—said shares when so reverting to be held by the several recipients subject to the above restriction and limitations, it being my desire that all my property remain with my children or their descendants and in no event become the property of strangers to my blood." He then provided that all advancements which had been made, or which should be made, should be held by his children "free from all debts contracted or to be contracted by them or either of them; in order the more fully to secure the same to them and their descendants."

In an action to quiet title, the circuit court held this will to be void because of the rule against perpetuities. The Supreme Court in affirming this judgment relies upon *Lockridge* v. *Mace*[2] and *Shepperd* v. *Fisher*.[3] The opinion is confined to a discussion of the remoteness of the attempted gift. No effort was made to avoid the application of the rule against perpetuities by a strained construction of the will. The decision therefore confirms the established rule that the construction of any limitation must be made wholly independently of the rule against remoteness.[4]

The court showed no disposition to inquire into the *extent* of the invalidity which was occasioned by a remoteness of a part of the testator's scheme of disposition. In *Lockridge* v. *Mace* a devise to the testator's wife for life, remainder to his children for life, remainder to his grandchildren for life, remainder to his great-grandchildren in fee, was held void because it was thought to constitute "but one disposition of the 'home farm,'" and the property passed as intestate property. In *Shepperd* v. *Fisher*, there was a devise to the testator's daughter Mary for life "and at her death to her bodily heirs, if the said bodily heirs have bodily issue, forever, but should the said bodily heirs of the said Mary die without issue" then to the testator's heirs; this devise was held to "constitute but one general disposition of all the lands and tenements of which the testator died seized," and the whole was therefore held to be void. The question at once arises whether the devise in *Riley* v. *Jaeger* can be said to have constituted but one disposition of the testator's property, so as to

2. (1891) 109 Mo. 162, 18 S. W. 1145.
3. (1907) 206 Mo. 208, 103 S. W. 989.
4. 3 Law Series, Missouri Bulletin, p. 14; Gray, Perpetuities, (3d ed.) § 629; *Dime Savings & Trust Co.* v. *Watson* (1912) 254 Ill. 419. But if two constructions are equally permissible, that should be preferred which avoids remoteness. *Allen* v. *Almy* (1913) 87 Conn. 517.

necessitate the failure of the devise *in toto* because of the remoteness of the gift over on the death of the children's descendants.

The writer has insisted that the rule of *Lockridge* v. *Mace* and *Shepperd* v. *Fisher*, invalidating as it does limitations of a testator's property which have in them no intrinsic taint, should be very narrowly limited.[5] These decisions go further than decisions in other states, where the tendency is to uphold as many of the limitations of a will as are not in themselves remote, unless it very clearly appears that the testator would have desired all of his gift to fail if part of it could not take effect. Thus *Lockridge* v. *Mace* has been spoken of as being "somewhat out of line with the other courts,"[6] and Professor Gray in commenting on the case said,[7] "It is confidently to be hoped that the learned court of Missouri will come into line with other courts." Even if the rule of *Lockridge* v. *Mace* and *Shepperd* v. *Fisher* has become a settled rule of the law of property so that under the doctrine of *stare decisis* it can not now be overthrown, still it is submitted that it is a rule which ought not to be extended, and for the application of which careful analysis should be made of every will containing remote limitations. If this position is sound, it is to be regretted that the Supreme Court in *Riley* v. *Jaeger* did not take the trouble to state that the remote limitations were so bound up with the other limitations that the testator had attempted a general scheme of disposition to which the peculiar Missouri rule as to the effect of remoteness would necessarily apply. BLAIR, J., in his opinion, merely stated that "this devise is clearly violative of the rule against perpetuities," and proceeded to affirm the holding of the court below that the will was void. One is led to ask whether in the future the existence of one void remote limitation in a will is going to be held to be sufficient to invalidate the whole will. Surely our law should not be developed toward such a position. Yet, if as in *Riley* v. *Jaeger*, wills are declared *wholly* void because of the application of the rule against perpetuities to some of the limitations, it will not be long until such an extreme position will be contended for.

The question then remains whether in *Riley* v. *Jaeger* the void limitations were so connected with other limitations as to constitute "a general plan of disposition" within the meaning of that expression as used in *Shepperd* v. *Fisher*. The testator gave his property outright to his eight children, and since there was nothing to limit their interests to life estates, they clearly took a fee simple. The ultimate remote limitation was made in *substitution* for the estate thus conferred on the testator's children, and it would have operated, if at all, by way of executory devise. In *Van Pretres* v. *Cole*,[8] there was a similar

5. See the writer's article on "The Rule Against Perpetuities in Missouri" 3 Law Series, Missouri Bulletin, pp. 22-28.
6. 20 L. R. A. 509.
7. Gray, Perpetuities (3d ed.) §249a.
8. (1880) 73 Mo. 39.

devise of a fee simple, with an executory devise over to a residuary legatee who was incapable of taking under the law of mortmain; the court held that the first devisee took the whole estate free from the void executory devise over. It is difficult to see why a devisee should not continue to hold even tho the executory devise be void for remoteness, inasmuch as the first devisee in such cases as *Van Pretres* v. *Cole* continues to hold in spite of the invalidity of the executory devise on account of the incapacity of the devisee. The situation is not one where the court should resort to a weighing of the various elements of the testator's intention, for the purpose of conjecturing whether he would have desired any of his intention to be validated if all can not be validated. But on the facts in *Riley* v. *Jaeger*, it is quite clear that the testator desired his property to go to his children, and there is nothing to indicate that he would have desired all of his devise to fail if he had been informed that the gift over on the children's descendants' death without children was void.

The devise in *Riley* v. *Jaeger* also contained void restrictions on alienation. Would it be contended that because of the invalidity of these provisions of restraint, the devise itself is void? It has always been held that the invalidity of a restraint on alienation simply frees the devise of the restraint. It might have been held in *Riley* v. *Jaeger* that the invalidity of the executory devise simply freed the estate given to the children of the executory devise.

As an authority, this case is to be distinguished on the ground that the result of the decision is not wholly at variance with the result which would have been reached if the court had held that the rule of *Lockridge* v. *Mace* and *Shepperd* v. *Fisher* did not apply. As the case was decided, the property passed as intestate property, and all of the testator's eight children therefore shared in it. If the court had refused to apply the rule of *Lockridge* v. *Mace* and *Shepperd* v. *Fisher*, all of the property would have passed to the same children, except that they would have taken by purchase instead of by descent and their portions would have been subject to the testator's provisions for the deduction of advancements. Furthermore as to certain advancements, certain of the children would have taken only life estates with remainders to their descendants. Undoubtedly the court would be influenced by the circumstances that the invalidity of the whole will would result in conferring the property upon persons other than those who are named in the will itself as devisees. Even if in such a case as *Riley* v. *Jaeger* there is a general plan of disposition which must fail *in toto* as a result of the invalidity of a part, it may be expected that the court would hesitate to find such a general plan if as a result the property would pass to persons in no wise named in the will itself.

It is to be hoped that when the question again arises the court will show some disposition to limit the rule of *Lockridge* v. *Mace*

and *Shepperd* v. *Fisher;* or failing that, at least that it will point out that there is a basis for the application of such a rule. At present it can not be safely assumed that any part of a will is valid, if any other part is void for remoteness.

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