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Notes on Recent Missouri Cases

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NOTES ON RECENT MISSOURI CASES

COURTS—POWER OF COURT TO ORDER INSPECTION OF MACHINERY ON DEFENDANT'S PREMISES. *State ex rel. American Manufacturing Co.* v. *Anderson*.[1]—The relator seeks to prohibit the respondent from enforcing compliance with an order entered by a circuit court in *Zasemowich* v. *American Manufacturing Co.*, directing that the defendant therein permit the plaintiff and his counsel to enter his premises for the purpose of taking photographs and measurements of certain machinery to be used as evidence in the case. The plaintiff was suing for damages for personal injuries alleged to have been caused by the relator's defective machinery. The Supreme Court quashed the preliminary writ of prohibition it had issued on the ground that the circuit court had the inherent power to make the order in question because that power existed at common law in the *nisi prius* judges and because it had not been abolished by the constitutional provisions forbidding unreasonable searches and seizures.

The early common law conception of a trial as a game in which the litigants were adversaries and the court referee would seem to account for the court's reluctance to compel one of the players to furnish

*In the Service of the Government. [1](1917) 194 S. W. 268.

evidence for his opponent.[2] The parties themselves, because of interest, were disqualified from testifying and, unlike the witnesses brought in by subpoena, might more readily be exempted from disclosing any relevant information. As a result of this attitude the ends of justice were defeated in many cases where one of the parties possessed books, documents, or other chattels, the inspection of which was necessary for the making of his opponent's case, and hence litigants out of possession had recourse to courts of equity where the chancellor, operating on the conscience of the party, compelled him to produce the documents or chattels for inspection.[3] Thus in *Kynaston* v. *East India Co.*,[4] the plaintiff having secured a decree establishing his right to certain tithe-rents the amount of which depended on the value of the defendant's premises, the chancellor issued an order directing the defendant to permit the plaintiff and two witnesses to enter for the purpose of appraising their value. The allowance of bills for discovery aimed at securing certain kinds of information known only to the other party became a common practice in the chancery courts.[5] In the United States, courts of equity have granted motions for the inspection of the defendant's premises or of chattels in his possession. In *Mutual Fire Insurance Co.* v. *Grierson*[6] the court made an order directing the exhumation of the body of respondent's husband for the purpose of inspection where the complainant contended that the deceased had committed suicide. Inspection of the defendant's mine was ordered in *Hensley* v. *Langton*.[7] The court refused to compel defendant to produce patterns for stove castings in *Re Sheppard*,[8] holding that it had not the power in the absence of statute. But as regards the power of a court of equity to make such an order the weight of authority seems opposed to the last mentioned case.[9]

In England, perhaps because of the certainty of relief in equity, there are few cases in which a common law court has been asked to order the production of evidence, other than that of a documentary nature, by one of the parties. The law courts did enter orders compelling a party to produce books and papers, or copies, for inspection, after the practice had grown up in chancery.[10] In an action for work and

[2]Wigmore, Evidence § 1862; *Anonymous Case* (1702) 3 Salk. 363.

[3] *Earl of Macclesfield* v. *Davis* (1814) 3 Ves. & B. 16.

[4](1819) 3 Swanst. 278.

[5]*Lewis* v. *Marsh* (1849) 8 Hare 97; *Atty. Gen.* v. *Chambers* (1849) 12 Beavan 159; *Bennit* v. *Whitehouse* (1860) 28 Beavan 119. In each of these three cases, the plaintiff was permitted to inspect the defendant's mine.

[6](1907) 156 Fed. 398.

[7](1899) 87 Fed. 178.

[8](1880) 3 Fed. 12. See also *Johnson Steel Street Rail Co.* v. *North Branch Steel Co.* (1891) 48 Fed. 191.

[9]Ruling Case Law 175; *Culbertson* v. *Iola Portland Cement Works* (1912) 87 Kan. 529; *Stockbridge Iron Co.* v. *Cone Iron Works* (1869) 102 Mass. 80; *Reynolds* v. *Burgess Sulphite Fibre Co.* (1901) 71 N. H. 332; *Thomas Iron Works v. Allentown Co.* (1877) 28 N. J. 77.

[10]*Stedman* v. *Arden* (1846) 15 M. and W. 487. For a history of the growth in the exercise of this power, see the note to *Lester* v. *People* 41 A. S. R. 388.

labor the trial court made an order directing the defendant to permit the plaintiff and his agents to come upon the premises for purposes of inspecting the work; on appeal, it was held that the court could not make the order because it could not attach the defendant for disobedience thereto.[11]

In *Hunter* v. *Allen*[12] a witness refused to produce a watch when requested to do so by counsel; upholding the refusal of the trial court to order him to do so, the Supreme Court of New York declared that neither a party nor a witness could be compelled to produce a chattel in court for inspection upon trial. In *Cook* v. *Lalance Grossjean Mfg. Co.*[13] the defendant had been ordered to permit plaintiff to inspect a machine. In an appeal from the order the court said: "Such an exercise of power would be an usurpation of authority to search and inspect the private premises of a citizen in a manner and purpose untolerated by our law." At present a statute[14] confers upon the New York courts the power denounced as a "usurpation of authority."

In Michigan the power of the court to permit an invasion of the defendant's premises for the purpose of securing evidence has been denied.[15] The defendant in *Groundwater* v. *Washington*[16] contended that the plaintiff's injury was caused by a faulty wagon seat. An instruction which stated, *inter alia,* that plaintiff did not have to produce the seat for inspection in court unless he wished, was held erroneous. That exhumation of a dead body might be ordered if thought necessary by the court, is decided in an early Mississippi case.[17] A *dictum* in *Sullivan* v. *Moulin*[18] seems to indicate that Iowa recognizes the existence of the courts' power to order an inspection of material on defendant's premises. The right of the plaintiff in a personal injury suit to compel the defendant to give him an opportunity of inspecting the machinery alleged to have caused the injuries was upheld in *Clark* v *Tulare Lake & Dredging Co.*[19] by the California Court of Appeals. The court's decision may have been influenced by a statute[20] which clothed it with power over every person connected with a judicial proceeding before it.

There are apparently no Missouri decisions directly in point. But an analogy may be found in the question which involves the trial court's power to compel the plaintiff in a personal injury suit to submit to a

[11]*Turquand* v. *Guardians of the Strand Union* (1340) 8 Dowling 201.

[12](1860) 95 Barbour 42.

[13](1883) 3 N. Y. 332.

[14]Laws of New York, 1913, c. 86, p. 152.

[15]*Martin* v. *Eliot* (1890) 106 Mich. 130, 63 N. W. 995 (power to order inspection of horse on defendant's premises); *Newberry* v. *Carpenter,* (1895) 107 Mich. 567 (power to enter and seize boiler to be used as evidence in criminal prosecution against a third party, defendant's agent).

[16](1896) 92 Wis. 56.

[17]*Granger's Life Insurance Co.* v. *Brown* (1879) 57 Miss. 308.

[18](1901) 113 Iowa 76.

[19](1910) 14 Cal. App. 414, 112 Pac. 564.

[20]Cal. Code of Civil Procedure, Sec. 128.

physical examination. A long line of cases has affirmed the existence of that power, although it was at one time denied.[21] The Supreme Court of the United States in the leading case of *Botsford* v. *Union Pacific*[22] decided that the plaintiff could not be ordered to submit to a physical examination. Mr. Justice Brewer wrote a vigorous dissenting opinion in which Mr. Justice Brown concurred. The slight weight of authority, however, seems to be with the Missouri view.[23] If our courts feel justified in compelling a litigant to submit his person to an examination in the interests of justice, it would seem to follow that an invasion of a litigant's property for the same reason is justifiable.

With this in view, the Supreme Court in the principal case suggests as the basis for the decision an implied agreement by the defendant, as an employer, to open to the inspection of the plaintiff, as an injured employee, the instrument or condition causing the injury, the plaintiff being under a corresponding obligation to permit an examination of his person at the defendant's request. But in asserting the power to compel an examination of the plaintiff's person, the courts have not confined the doctrine to cases in which the plaintiff was suing his employer for personal injuries.[24] Such a restriction, it is submitted, would be an unfortunate one; nor, need it be made if we look beyond the fiction of an implied agreement for the basis of the defendant's duty. Mr. Wigmore points out the existence of a duty owed by every man to give the public his evidence; he takes the position that since the individual is under a duty to disclose facts within his knowledge in furtherance of justice, no distinction can be made between the "mental impressions preserved in his brain—and the chattels and premises within his control."[25] Legislation making parties compellable to testify has been almost universal, indicating a departure from the common law conception of litigation. The statutory provisions making it possible for one of the parties to use his adversary as a witness seems a recognition, if not a creation, of a duty upon parties to furnish evidence, as well as upon other individuals who were always subject to subpoena simply because they possessed some relevant information. No reason is seen for the exis-

[21]*Lloyd* v. *Hannibal & St. Joseph Ry.* (1873) 53 Mo. 509 (denying the power); *Shepard* v. *Mo. Pacific Ry. Co.* (1885) 85 Mo. 629; *Sidekum* v. *Wabash, St. Louis & Pacific Ry. Co.* (1887) 93 Mo. 400; *Owens* v. *Kansas City, St. Joseph &Council Bluffs R. R. Co.* (1888) 95 Mo. 169; *Fullerton* v. *Fordyce* (1893) Mo. 1; *Haynes* v. *Trenton* (1894) 123 Mo. 326; *Shome* v. *Lambert* (1909) 142 Mo. App. 567, 121 S. W. 799.

[22](1890) 141 U. S. 250.

[23]*Alabama G. S. Ry. Co.* v. *Hill* (1890) 90 Ala. 71; *Johnston* v. *So. Pacific Ry. Co.* (1907) 150 Cal. 536; *Schroeder* v. *C. R. I. & P. Ry. Co.* (1877) 47 Ia. 375; *Atchison T. & S. F. Ry. Co.* v. *Thul* (1883) 29 Kan. 333; *Miami & Montgomery Turnpike Co.* v. *Bailey* (1881) 37 Ohio St. 104, *accord*. *Parker* v. *Enslow* (1882) 102 Ill. 272; *Penn. Co.* v. *Newmeyer* (1891) 129 Ind. 401 (but see *Terre Haute & Ind. R.R. Co.* v. *Brunker* (1890) 128 Ind. 542); *Stock* v. *N. Y., N. H. & H. R. Co.* (1900) 177 Mass. 155; *McQuegan* v. *Delaware, N. & W. R. R. Co.* (1891) 129 N. Y. 50, *contra*.

[24]*Haynes* v. *Trenton* (1894) 123 Mo. 326.

[25]Wigmore, Evidence § 2194.

tence of a privilege by virtue of which a party might decline to furnish this particular kind of evidence.[26] He may rely upon the constitutional guaranty against unreasonable searches and seizures if the order in a particular case is arbitrary and unreasonable.

The objection has been urged that the court has no means of enforcing its order should the defendant fail to comply. But once the power of the court to make the order be conceded this objection vanishes, for disobedience to an order properly made by a court is contempt, and may be punished by fine or imprisonment.[27] In personal injury cases the courts have asserted their power to refuse to permit plaintiff to present his evidence, or their power to dismiss his suit.[28] A defendant who disobeys the order might be precluded from going on with his defense.

Since the law is well established in this state that the trial court may, in its discretion, order a party to submit to a physical examination, the result in the principal case, it is submitted as consistent with our present attitude toward litigation. But since the making of the orders in the physical examination cases is not based upon any relationship of master and servant, it would seem unnecessary to limit the power to make the order approved in *State* v. *Anderson* to cases where that relationship exists.

S. H. LIBERMAN

ESTATES—CONSTRUCTION OF DEEDS—"ASSIGNS" AS A WORD OF LIMITATION. *Tennison* v. *Walker*.[1]—Land was conveyed by deed to A "and her bodily heirs and assigns," habendum to A "and unto their heirs and assigns forever," and the grantor covenanted to warrant and defend the title to A and "her heirs and assigns forever." A conveyed the land to B, and on A's death ejectment was brought by her bodily heirs who claimed under the deed as the owner of the statutory remainder created by the statute on estates tail. The Supreme Court reversed a judgment for the plaintiffs and held that A took a fee simple which she had conveyed to B.

While the result of this decision may be unobjectionable, certain features of the opinion of WOODSON, J., are very disappointing. First, a distinction was drawn between deeds of gift and deeds executed to purchasers. It seems unnecessary to clog our law of real property with any such distinction. The security of titles demands a large measure of certainty in the meaning of words used in a conveyance. Purchasers of land ought to be able to rely on the words used in deeds without too much variance according to the circumstances of each conveyance. It is difficult therefore to agree with Judge WOODSON'S statement that "where the grantee purchases property and it is not a gift by the grantor, it will not be presumed the latter intended to make the same circum-

[26]Wigmore, Evidence § 2221.
[27]*Shroeder* v. *C. R. I. & P. Ry. Co.* (1877) 47 Ia. 375, 381.
[28]*Miami & Montgomery Turnpike Co.* v. *Bailey* (1881) 37 Ohio St. 104.
[1](1916) 190 S. W. 9.

scribed limitations against the former's right of alienating the property as if the property had been a gift by the grantor to the grantee." It is submitted that such a rule will only add to the existing uncertainty which necessitates the opinion of an appellate court on deeds which ought to be perfectly clear.

Second, the court relied upon the use of the word "assigns" in the granting clause, and held that on account of it the granting clause was "indefinite, uncertain and ambiguous." In the grant of a fee simple, which is frequently phrased *to A and his heirs and assigns*, one word *assigns* is a meaningless part of a formula. In feudal days it probably had some significance,[2] but since all lands were made alienable by the statute of Quia Emptores, the phrase has performed no office whatever. Hence it was possible for Joshua Williams to say that the words *"and assigns forever* had no conveyancing virtue at all; but were merely declaratory of that power of alienation which the purchaser would have possessed without them."[3] In *Bean* v. *Kenmuir*[4] the court refused to give to the word *assigns* the effect of adding a power of disposition. The same result was reached in *Chew* v. *Kellar*.[5] The addition of the word *assigns* is purely formal, and it ought to be treated as quite as meaningless as the frequent expression *to their behoof*. It is unfortunate that in *Gannon* v. *Albright*[6] and in *Gannon* v. *Pauk*[7] the word *assigns* was emphasized; in both of those cases the court was dealing with a will, and even if the word is to be given some importance in wills, it deserves no importance in deeds where the formula is generally employed. Nor should the effect of the word *assigns* be different when it is added to words of limitation of a fee tail. In any case it is only formulary, and should for practical purposes be omitted. It seems unfortunate, therefore, that WOODSON, J., should have said in *Tennison* v. *Walker* that the use of the word *assigns,* "throws some doubt on the meaning of the words 'and her bodily heirs.'" This merely opens up another avenue for uncertainty in deeds, and gives another ground for litigation which ought to be avoided. No suggestion had been made in *Chew* v. *Kellar* that a conveyance to a grantee and "her bodily heirs and assigns" was rendered equivocal by the use of the words *assigns*. Careful conveyancers have in the past employed the word *assigns* in a purely formal way. In the future they should omit it altogether.

Third, in construing the deed in *Tennison* v. *Walker,* WOODSON, J., relied upon facts which tended to show that the grantee had acted as tho she believed that she had received a fee simple. The grantee had several times encumbered the land with deeds of trust, and had by her warranty deed attempted to "convey all of the title to the land." It is an alarm-

[2]Leake, Real Property (2d ed.) p. 23 n.; *Brookman* v. *Smith* (1871) L. R. 6 Ex. 291, 306.

[3]Williams, Real Property (22d ed.) p. 149, cited in *Brookman* v. *Smith* (1871) L. R. 6 Ex. 291, 306. See also Challis, Real Property (3d ed.) p. 221.

[4](1885) 86 Mo. 666, 671. Cf. *Davidson* v. *Manson* (1898) 146 Mo. 608, 48 S. W. 635.

[5](1902) 171 Mo. 215, 225, 71 S. W. 172.

[6](1904) 183 Mo. 238, 249, 81 S. W. 1162.

[7](1906) 200 Mo. 75, 88, 98 S. W. 471.

ing proposition that the construction of a deed should in any measure depend upon an act of the grantee after its execution where such act is in no sense an admission against interest. What more attractive temptation could be held out to dishonest persons who desire to enlarge their ownership! The question in the principal case was whether the grantee took a fee simple, or a life estate. To determine this question with any reference to the grantee's acts subsequent to the conveyance is to permit the grantee to lift herself by her own boot straps. Such a rule would necessitate lawyers' advising their clients to deal with property as tho they had full title, lest it be concluded from their actions that they have less than they are entitled to. If the court will permit grantees' actions to enlarge their rights, it may be incumbent upon grantees to so act lest their rights be diminished. In *Scott* v. *Scott*,[8] the question was whether a deed had been delivered, and the conduct of the alleged grantee as well as that of the alleged grantor showed that neither understood that their prior acts amounted to a delivery. Such conduct in tantamount to an admission against interest and had some probative value. But this cannot be said of the grantee's conduct in *Tennison* v. *Walker*. The statute of frauds was enacted to insure that all efficacious parts of a conveyance would be contained in the writing itself. To permit the later acts of the grantee to enlarge the effect of words used in a deed is to jeopardize the position of every purchaser who relies on the record.

Has not the time come when the court should consider more carefully the social interest in the security of titles? That security demands certainty above all else. Land will become unsalable unless the courts stick strictly to rules of law which will enable lawyers to pass on titles readily. But if under the guise of effectuating what is thought to have been the probable intention of the parties the Supreme Court continues to enlarge the realm of loose construction, it will soon have become impossible for any lawyer to advise a client with reference to the validity of a title without having the Supreme Court itself declare what was the intention of the parties under all of the circumstances. It ought to be recognized that the task of ascertaining unexpressed intentions is usually guesswork. Formality in conveyances has its proper place, even in an age when informality is religion.

In the principal case, the difference between the granting clause on the one hand and the habendum and warranty clauses on the other hand, is a sufficient justification of the result which the court reached: for since the adoption of the rule that all parts of an instrument are to be considered in its construction, there is no reason for assigning arbitrary weight to either the granting or the habendum clause. In Lord Coke's day if the grant in the premises were to A and the heirs of his body, habendum to A and his heirs forever, A would have taken a fee

[8](1888) 95 Mo. 300, 81 S. W. 161. Cf. *Blumenthal* v. *Blumenthal* (1913) 251 Mo. 693, 706, 158 S. W. 648; *Warne* v. *Sorge* (1914) 258 Mo. 162, 169, 167 S. W. 967.

tail and a fee simple expectant.[9] In *Corbin* v. *Healey*,[10] it was held that A took a fee tail, and apparently a fee simple expectant thereon. But under the Missouri rule, the deed in *Tennison* v. *Walker*, taken as a whole may very properly be said to have indicated an intention to pass a fee simple. It is to be regretted that the court put reliance on such artificial rules in reaching this result.

MANLEY O. HUDSON.

LARCENY—CONSTRUCTIVE ASPORTATION—CONSENT OF OWNER. *State* v. *Loeb*.[1]—Some person having access to the office of a manufacturing company prepared a false order for goods, to be shipped to his confederate. To this order he forged the initials of the sales manager and inserted it among the valid orders of the company, so that in the due course of business the order was filled by employees of the company who acted innocently. After the goods had been baled, billed, and labeled, the company discovered the fraud, but in order to apprehend the fraudulent consignee, permitted the shipment to be made. The defendants were accused of preparing the false order and were convicted of larceny but on appeal the Supreme Court found that there was not sufficient evidence to connect the defendants with the shipment. In considering whether the facts disclosed such a trespass as would constitute larceny, the court said that even "if it be conceded that the false billing and labeling of the goods have been sufficiently shown to constitute a constructive asportation, we find that the owner, upon discovery of this fraud, directed that the goods be shipped as labeled, thereby sanctioning the theretofore unlawful taking."

To constitute larceny there must be a taking and a carrying away of property[2] without the consent of the owner.[3] The property must come into the possession of the taker, but such possession need be but for an instant,[4] and the removal need extend no further than a mere change of place or position of the entire subject matter of the larceny.[5] Thus it was held in *State* v. *Hecox*,[6] that taking wheat from its place in the granary, placing it in sacks and tying the sacks constituted a sufficient asportation. The act of asportation may be accomplished by stratagem or fraud through the agency of an innocent party,[7] and it is not essential that the property actually come into the hands of the thief.[8] In

[9]Coke on Littleton, 21a.

[10](1838) 20 Pickering 514.

[1](1916) 190 S. W. 299.

[2]2 Bishop, Crim. Law (8th ed.) § 794.

[3]2 Wharton, Crim. Law (11th ed.) § 1152; *State* v. *Hayes* (1891) 105 Mo. 76, 16 S. W. 514; *State* v. *Storts* (1897) 138 Mo. 127, 39 S. W. 843; *State* v. *Waller* (1903) 174 Mo. 518, 74 S. W. 842.

[4]*State* v. *Williams* (1906) 199 Mo. 137, 97 S. W. 562.

[5]*State* v. *Gazell* (1860) 30 Mo. 92 (leading a horse a short distance in owner's lot); *State* v. *Higgins* (1885) 88 Mo. 354 (money falling to floor when till was removed); *State* v. *Taylor* (1896) 136 Mo. 66, 67, 67 S. W. 907. 620.

[6]*Rex* v. *Pitman* (1826) 2 Car. & P. 423; *State* v. *Hunt* (1877) 45 Iowa 673; *Cummings* v. *Commonwealth* (1883) 5 Ky. L. Rep 200; *Smith* v. *State* (1912) 74 S. E. 1093 (Ga.).

Commonwealth v. *Barry*,[9] the defendant changed a check upon a trunk which stood in the baggage room of a depot so that it was transported by the railroad company to an accomplice of the defendant. This was held equivalent to a taking and carrying away by the defendant. In the principal case, the boxing up of the goods sufficient to satisfy the requirement of a taking and a carrying away, and would constitute larceny unless the owner's consent nullified the crime.[10]

No cases have been found which decide whether or not a voluntary handing over of property by the owner, who has regained possession of it after there has been a complete asportation without his consent, will operate so as to make the taking lawful *ab initio*, or to prevent a "theretofore unlawful taking" from being larceny.[11] A consideration of the doctrine of consent in criminal law, however, leads to the conclusion that this position is untenable. The consent of an individual may prevent certain acts from being crimes, as in *State* v. *Waghalter*,[12] where, in pursuance of a plan of a railroad company to entrap one suspected of receiving goods stolen from the company, an agent of the company, took a box of goods from the company and delivered it to the defendant with its consent, it was held that there was no larceny because the owner had consented to the asportation. But if an individual once does an act which the law forbids, a later consent or condonation by the person injured can have no effect upon the criminal liability of the offender.[13] In *State* v. *Welch*,[14] it was held that when the offence of rape is complete by penetration no subsequent consent by the woman will avail the party who committed the crime. A complete crime is an injury to the public, to be redressed as such, and if all the elements of a crime are present the demands of public interest cannot be affected by the consent of any individual.[15]

In the principal case, if no larceny had been committed up to the time the goods were shipped, the voluntary delivery over of the property by the owner was a consent to the taking which would operate to prevent what otherwise would have been larceny.[16] But if there had been a complete asportation prior to this time, it is difficult to substantiate the view that the subsequent regaining of possession and voluntary delivery over of the goods operates to nullify a crime already committed. The quotation from the opinion of the court seems to indicate that the

[9](1898) 125 Mass. 390.

[10]*State* v. *Chambers* (1883) 22 W. Va. 779; *Harrison* v. *People* (1872) 50 N. Y. 518; *Adams* v. *Commonwealth* (1913) 153 Ky. 88.

[11]In *State* v. *Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, cited by the court in the principal case, the consent was given *prior* to the asportation.

[12](1903) 177 Mo. 676, 76 S. W. 1028.

[13]*Fleener* v. *State* (1893) 58 Ark. 98; *State* v. *Tull* (1893) 119 Mo. 421, 24 S. W. 1010; *Truslow* v. *State* (1895) 95 Tenn. 189; *Thalheim* v. *State* (1896) 38 Fla. 169; *Williams* v. *State* (1898) 105 Ga. 606; *State* v. *Merkel* (1905) 189 Mo. 315, 87 S. W. 1186.

[14](1905) 191 Mo. 189, 89 S. W. 945. See the note to *Smith* v. *State* (1861) 12 Ohio St. 466, in 80 Amer. Dec. 367.

[15]See Consent in Criminal Law, 8 Harv. Law Rev. 323.

[16]*Topolewski* v. *State* (1906) 130 Wis. 244, 7 L. R. A. (N. S.) 756.

court neglected this sequence in reaching its conclusion, and the contrary result may well have been made to depend on the precise time of completion of the asportation.

J. C. BOUR.

MASTER AND SERVANT—LIABILITY OF RAILROAD FOR ACT OF TICKET AGENT—FALSE IMPRISONMENT. *Sacks* v. *St. Louis & San Francisco R. R. Co.*[1]—A ticket agent employed by a railroad company sold the plaintiff a ticket, receiving in payment a bill of somewhat unusual appearance. The plaintiff returned to his hotel where he was shortly afterwards visited by the ticket agent accompanied by two policemen. The agent said something to the officers, then alone approached the plaintiff and accused him of having given a counterfeit bill. The plaintiff asserted his innocence but gave the agent another bill in exchange for the one said to have been counterfeit. The agent returned to the officers, talked with them for a short time, and then left. The officers then charged the plaintiff with having passed counterfeit money and placed him under arrest. The plaintiff was later discharged when the bill was found to be genuine. He then brought suit against the railroad company for false imprisonment. The Supreme Court held that the defendant was not liable on the ground that since the money had been returned before the arrest, the company's interest in the matter had ceased and the agent was acting without the scope of his authority after that time.

Where no agency is involved, it is not necessary, for liability for false imprisonment to attach, that the defendant have *requested* the officer to arrest the plaintiff. It is sufficient that the defendant by his advice, suggestion or groundless information was the moving cause of the arrest.[2] Thus in *Schmidt* v. *New Orlean R. R. Co.*,[3] a street car conductor stated to an officer, "There is a pickpocket on the car", and pointed out the suspect. The arrest by the policeman was held to be the natural consequence of the conductor's acts. And it was held in *Bright* v. *Patton*[4] that if the wrongful arrest was made at the instance, suggestion or request of the defendant, or if he counseled, advised or encouraged the arrest he would be liable for the false imprisonment. In *Warner* v. *Riddiford*,[5] the defendant went to the plaintiff's house to collect some money, taking with him two police officers. He demanded the money in their presence and the plaintiff, believing he was entitled to more time, refused payment. The defendant did not direct the officers to take the plaintiff into custody, but it was held that the defendant's conduct in bringing officers and making the demands in their presence

[1](1917) 192 S. W. 418.

[2]*Monson* v. *Rouse* (1900) 86 Mo. App. 97; *McMorris* v. *Howell* (1903) 89 App. Div. 272 (N. Y.); *McAleer* v. *Good* (1907) 216 Pa. 473; *Tenney* v. *Harney* (1891) 63 Vt. 520.

[3](1906) 40 S. 714, 7 L. R. A. (N. S.) 162 (La.).

[4](1887) 5 Mackey (D. C.) 534.

[5]4 C. B. N. S. 180, 202.

was such as to make the defendant the moving cause of the arrest. In these cases the defendant's actual participation in the arrest ceased when the complaint had been registered and before the actual imprisonment was effected. But the defendant had set the forces of the law in motion and was held liable for the ensuing arrest upon the ground that the imprisonment was the natural consequence of his acts. And, upon the same principle, it is recognized that a defendant may be liable though he is not actually present at the time the arrest is made. In *Floyd* v. *State*,[6] where the defendant caused a false process to be issued against the plaintiff, the court said: "It is true the defendant was not actually present when the arrest was made, yet as he first put the law in motion and was mainly instrumental in causing the act to be done, we consider him legally liable for the consequences."

The liability of a railroad company for the acts of its servants depends, of course, upon whether the acts relied upon were done in the course of the servant's employment. And what this course of employment is may be implied from the relationship or from the duties expressly devolving upon the servant,[7] as where one employed by a railroad company to watch for trespassers, while keeping watch shoots an innocent individual, the company is liable.[8] So if a false arrest is procured by the servant acting in the course of his employment, the railroad is liable.[9] In *Lynch* v. *Metropolitan Elevator Rd. Co.*[10] a railroad company was held liable where a gatekeeper, who had been instructed to allow no one without a ticket to pass through a certain gate, arrested a passenger who had lost his ticket. And in *Goff* v. *Great Northern Ry. Co.*,[11] an agent had the plaintiff arrested for failure to pay fare in accordance with a railroad act and although the agent had no express authority to cause an arrest, the company was held liable. The companies must expect that some exigencies will naturally arise which demand prompt decision and action on the part of its representatives, and it must be inferred that authority has been given their ticket agents to make or authorize arrests in certain exigencies, which often arise. There is always implied authority to protect or recover railroad property, and arrests made for the accomplishment of these purposes are within the scope of

[6](1851) 12 Ark. 43, 49.

[7]*Robinson & Co.* v. *Green* (1906) 148 Ala. 434.

[8]*Haehl* v. *Wabash R. R. Co.* (1893) 119 Mo. 325, 24 S. W. 737; *Meade* v. *C., R. I., & P. R. Co.* (1896) 68 Mo. App. 92; *American Express Co.* v. *Patterson* (1881) 73 Ind. 430; *Evansville & Terre Haute R. Co.* v. *McKee* (1884) 99 Ind. 519.

[9]*Wheeler Mfg. Co.* v. *Boyce* (1887) 36 Kans. 350; *Shea* v. *Manhattan Rd. Co.* (1889) 7 N. Y. Supp. 497; *Galveston, etc. R. C.* v. *Donahue* (1882) 56 Tex. 162. Story, Agency (9th ed.) § 452; Cooley, Torts (3rd ed.) p. 319.

[10](1882) 90 N. Y. 77. But if the individual has already passed through the gate he is no longer a passenger and the railroad company is not liable for the arrest. *Corwin* v. *Long Island R. Co.* (1885) 2 N. Y. City Ct. 106.

[11](1861) 3 El. & El. 672.

the agent's authority.[12] In *Palmeri* v. *Manhattan Rd. Co.*,[13] the ticket agent received a coin from the plaintiff, and later believing it counterfeit, he followed the plaintiff to the platform, demanded other money of her, and detained her for a time. It was held that the railroad company was liable because the agent was acting for his employer in an endeavor to recover its property. On the other hand, in *Mulligan* v. *N. Y. Rd.*,[14] where the agent accepted the money believing it was counterfeit, but accepted it for the purpose of ensnaring the plaintiff, the arrest was not for the protection of the defendant's property.

It is this distinction upon which the court relied in *Sacks* v. *St. Louis & San Francisco R. R. Co.*, where the court concluded that the company could not be liable for an arrest accomplished after its interest had ceased. But it is submitted that if the arrest was instigated during the period of the defendant's interest, the company should be held liable regardless of the defendant's interest at the time of the resulting imprisonment. Since one is liable for any false imprisonment procured by his agent while his interest continues, and since the agent's participation in the arrest may consist only in instigating the arrest, it would seem that the defendant is liable for a false imprisonment *instigated* by his agent during the continuance of the defendant's interest. Whether the arrest caused by the agent occurred after the conmpany's interest had ceased is immaterial. In fixing liability the important element should be the interest of the defendant at the time of the original instigation of the arrest rather than at the time of the arrest itself, and the principal case should have turned upon the time at which the defendant's agent set in motion the forces of the law which resulted in the arrest of the plaintiff. If he set these forces in motion after the money had been returned, and the company's interest had accordingly ceased, the company should not be held. If, however, the proximate cause of the arrest was conduct or communications of the agent to or in the presence of the officers at any time prior to the recovery of the money or while securing the return of the money, then the company should be liable, as the arrest was caused by the agent while acting in the course of employment.

In the principal case, the time at which the agent started the process of causation which resulted in the arrest is not clear. It is not shown what the agent told the officers when he took them to the plaintiff's hotel or when he left them just before he approached the plaintiff, but he probably expressed a belief in the plaintiff's guilt, and in the process of recovering the money he formally accused the plaintiff within the hearing of the officers whom he had brought there. In the light of these facts, it is reasonable to suppose that he was setting in motion the forces of the law as truly as though he had said, "Officer, there is a counterfeiter!" The precise time at which the agent set these forces in

[12]*Palmeri* v. *Manhattan R. Co.* (1892) 133 N. Y. 261; *Cameron* v. *Pacific Exp. Co.* (1892) 48 Mo. App. 99; *Davis* v. *C., R. I., & P. R. Co.* (1916) 192 Mo. App. 419, 182 S. W. 826. Wood, Law of Master and Servant, (2nd ed.) § 307.

[13](1892) 133 N. Y. 261.

[14](1892) 129 N. Y. 506.

motion is a question of fact, and it is submitted that to have arrived at a proper solution of the case the court should have addressed itself to the alternative possibilities involved.

P. G. KOONTZ.

PUBLIC SERVICE COMPANIES—MUNICIPAL CORPORATIONS—PRIVATE CONTRACT CONFLICTING WITH PUBLIC SERVICE DUTY. *State ex rel. St. Joseph Water Co.* v. *Eastin*.[1]—A public service company, the St. Joseph Water Co., constructed at considerable expense a private water main to a State hospital, then a short distance outside the city limits, and contracted to furnish the hospital with water through this new pipe and another already in service, for ten years at ten cents a thousand gallons. The rate for similar service within the city was fixed by the franchise of the company at six cents a thousand gallons. Before the expiration of the period fixed by the contract, the limits of the City of St. Joseph were extended so as to include the hospital grounds, and other consumers in the annexed district were supplied with water from the old main, apparently at six cents a thousand gallons. The managers of the hospital refused to pay more than the six-cent rate and the water company instituted mandamus proceedings to compel payment of the balance alleged to be due under the contract. The Supreme Court held that the contract had not been abrogated by the extension of the limits of the city, and that the hospital must pay the contract rate instead of the lower rate fixed by the charter of the company for consumers within the city limits. That part of the decision of *State ex rel. St. Joseph Water Co.* v. *Geiger*[2] relating to this point is expressly overruled by this decision.

The court admitted that as a general principle "in all ordinary matters and things the ordinances of an annexing town or city at once and automatically extend to and over the annexed territory",[3] but drew a distinction between the situation in which an incorporated municipality is annexed and a franchise agreement exists between the company and the municipal corporation, and the situation in which the territory so annexed is unincorporated and there exists a series of contracts between the company and private consumers. As to cases of the first type in which the territory annexed is incorporated and the public utility has "franchise contracts" as to rates in both the annexing and annexed municipality, the court said "there existed the power to regulate public service rates as to each of such existing contracts in both the annexed and annexing municipality. So, the franchise contracts in each municipality, having been made with imputed reference to the power in each municipality to regulate rates, it follows that no very serious objection could be urged against applying the rate of the annexing rather than that of the annexed municipality." As illustrative of this first class, the court

[1](1917) 192 S. W. 1006.
[2](1912) 246 Mo. 74, 154 S. W. 486. Commented upon in 1 Law Series, Missouri Bulletin, p. 39.
[3]*St. Louis Gaslight Co.* v. *St. Louis* (1870) 46 Mo. 121.

cited several cases in which water,[4] street-railway,[5] railroad,[6] telephone,[7] etc., rates in force in the annexing territory were held to apply to the annexed territory notwithstanding franchise contracts permitting higher rates in the territory annexed. In distinguishing the situation of the second type—the court was of the opinion that there could be only private contracts for service, each of which would be made for a valuable consideration with a private consumer, who would not have reserved to himself any right of regulation within the contract period, and who would have in his favor no statute retaining for him any power of rate regulation. This distinction is drawn, of course, not between incorporated municipalities and unincorporated territory as such, but between the type of agreement generally entered into by a public service company with an incorporated municipality and the type of agreement generally entered into by such a company with private individuals living in any unincorporated territory.

Denver v. *Denver Union Water Co.*,[8] cited in support of this disinction does not seem to bear out the contention of the court, for in that case it seems that the territory annexed consisted of "independent towns or cities" with each of which the water company had franchise contracts, and not, as appears in the syllabus, unincorporated territory in which the company had "private" contracts with individual consumers. So, while this decision is *contra* to those cited by the court, in holding that the rates of the annexing city will not apply so as to nullify pre-existing franchise contracts for service in the annexed territory, nevertheless it does not seem to support the court's contention for a different rule where unincorporated territory is annexed from that where incorporated territory is annexed.

On the other hand, there is at least one case directly opposed to the proposition that in the absence of a reservation of a right of regulation or a statute retaining to such consumer that power consumers outside of the municipality granting the franchise have no right to a reasonable rate, if the water company chooses to go without the confines of the city to serve them. In *Brown* v. *Lawrence County Water Co.*,[9] it was held to be "the duty to the state, a part of whose functions these [public service companies] are incorporated to perform, not to discriminate unjustly against citizens of the state whether within or without the municipal limits." In that case it was directed that the rates for private consumers in the vicinity and for the inhabitants of an unincorporated village, which could not grant a franchise, be lowered to a point equal to those in effect in the municipality granting the franchise to the public service company.

[4]*Des Moines* v. *Des Moines Waterworks Co.* (1895) 95 Iowa 348.

[5]*Peterson* v. *Tacoma R. & P. Co.* (1910) 60 Wash. 406.

[6]*Indiana R. Co.* v. *Hoffman* (1903) 161 Ind. 593.

[7]*People* v. *Chicago Telephone Co.* (1905) 220 Ill. 238.

[8](1907) 41 Colo. 77.

[9](1914) 1 Mo. P. C. R. 355.

As an element of injustice to the water company should the franchise rate be enforced the court mentioned this: the contract between the water company and the city provided that for each five hundred feet of main laid as directed by the city, apart from any private contract, the company should install a fire hydrant for which the city would pay an annual rental, and, that therefore it would be unfair in that the expenses of the new pipe line to the hospital would be offset by neither contract rate from the hospital nor hydrant rentals from the city. However, even under the doctrine laid down by the court to the effect that the ordinance changing the city limits would not be wholly void but would be inoperative in so far as it abrogated the existing contract with the hospital, there is nothing, apparently, to prevent the installation of fire hydrants which would yield an annual rental, since the installation of such would not abrogate the contract with the hospital to furnish a supply of water at a given rate. Certainly they could be installed and thus bring in rentals were the contract with the hospital to be entirely abrogated.

Under the rule applied in the instant case to a situation where unincorporated territory is brought within the city limits, other private consumers in relatively the same position as the hospital, but who happened to have made no contracts, were entitled to receive, at a rate forty per cent lower, substantially the same service as the hospital. Obviously this is in conflict with the generally recognized principle that forbids discrimination between applicants who ask substantially the same service.[10] In this situation the only party to object would be the one paying the higher contract rate but we have only to reverse the facts, in which case the reasoning of the court would still apply unconditionally, to see the interest of the entire community in the matter. Had there been a binding contract to supply water to the hospital at, say, three cents a thousand gallons, after annexation, everyone within the scope of the public duty of the company could have complained of the discrimination. Nor could the existence of a private contract between the company and the hospital to serve it at a rate lower than that charged the general public for the same service, justify the discrimination.[11]

The question arises whether a lowering of the rate in the case under consideration would unconstitutionally impair the obligation of the contract for a higher rate. The cases are numerous and authoritative to the effect that private contracts entered into between a public service company and a private individual are made subject to the power possessed by the proper authority to modify rates, and that, by private contracts for higher rates, such a public servant can neither deprive such proper authority of its regulatory police powers, nor relieve itself of the

[10] 1 Wyman, Public Service Corporations § 1290.

[11] *Armour Packing Co.* v. *U. S.* (1908) 209 U. S. 56.

public service duty it owes.[12] This was intimated by the Supreme Court when it said, "We are not called on to consider whether a private contract for supplying water for ten years to a private consumer residing a mile from the company's mains, wherein connection was made at an expense to the water company of more than $12,000, at ten cents per 1,000 gallons, was or was not so unreasonable as to have warranted a reduction upon proper and timely application therefor." In so far as this *dictum* implies that upon proper application therefor, an unreasonable rate would be lowered, regardless of contract, to a point of reasonableness, the foundation of the distinction between cases of franchise contracts and private contracts seems to be undermined by the very court which sets it up.

The argument in the dissenting opinion seems to be, that, since the existence of both a legal and a contractual duty on the part of the company would be anomalous, there exists but the legal or public service duty, and the rate to be paid for water should be the legal, not the contractual rate. This reasoning assumes the conclusion reached, namely, the invalidity of the contractual relationship after the extension of the city limits. But the results of the dissenting opinion seems to conform with prevailing authority, and is in consonance with the present day economic interpretation put upon the subject by the Missouri Public Service Commission.

G. K. TEASDALE

[12]*S. W. Telegraph & Telephone Co.* v. *Dallas* (1911) 104 Tex. 114 (reversed on other grounds); *Union Dry Goods Co.* v. *Georgia Public Service Corporation* (1914) 142 Ga. 841; *Pinney and Boyle Co.* v. *Los Angeles Gas & Electric Co.* (1914) 168 Cal. 12; *New Orleans* v. *New Orleans Water Co.* (1891) 142 U. S. 79; *Knoxville Water Co.* v. *Knoxville* (1903) 189 U. S. 434.