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NOTES ON RECENT MISSOURI CASES

BILLS AND NOTES—PAROL EVIDENCE TO CHARGE ENDORSEE AS CO-MAKER—"ACCOMMODATED PARTY"—*Overland Auto Co.* v. *Winters et al.*[1] After being decided in 1915 in the Kansas City Court of Appeals[2] this case has again appeared in the reports. The majority opinion was at that time dissented from by Judge Ellison, who caused the case to be certified to the Supreme Court for final determination. The Supreme Court has approved the decision[3] of the Kansas City Court of Appeals. The facts were as follows: A and B, associates in business, contracted to purchase an automobile, to be used in their business, from C, the agent of the plaintiff company. In payment C took a note payable to himself, signed by A as maker and indorsed on the back by B, prior to delivery. The note read: "We promise to pay." Plaintiff charged B as co-maker in his petition, but set out the note showing B's signature on the back. Evidence was admitted without objection that the note was for the joint

[1](1919) 210 S. W. 1.
[2](1915) 180 S. W. 56.
[3]The case was fully reviewed at the time of the first decision in 12 Law Series Univ. Mo. Bulletin, p. 44, and was also commented on in 29 Harvard Law Review, 549, and 25 Yale Law Journal 411.

benefit of A and B. B contended that under sections 10033 and 10034[4] R. S. 1909 he could be charged only as an indorser and that since plaintiff did not aver presentment and notice to charge him as an indorser he was not liable. The Kansas City Court of Appeals took this view of the case. Judge Ellison in the dissenting opinion thought that the words "We promise to pay" created an ambiguity which might be explained by extrinsic evidence.[5] The case seems to present three questions: first, can parol evidence be introduced to charge an apparent indorser as a co-maker? Second, do the words "We promise to pay" create an ambiguity which can be explained by extrinsic evidence? Third, admitting that the party B cannot be shown by parol evidence to be a co-maker, was he not an "accommodated party" within sections 10050,[6] 10059,[7] 10085,[8] R. S. Mo. 1909 and thus not entitled to notice?

The first two questions have been fully considered in the articles mentioned in note 3. It might be added that several courts have held that only a *prima facie* liability as indorser is created by the fact of the name appearing on the back of the note, and that, as between the parties at least, parol evidence may be introduced to show the real state of affairs.[9] The use of the words "we promise to pay" has been held to raise an ambiguity explainable by parol evidence in New York[10] and California. [11]Considering the purpose of the Negotiable Instruments Law the

[4]These sections correspond to sections 63, and 64, of the Uniform Negotiable Instruments Act adopted by Missouri in 1905.

[5]See article in 25 Yale Law Journal 411 referred in note 3, in which the reviewer agrees with the dissenting opinion of Judge Ellison and argues that the use of the words "we promise" creates an ambiguity, explainable by parol evidence. Section 10033 R. S. 1909 provides as follows: "A person placing his signature upon an instrument otherwise than as a maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Section 10034 R. S. 1909 reads: "Where a person, not otherwise a party to an instrument, placed thereon his signature in blank before delivery, he is liable as an indorser x x x."

[6]"Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented." Section 80 N. I. L.

[7]"Except as herein otherwise provided, when a negotiable instrument has been dishonored by x x x nonpayment, notice of dishonor must be given to the drawer and to such indorser, and any drawer or indorser to whom such notice is not given is discharged." Section 89 N. I. L.

[8]"Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) "x x x (2) Where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation." Section 115 N. I. L.

[9]*Kohn* v. *Consolidated etc. Co.* (1900) 63 N. Y. Supp. 265; *Mercantile Bank* v. *Busby* (1908) 120 Tenn. 652, 113 S. W. 390 (between the parties); *Haddock, Blanchard & Co.* v. *Haddock* (1908) 192 N. Y. 499, 85 N. E. 682.

[10]*Dunbar Box & Lumber Co.* v. *Martin* (1907) 103 N. Y. Supp. 91.

[11]*New England Electric Co.* v. *Shook* (1915) 145 Pac. (Calif.) 1002.

contrary holding would seem more correct, however, and the weight of authority is to that effect.[12] On the third point the reasoning of the court in the principal case is not so clear. Sec. 10050 R. S. 1909 says, "Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented." Section 10085 reads: "Notice of dishonor is not required to be given to an indorser x x x where the instrument was made or accepted for his accommodation." In the opinion in the principal case the court says: "The majority opinion and the dissenting opinion in Kansas City Court of Appeals agree that one who signs as an indorser may not by parol evidence be shown to have signed in any other capacity, but under sections 10050 and 10085 parol evidence may be introduced to show in what character he indorses, whether he is an accommodation party or the party accommodated."[13] The court then argues that an "accommodated party" means one who gets the loan of credit without consideration.[14]

As noticed in the previous review of the case[15] there has been considerable controversy as to the proper interpretation of the term "accommodation party." It is defined by sec. 10000 R. S. 1909[16] and the cases under note 14 as one who signs "without receiving consideration therefor." *"Accommodated party"* is not defined, but if the definition of "accommodation party" be correct, then "accommodated party" would obviously be one *for whom* an instrument is signed without consideration.

On the facts proven may it not be fairly said that B was such an accommodated party? The parties contracted for the article purchased for their joint use. The seller was present and acquainted with the agreement. Under the ruling of the court and the weight of authority

[12]*Rockfield* v. *First Nat'l. Bank* (1907) 77 Oh. St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Gibbs* v. *Guaraglia* (1907) 75 N. J. Law 168; 67 Atl. 81; *McDonald* v. *Luckenbach* (1909) 170 Fed. 434; *Mechanics, etc. Bank* v. *Ketterjohn* (1910) 137 Ky. 427, 125 S. W. 1071. See collection of cases in Brannan, Negotiable Instruments Law, p. 77.

[13] Page 3 in opinion in the principal case.

[14]Black's Law Dict. defines "accommodation" as "an arrangement or engagement made as a favor to another, not upon consideration received." In the opinion in the case of *Rea* v. *McDonald*, 68 Minn. 187, l. c. 191, the court gives this definition: "Accommodation paper is defined as such as is made, accepted, or indorsed by one party for the benefit of another without consideration. It represents and is a loan of credit to the party accommodated." See also to the same effect: *Thom* v. *Kibbee* (1899) 62 N. J. Law, 753, l. c. 754, 42 Atl. 729; *Dillingham* v. *Scott*, 19 Hawaii, 421, l. c. 426; *Mosser* v. *Criswell* (1892) 150 Pa. 409, 24 Atl. 618; *Morris County Brick Co.* v. *Austin* (1910) 79 N. J. Law, 273, 75 Atl. 550.

[15]12 Law Series, University of Missouri Bulletin, page 46.

[16]"An accommodation party is one who has signed the instrument as a maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person x x x." This section corresponds to section 29 N. I. L.

no parol evidence could be shown to the effect that B intended to sign in any capacity other than as an endorser. A was the maker of the note both for his own benefit and for the benefit of B. For this benefit flowing to B what consideration was there coming to A? It was argued that B signed for his own benefit,[17] which was doubtless true, but it is difficult to see why he also was not "accommodated" by the maker of the note, A.

Authorities on the point are meagre. But a well considered case in Maryland,[18] where the Negotiable Instrument Law is also in effect, would seem to support this view. In that case the defendants signed as indorsers in order to secure a loan for the benefit of both the maker and themselves. The evidence showed that the payee was present and knew the agreement between the maker and indorsers and that he relied upon both for the payment of his note. The court there held that altho the loan for which the notes were given was not for the *sole benefit* of the indorsers, they were still "accommodated indorsers," within the meaning of Code Pub. Gen. Laws 1904 Act. 13, Section 99, 134, which corresponds to sections 10050 and 10085 R. S. Mo. 1909.[19] In other words, the indorser was an "accommodated indorser" even tho the maker was also signing the note for his own benefit.

There is nothing violent in this construction and it would seem to give effect to the intention of the parties without defeating in any sense the intention of the Uniform Negotiable Instruments Act. Under the present ruling of the court B, who got valuable consideration from the plaintiff company, escapes liability entirely because there was no allegation of presentment and notice. If he is the accommodated party on the instrument, then, under sections 10050 and 10085 R. S. 1909, he is not entitled to notice. Should he be permitted to entirely escape merely because the note was not given for his *sole* benefit?

JESSE E. MARSHALL.

HUSBAND AND WIFE—RIGHT OF ONE SPOUSE TO RECOVER FOR LOSS OF CONSORTIUM OF THE OTHER DUE TO THE NEGLIGENT ACTS OF DEFENDANT.[1] *Bernhardt et al* v. *Perry*.[2] The plaintiff's husband, a janitor in defendant's employ, was severely injured in the course of his duties as a result of the negligence of defendant in furnishing him dangerous appliances with which to work. The plaintiff brought this action for the loss of the protection, support, and society of her husband resulting from

[17]See note in 12 Law Series, Univ. of Mo. Bulletin, p. 46, and opinion in the principal case.

[18]*Bergen* v. *Trimble* (1917) 101 Atl. (Md.) 137.

[19]See notes 6 and 8 *supra*.

[1]For a discussion of this subject see 2 Law Series, Missouri Bulletin, p. 34; 24 H. L. R. 501; 26 H. L. R. 74; 10 Col. L. R. 678; 14 Mich. L. R. 689; 20 Yale L. J. 645; 77 Cent. L. J. 206.

[2](1918) 208 S. W. 462 (Mo.).

those injuries. The court held that the wife was not entitled to recover on the ground that the physical injury being to the husband, he alone could recover for all damages arising out of it, including damages for his consequent inability to perform his duties to his wife.[3]

At common law an injury to the wife gave rise to two causes of action; one to the wife joined with her husband for the injury; the other to the husband alone for the loss of the services, comfort and society or consortium of his wife.[4] But the wife had no corresponding right of action for an injury to her husband, either because of her inferiority to her husband, or because of her inability to sue in her own name.[5]

Under the Married Women's Acts the wife is given the right to sue alone for violations of her personal rights.[6] She has been allowed to recover for the loss of her husband's consortium, when such loss was caused by the alienation of the husband's affections[7] or the selling of morphine to the husband over the wife's protest.[8] Recovery is allowed the wife in such cases because the husband by his conduct is barred. It has been said that the acts of defendant strike at the very foundation of the marriage relation itself. It also has been said that recovery is allowed because the torts of defendant are willful and intentional. Thus, a wife in *Clark* v. *Hill*[9] was permitted to recover for loss of consortium against a defendant who had driven her husband insane by threats of violence. But it is not believed that such a classification of "intentional torts" is sound. The wife's right of action for loss of consortium resulting from the husband's physical inability should not be made to depend upon whether the injury to the husband was caused by negligent or intentional acts of the defendant.

When the loss of consortium and services results from the negligence of the defendant, the husband usually is given the same right of

[3]Woodson, J., 208 S. W. 462, 466: "with those damages collected, he would be just as able to perform all of his marital duties and obligations to her as if he had never been injured, and the law presumes he would lischarge those duties to the best of his ability, which would fully compensate her for all damages she had received. But if he should not do so, then she would have her legal remedy against her husband, and not against the person who injured him."

[4]*Smith* v. *St. Joseph* (1874) 55 Mo. 456, 17 Am. Rep. 660; *Thompson* v. *Metropolitan St. R. Co.* (1896) 135 Mo. 217, 36 S. W. 625; Schouler, Husband and Wife, sections 140, 143.

[5]Schouler, Husband and Wife, section 143; 21 Cyc. 1530.

[6] Sec. 8309, R. S. 1909. The statute provides that a married woman shall have as her separate property a right in action for "any violation of her personal rights"; and that she may institute in her own name without joining her husband an action for the recovery of personal property including rights of action.

[7]*Clow* v. *Chapman* (1894) 125 Mo. 101, 28 S. W. 328; *Nichols* v. *Nichols* (1898) 147 Mo. 387, 48 S. W. 947; *Westlake* v. *Westlake* (1878) 34 Oh. St. 621.

[8]*Flandermeyer* v. *Cooper* (1912) 85 Oh. St. 327.

[9]*Clark* v. *Hill* (1897) 69 Mo. App. 541.

recovery since the Married Women's Acts as under the common law.[10] It has been contended that, since the statute removes the disabiliy of married women to sue the wife should have an equal and corresponding right to sue for loss of consortium and support in case the husband is injured by the defendant's negligence.[11] But the courts have refused to adopt this proposition, as is illustrated in the principal case.

A few courts, however, have concluded that since the wife may recover for her own injuries, and for all damage resulting therefrom, the husband should no longer have a right of action for the loss of his wife's consortium.[12] The basis of these decisions is that the wife may recover in full for the impairment of her ability to render services, and that she should share these damages with her husband.[13] These jurisdictions recognize the right of one spouse to sue for the loss of support or services or consortium of the other only in those cases where the other spouse is denied a right of action by reason of his conduct as in alienation of affections or criminal conversation.

The law in Missouri has been formulated in accordance with the weight of authority by a line of decisions culminating in the principal case, *Bernhardt et al* v. *Perry,* decided by the Supreme Court en banc. The husband may recover for loss of services and consortium of his wife in cases where the loss is due to the defendant's negligence.[14] The wife was refused recovery where the loss was due to a physical injury to her husband caused by the negligence of the defendant in *Stout* v. *K. C. Terminal R. R.*[15] and in *Gambino* v. *Manufacturer's Coal and Coke Co.*[16] The rule of these two decisions was recognized by the Supreme Court in *Bernhardt et al* v. *Perry.* In the three cases the distinction was drawn between negligent and intentional torts causing the loss of consortium. If in these cases there is no sound distinction between negligent torts and intentional torts then it follows that the decision in *Clark* v. *Hill supra* is wrong.

It would seem that the Married Women's Acts place the wife upon an equal footing with the husband; and if the husband has a right of action for loss of services and consortium of his wife, then the wife should have a similar right of action. It is further submitted that if the reason-

[10]*Smith* v. *St. Joseph* (1874) 55 Mo. 456, 17 Am. Rep. 660; *Contra: Feneff* v. *New York C. R. R. Co.* (1909) 203 Mass. 278, 89 N. E. 436; 24 L.R.A. N.S. 1024; *Marri* v. *Stamford Street Ry. Co.* (1911) 84 Conn. 9, 78 Atl. 582.

[11]See dissenting opinion of Bond C. J. in *Bernhardt* v. *Perry, supra.*

[12]*Marri* v. *Stamford Street Ry. Co.* (1911) 84 Conn. 9, 78 Atl. 582; *Bolger* v. *Boston Elevated Ry. Co.* (1910) 205 Mass. 420, 91 N. E. 389; *Blair* v. *Seitner Dry Goods Co.* (1915) 184 Mich. 304. 151 N. W. 724.

[13]*Marri* v. *Stamford Street R. Co., supra.*

[14]*Smith* v. *St. Joseph* (1874) 55 Mo. 456.

[15](1913) 172 Mo. App. 113, 157 S. W. 1019.

[16](1913) 175 Mo. App. 653, 158 S. W. 77.

ing of the court is sound that it would be giving double damages to allow the wife to recover for the loss of support and consortium of the husband where the loss is due to defendant's negligence, because he "is entitled to a recovery of damages resulting therefrom which in legal contemplation is supposed not only to make him whole, but enables him to support his wife and children and to discharge all of his marital and parental duties due them in the same degree that the law imposed those duties upon him previous to the injury,"[17] that the same reasoning should apply to deny the husband a recovery for loss of services and consortium of the wife.

R. E. H.

HUMANITARIAN DOCTRINE—DUTY TO TRESPASSERS—*Dalton* v. *M. K. & T. Ry. Co.*[1] George Dalton, twelve years old, was injured by defendant's employees while they were engaged in backing a string of cars into another string of cars on which he was playing. The accident occurred in defendant's switch yards in Hannibal. Dalton was a trespasser on the premises at the time of his injury. The evidence, however, showed that defendant had actual knowledge that children had been accustomed for several years to play in and around the cars in this switch yard. The jury were instructed in substance, that the defendant was liable if it saw or by the exercise of due care could have seen George Dalton in time to have warned him or otherwise have averted the injury, and did not do so. The jury were also instructed in effect that if user of the premises by children in their playing had been shown and that the defendant had knowledge thereof then it was the duty of the defendant to give notice before it began its switching operations. The Supreme Court held that the case involved the humanitarian rule, but that the latter instruction went beyond that rule, and imposed a duty on the defendant to warn the trespasser on the premises whether or not the latter could have been seen by the exercise of due care.

A survey of the cases reveals two possible situations where the humanitarian doctrine may arise, viz: (a) where the plaintiff's peril is discovered in time to avoid injury and (b) where it is not discovered.[2]

Nearly all courts permit recovery where the defendant saw the peril of the plaintiff in time to have avoided the injury by the exercise of

[17]Woodson, J., in *Bernhardt et al* v. *Perry*, 208 S. W. 462. 465.

[1](1919) 208 S. W. 828.

[2]Defendant saw plaintiff's peril—*Cole* v. *Metropolitan Street Railway Co.* (1906) 121 Mo. App. 605, 97 S. W. 555. *Dutcher* v. *Railroad* (1912) 241 Mo. 137, 145 S. W. 63. Plaintiff's peril could have been discovered in time to have avoided. *Dale* v. *Hill-O'meara Construction Co.* (1904) 108 Mo. App. 88, 90 S. W. 1092. *Eppstein* v. *Pentwood* (1906) 197 Mo. 720, 94 S. W. 967. *Rapp* v. *St. Louis Transit Co.* (1905) 190 Mo. 155, 88 S. W. 865.

ordinary care, but there is conflict of authority where there is no actual knowledge of plaintiff's peril and the courts of this jurisdiction seem to be with the minority[3] in holding that the defendant is liable for failure to discover the plaintiff's peril.

The principle case seems properly to come within the humanitarian rule. The plaintiff was a trespasser and he was negligent in being on top of a car in the defendant's switch yard where locomotives were being used to switch cars about, and where it was probable that he might be hurt.

The important question in the case is as to the extent of the duty which defendant owed to the plaintiff. Under the universally accepted rule the defendant is liable, if, after discovering the plaintiff's peril, he negligently injures him. Furthermore, knowledge of the use of the premises by trespassers is equivalent to actual knowledge of their presence on the premises; and under such circumstances there is an additional duty required of the defendant based upon the importance of human life to use due care to look out for trespassers so that their peril may be discovered and injury averted.

The Supreme Court interpreted the second instruction as above stated, to mean that the defendant must *warn* at his peril whether or not the plaintiff could have been *seen* by the exercise of due care. Does the instruction condemned extend the humanitarian doctrine? It seems quite obvious that it does. The duty of the defendant in this case was[4] to use due care to avoid injuring plaintiff after he was discovered or could have been discovered by the exercise of due care.[5] There was no duty to sound a warning for persons who could not have been seen.

In *Ayres* v. *Railroad*[6] plaintiff in a drunken condition fell asleep on defendant's right of way at a point which had been for years used by pedestrian trespassers. Defendant had knowledge of the use. The evidence disclosed that altho the defendant's employes were looking ahead, and exercising due care, still they were not able to see the plaintiff in time to avoid running against him. The plaintiff contended that defendant was negligent in failing to give a warning when it approached the place where the presence of trespassers was to be expected, and where the plaintiff actually lay, but the court held it was not negligence to fail to sound the whistle or bell at such a place. The court held that the

[3]Otis, Humanitarian Doctrine, . 46 Amer. L. R. 381. See note in 55 L. R. A. N.S. 421. *Betchenwald* v. *Metropolitan Street Ry. Co.* (1906) 121 Mo. App. 545, 97 S. W. 557.

[4]*Fearons* v. *Kansas City El. R. R. Co.* (1904) 180 Mo. 209, 79 S. W. 394; *Guenther* v. *St. Louis M. & S. Ry. Co.* (1891) 108 Mo. 18, 18 S. W. 846; *Chamberlain* v. *Railroad* (1895) 133 Mo. 587, 33 S. W. 437; 34 S. W. 842.

[5]*Warmington* v. *A. T. and S. F. Ry. Co.* (1891) 46 Mo. App. 159. *Hila* v. *Railroad* (1890) 101 Mo. 36, 13 S. W. 946.

[6]*Ayres* v. *Railroad* (1905) 190 Mo. 228, 88 S. W. 608.

humanitarian rule did not apply. Apparently this case has not been overruled, and the fact that the injury in the Ayres case occurred on the main track, and not in a switch yard should not make the rule different. It is believed that this case also is an authority for the proposition that there is no duty to warn a trespasser where he could not have been seen by the exercise of due care. In *Cleveland C. C. & St. Louis Ry. Co.* v. *Means,* a somewhat different rule is announced.[7] There defendant was engaged in switching cars on a side track. It had constructive knowledge of the probable presence of children playing around these premises. The court left it to the jury to say whether under the circumstances, a failure to give a warning or signal before moving the cars was negligence which was the proximate cause of the injury. According to the facts in this case, it appears the defendant, had it been diligent, could have discovered the danger to which the deceased was exposed in time to have avoided injury, yet there is *dicta* in the case which would require the defendant to warn by signal. Such an extension of the doctrine seems unjustly to burden industry without promoting the security of human life. There is no sound reason for extending a doctrine that finds so little support in sound legal principles. It is submitted that both on reason and authority the court properly decided the case.

C. E. C.

PRACTICE—SUFFICIENCY OF MOTION FOR NEW TRIAL. *State ex rel United Railways of St. Louis* v. *Reynolds.*[1]—The St. Louis Court of Appeals held that a motion for a new trial specifying that the "court erred in refusing to give and read to the jury legal and proper instructions" and "because the court erred in giving and reading to the jury erroneous, illegal, and misleading instructions" was "too general and indefinite to preserve for review such rulings."[2] On certiorari, the Supreme Court *en banc* held the motion was sufficient to present for review the instructions given and refused.

The question as to how definite specification of error in a motion for a new trial must be to preserve for review the correctness of instructions complained of has been the subject of some conflict of opinion in recent decisions. An analysis of the cases on this point discloses two important questions for consideration, viz: (a) does section 1841, R. S. 1909[3] apply to motions for a new trial, and, if so, what degree of definite-

[7](1914) 104 N. E. 785, 55 Ind. App. 243.

[1](1919) 213 S. W. 782. Faris, Williams, and Walker, JJ., dissenting.

[2]*Lampe* v. *United Railway Co.* of St. Louis (1918) 202 S. W. 438.

[3]This section is printed under Article V of the Practice Code entitled "Pleadings" and reads, "All motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reason not so specified shall be urged in support of the motion."

ness is required; and, (b) if this statute does not apply what rule obtains?

(a) Section 1841 first came into our practice act in 1835[4] under Article VII entitled "New Trials," but the section also contained a provision as to the time of filing motions for new trials.[5] The section was divided in R. S. 1845[6] and the provision as to the time of filing a motion for a new trial was separated from that part which provided what the motion should contain, each being placed in a distinct section. Both sections were printed under the article, "New Trials," and had reference only to motions for a new trial and in arrest of judgment. In R. S. 1855, the section which provided what a motion should contain (now Section 1841) was changed to read "all motions," etc., and was printed under the "Miscellaneous Provisions" of Article VI of the Practice Act entitled "Pleadings."[7] As Faris, J., pointed out in *State* v. *Rowe*,[8] *it* was "then for the first time made to apply to all formal motions of whatever kind made under the civil code." Did the shifting of this section from the article, "New Trials," to another article of the Practice Code called "Pleadings" and the changing of its phraseology to "all motions," prohibit its further application to motions for a new trial?

This question has been answered in the negative by a majority of the cases.[9] The writer of the majority opinion in *Wampler* v. *Atchison, T. and S. Ry. Co.*[10] however took the view that this section did not apply to motions for a new trial, because it was placed under the article "Pleadings" and must be construed in the light of its surroundings and refers to motions of all kinds which are in the nature of pleadings or which attack pleadings. But the majority of the court did not place the

[4]Sec. 1, p. 469, R. S. 1835.

[5]This is now covered by Sec. 2025. R. S. 1909.

[6]Art. VII, Sec. 1. "All motions for new trials and in arrest of judgment shall be made within four days after the trial, if the term shall continue so long, and if not, then before the end of the term. Sec. 2. Every such motion shall be accompanied by a written specification of the reasons upon which it is founded."

[7]Sec. 27, p. 1235. Identical in form with Sec. 1841, R. S. 1909. See note 3 *supra*. This section has retained its present form and position in the statute since 1855. Sec. 48, p. 662, G. S. 1865; Sec. 3557, R. S. 1879; sec. 2085, R. S. 1889; Sec. 640, R. S. 1899; Sec. 1841, R. S. 1909.

[8](1917) 271 Mo. 88, 95; 196 S. W. 7.

[9]*Carver* v. *Thornhill* (1873) 53 Mo. 283; *Sweet* v. *Maupin* (1877) 65 Mo. 65; *Fox* v. *Young* (1884) 22 Mo. App. 386; *Alexander* v. *The Grand Avenue Ry. Co.* (1893) 54 Mo. App. 66; *Dale* v. *Parker* (1910) 143 Mo. App. 492; 128 S. W. 510; *Bouillon* v. *Laclede Gas Light Co.* (1912) 165 Mo. App. 320, 147 S. W. 1107; *State* v. *Gifford* (1916) 186 S. W. 1058; *Johnson* v. *Waverly Brick and Coal Co.* (1918) 205 S. W. 615; *Wynne* v. *Waggoner Undertaking Co.* (1918) 204 S. W. 15; *Bright* v. *Sommers* (1919) 214 S. W. 425. *Contra*: *Chapman* v. *Eneberg* (1902) 95 Mo. App. 127, 68 S. W. 974; *Hooper* v. *Standard Life* and *Accident Insurance Co.* (1912) 166 Mo. App. 209, 148 S. W. 116.

[10](1916) 269 Mo. loc. cit. 473, 190 S. W. 908.

decision on this ground, and the view expressed is *obiter*.[11] The majority opinion in the principal case does not discuss section 1841 but merely cites the Wampler case. It is, therefore, not authority for the proposition that section 1841 does not govern motions for a new trial. It is submitted that this section, in the light of its history and by the weight of authority, is applicable to such motions.[12]

A majority of the cases which apply section 1841 hold that a general assignment of error in instructions is not sufficient in a motion for a new trial.[13] The Wampler case distinguishes a few cases[14] on the ground that they do not condemn a general assignment of error as to instructions, but it is said by Graves, J., that they merely hold that there were no assignments of error in the motions in those cases covering the particular errors urged on appeal. But neither are these cases authority for the proposition that a general assignment of error is good even if it were broad enough to cover the error complained of.

(b) Even those cases which do not consider section 1841 applicable incline towards the view that a motion for a new trial must be specific in its assignment of error.[15] The Wampler case is cited in the principal

[11]In the principal case, 213 S. W. loc. cit. 784, Walker, J., (dissenting) discussed the Wampler case and said, "This for the reason that the motion in that case was sufficiently specific to conform to the requirements of section 1841 and hence the general observations of the learned writer of that opinion may not unfairly be classed as *obiter* so far they conclude that said section is not controlling."

[12]Bond, J., (concurring in result only) said in the Wampler case, 269 Mo. loc. cit. 486, "I do not think a statute so all embracing in its language can be logically limited only to certain motions filed during the trial of a law suit which are addressed to the "Pleadings."

[13]Thus the following assignments of error have been held insufficient: that "the court erred in giving improper instructions to the jury," *Bright* v. *Sammons* (1919) 214 S. W. 425; *Wolf* v. *Baun* (1919) 211 S. W. 697; *contra, Hooper* v. *Standard Life* and *Accident Ins. Co.* (1912) 116 Mo. App. 209, 148 S. W. 116; that the court gave "illegal, improper, and erroneous instructions over defendants motion." *State* v. *Rowe* (1917) 271 Mo. 88, 196 S. W. 7; *State* v. *Selleck* (1917) 199 S. W. 129; that "the court misdirected the jury as to the law in the case." *Wynne* v. *Waggoner Undertaking Co.* (1918) 204 S. W. 15; *Sweet* v. *Maupin* (1877) 65 Mo. 65; *State ex rel* v. *Woods* (1911) 234 Mo. 16; *Maplegreen Co.* v. *Trust Co.* (1911) 237 Mo. 350; *Polski* v. *City of St. Louis* (1915) 264 Mo. 458.

[14]Graves, J., said, 269 Mo. 481, that the cases did not hold that a general assignment of error in the motion was insufficient but only "that the motion failed to contain any assignment of error (either general or specific) which would cover the assignment urged in the appellate courts."

[15]*Matthews* v. *Central Coal & Coke Co.* (1915) 177 S. W. 650; *Kansas City Disinfecting Co.* v. *Bates* (1918) 273 Mo. 300, 201 S. W. 92; *Seitz* v. *Pelligreen Const.* and *Inv. Co.* (1918) 203 S. W. 503; *Nitchman* v. *United Ry. Co.* of *St. Louis* (1918) 203 S. W. 491; *Probst* v. *St. Louis Basket* and *Box Co.* (1919) 207 S. W. 891; *Kansas City Trunk Co.* v. *Bush* (1919) 208 S. W. 625; *Grace et al* v. *M. K. & T. Ry. Co.* (1919) 212 S. W. 41; *Baker* v. *Bakewell* (1919) 208 S. W. 844; *Contra, Palmer* v. *Huckstead* (1917) 197 Mo. App. 512, 196 S. W. 1053.

case as authority for the rule that a general allegation of error in a motion is good, yet the motion in the Wampler case stated that "each and all of the instructions" were erroneous and the expressions of the court on general assignments may be construed as *dicta.*[16]

One of the functions of a motion for a new trial is to direct the mind of the trial court to the specific error committed on the trial.[17] It would seem that a motion to fulfill this office and to reduce the labor of courts and afford trial courts a fair opportunity to correct error, should at least point out what particular instruction or instructions are wrong.[18] Altho the decision of the principal case does not exclude the further application of section 1841 to motions for a new trial, it definitely establishes the rule of practice in Missouri that the correctness or incorrectness of *instructions* given or refused by a trial court in a civil case may be preserved for review on appeal by a motion couched in the most general language.

J. C. B.

ACCIDENT INSURANCE—"SUICIDE STATUTE"—INSANITY—*Scales* v. *National Life & Accident Ins. Co.* Section 6945 R. S. Mo. 1909, commonly known as the "suicide statute," provides as follows: "In all suits on policies of insurance on life hereafter issued by any company doing business in this state to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide

[16]In *Wynne* v. *Waggoner Undertaking Co.* (1918) 204 S. W. 15, Walker, J., discussed the Wampler case and said, "This case seems from its reasoning to hold that a general statement in a motion for a new trial as to errors in instructions is sufficient, but it will be found that the motion in that case while general in its terms, so far as ignoring the number of the instructions is concerned is specific in referring to each and all of those to which objections are interposed, and therefore it was not general in the sense in which such motions have been ruled insufficient in other cases, which is not the fact in the instant case."

[17]*Roher* v. *Brockhage* (1884) 15 Mo. App. 16, 25; *Bouillon* v. *Laclede Gas Light Co.* (1912) 165 Mo. App. loc. cit. 324; 147 S. W. 1107; In *Maplegreen Co.* v. *Trust Co.* (1911) 237 Mo. loc. cit. 363, 141 S. W. 621, 624, Lamm, C. J., speaking for the Supreme Court *en banc* said, "..... the office of a motion for a new trial is to gather together those rulings complained of as erroneous and solemnly and formally present them, one by one, in black and white, to the judge, in order that he may have a last chance to correct his own errors without the delay, expense or other hardships of an appeal. This, on the theory that even a judge is entitled to a last chance—a *locus poenitentiae.*"

[18]Walker, J., (dissenting) in the principal case, 213 S. W. 782, 783, said, "The cardinal purpose of our code of procedure is one of simplicity and directness. . . . . An observance of the requirements of this section (1841) cannot but aid the trial court in readily ascertaining and speedily determining the errors assigned, especially as to instructions."

at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

The recent cases of *Scales* v. *National Life & Accident Ins. Co.*[1] *Brunswick* v. *Standard Accident Ins. Co.*,[2] and *Wacher* v. *National Life & Accident Ins. Co.*[3] presented the question whether by virtue of the above statute, the beneficiary under an accident policy would recover where the insured had committed suicide while sane.

This question the Supreme Court answered in the negative. The reasons were: To recover under an accident policy the insured must have met death by means of an accident;[4] self-destruction while sane is not an accident;[5] hence, while the statute prevents the defense of suicide it will not be inflated to prevent a showing that the insured did not meet an accidental death, and so create a cause of action where none exists.[6]

Authority on the precise point from other jurisdictions was lacking because statutes of this nature are found in very few states. In Missouri the question had never been fully considered. The courts seem tacitly to have regarded suicide while sane as an accident.[7]

The Supreme Court in the Scales and Brunswick decisions goes at some length into prior decisions in Missouri. A passing reference will do here. Judge Faris at p. 48 of 213 S. W. in the Brunswick case says of *Logan* v. *Ins. Co.*:[8] "Under these defenses and the above admission it was competent for the court to find and conclude that the insured was insane when he committed suicide." Such a conclusion disposes of that decision as any authority for the instant question.

Fetter v. *Fidelity & Casualty Co.*,[9] as stated by Judge Faris, is authority only for the proposition that when the plaintiff under an accident policy has made out a *prima facie* case of accidental death the burden is on the company to show that it resulted from natural causes.

Whitfield v. *Aetna Life Ins. Co.*[10] was disposed of as being of only persuasive force. James Whitfield was insured under an accident policy for $5,000 in case of accidental death with the proviso that the insurer should be liable for only one-tenth that amount in case of death due to injuries intentionally inflicted, sane or insane. The case was tried upon

[1](1919) 212 S. W. 8.
[2](1919) 213 S. W. 45.
[3](1919) 213 S. W. 869.
[4]*Scales* v. *National Life & Accident Ins. Co.* (1919) 212 S. W. l. c. 10; *Brunswick* v. *Standard Accident Ins. Co.* (1919) 213 S. W. l. c. 48.
[5]*Brunswick* v. *Ins. Co.* (1919) 213 S. W. l. c. 47; *Scales* v. *Ins. Co.* (1919) 212 S. W. l. c. 8.
[6]*Scales* v. *Ins. Co.* (1919) 212 S. W. l. c. 10; *Brunswick* v. *Ins. Co.* (1919) 213 S. W., l. c. 48.
[7]*Scales* v. *Ins. Co.* (1919) 212 S. W. l. c. 10.
[8]*Logan* v. *Casualty Co.* (1898) 146 Mo. 114, 47 S. W. 948.
[9]*Fetter* v. *Casualty Co.* (1902) 174 Mo. l. c. 269, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560.
[10]*Whitfield* v. *Aetna Life Ins. Co.* (1907) 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895.

the agreed fact that the insured died "from bodily injuries caused by a pistol shot intentionally fired by himself, for the purpose of thereby taking his own life; that the cause of the death of said Whitfield was suicide." The insurer was held liable for the full amount; the reduction to one-tenth of the liability being a defense within the prohibitive terms of the statute. The force of the decision as a precedent in our case depends on whether James Whitfield was sane at the time he took his life. No decisive statement as to his sanity appears. Faris, J., was of the opinion that plaintiff's reply admitted his sanity and that the court fell into error of considering suicide while sane an accident.

The question in *Laessing* v. *Traveler's Protective Association of America*[11] and *Reynolds* v. *Maryland Casualty Co.*[12] was whether death was due to natural causes or accidental causes or to injuries self inflicted while sane. The cases go extensively into the presumptions and burden of proof under these circumstances, but furnish no criterion as to the effect of the statute when a sane man has taken his life.

The decision in *Knights Templars' and Masons' Life Indemnity Co.* v. *Jarman*[13] was upon the stipulated fact that the insured was insane when he killed himself.

Roy, C., speaking of *Applegate* v. *Travelers' Ins. Co.*,[14] in his opinion in *Scales* v. *Ins. Co.*,[15] says: "The plain truth is that courts and counsel in all those cases proceeded on the theory that, under the Logan case, suicide by a sane person was an accident covered by an accident policy." But in the Applegate case Reynolds, J., made the statement: "This however is not a case of accident but of design—a case of suicide by poison." The decision was that by Section 6945 R. S. Mo. 1909 the beneficiary under an accident policy could recover altho the insured had taken his life while sane. *This is not an accident.* That case, therefore, is squarely in conflict with the decisions under consideration.

If the legislative intent in the suicide statute is that suicide *simply because it is suicide* may never become a defense—that is, if the emphasis is to be put on the exact words "suicide shall be no defense," a narrow and technical argument may be advanced against the decisions.

In an action on an accident policy the plaintiff must make out a *prima facie* case of accident.[16] In any case where from the facts death may have been the result of either accident or of selfkilling while sane a presumption arises against the latter.[17] True under Laessing v. Ins.

[11]*Laessing* v. *Ins. Co.* (1902) 169 Mo. 280, 69 S. W. 469.

[12]*Reynolds* v. *Casualty Co.* (1918) 274 Mo. 83, 201 S. W. 1128.

[13]*Knights Templar* v. *Jarman* (1902) 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139.

[14](1910) 153 Mo. App. 63, 132 S. W. 2.

[15](1919) 212 S. W. 1. c. 10.

[16]*Laessing* v. *Travelers Protective Ass'n.* (1902) 169 Mo. 272, 69 S. W. 469; *Travelers Ins. Co.* v. *McConkey* (1902) 127 U. S. 661; 32 L. Ed. 308.

[17]*Reynolds* v. *Casualty Co.* (1918) 274 Mo. 1. c. 96, 201 S. W. 1131, 14 R. C. L. 1236.

Co., *supra,* the presumption that death was not by the hand of the insured does not relieve the plaintiff from establishing that death was accidental. Death might have been natural. But few cases where there is a real question whether death was due to accident or suicide while sane will present any difficulty to the plaintiff in establishing that death in any event was not natural. Presumptions in law refer to the burden of going forward with the evidence.[18] The plaintiff now has a *prima facie* case of accident and the burden would be upon the defendant to come forward with evidence that death was due to suicide while sane. A defense is a general assertion that the plaintiff has no cause of action, a denial of the truth and validity of the complaint.[19] Thus, any proof of suicide while sane would be a denial of the truth and validity of the complaint in which plaintiff alleges that death was due to accident and hence a defense. But the exact words of the statute are suicide shall be "no defense," and it would effectually bar any evidence to overcome the presumption against suicide and that presumption will be decisive of the case until overcome by evidence which shall out weigh the presumption.[20] The plaintiff would recover on his *prima facie* case, the defendant being unable to rebut it.[21]

The purpose of the statute, as applied to accident insurance, was to prevent insurance companies from excepting from liability a particular accident, viz: accidental suicide. The purpose was not to prevent insurance companies, writing accident insurance, from stipulating that they would not be liable for something not an accident. Intentional self destruction by a sane man is clearly not an accident. Self destruction while insane is an accident.

The conclusion that the decisions under review are sound cannot be escaped. Their effect is to add despite the statute an element to the *prima facie* case the plaintiff must produce. Wherever the facts balance between self killing while sane and accident the decisions do not disturb the presumption which rises against the former.[22]

But where a plaintiff seeks to recover under an accident policy, the insured having taken his own life, evidence must be produced of the insanity of the deceased, at the time of his death, because in absence of evidence the law presumes a man sane,[23] and the burden is with the plaintiff to overcome this presumption.[24]

[18] 4 Wigmore on Evid. 2490-2511; *State* v. *Hudspeth* (1900) 159 Mo. 178; 60 S. W. 136.

[19] Bouvier's Law Dict., Rawle's 3rd ed.

[20] *Standard Life Ins. Co.* v. *Thornton* (1900) 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116.

[21] *Kelley* v. *Jackson* (1832) 6 Pet. (U. S.) 622, 632, 8 L. Ed. 523.

[22] 14 R. C. L. 1236; *Reynolds* v. *Casualty Co.,* (1918) 274 Mo. l. c. 96, 201 S. W. 1131.

[23] *Mutual Life Ins. Co.* v. *Terry* (1872) 15 Wall. 580, 21 L. Ed. 236; *Reynolds* v. *Casualty Co., supra.*

[24] *Blackstone* v. *Ins. Co.* (1889) 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

The degree of insanity necessary to make self destruction accidental,[25] becomes of moment. In jurisdictions having no "suicide statute" a provision avoiding liability "in case of suicide" is construed to allow recovery where deceased was insane.[26] These cases, construing such a provision and laying down a test as to when deceased was sane and when insane at time of self-destruction would seem to furnish a guide.

Suicide raises no presumption of insanity nor is it *prima facie* evidence of insanity.[27] But the manner of the act and all its circumstances may be considered in determining the question of insanity.[28]

Not every degree of insanity would seem to be sufficient.[29] Mental disorder at least is necessary.[30] The courts of this country have followed, in the main, either the English rule or the rule of the Federal Courts.

The English cases of *Borradaile* v. *Hunter*[31] and of *Dormay* v. *Borradaile*[32] stated the rule to be that the deceased must be of so unsound a mind as to be unaware that his act will lead to his self destruction. It is not sufficient that he was incapable of recognizing its moral obliquity. This rule seems to be followed in New York,[33] Massachusetts,[34] Vermont,[35] and Kentucky.[36] To the rule as laid down in New York and Vermont[37] the qualification is found that if deceased is compelled to take his own life by an irresistible insane impulse his act is not intentional suicide.

The rule of the Federal Courts and of a majority of the states,[38] tho somewhat variant in terms,[39] makes the test upon the ability of the in-

[25]*Accident Ins. Co.* v. *Crandel* (1886) 120 U. S., l. c. 531; 7 Sup. Ct. 685, 30 L. Ed. 740.

[26]*Bigelow* v. *Ins. Co.* (1876) 93 U. S. 284, 23 L. Ed. 918; *Knickerbocker Ins. Co.* v. *Peters* (1875) 42 Mo. 414.

[27]*Weed* v. *Mutual Benefit Life Ins. Co.* (1877) 70 N. Y. 561. But see *Coffee* v. *Home Ins. Co.*, 3 Jones & S. 314, saying that it might go to remove the presumption of sanity. The question of insanity is one for the jury. (95 U. S. 223, 24 L. Ed. 433.) Insanity must exist at the time of self destruction to excuse suicide, and it is insufficient to show that the insured was insane at other times (55 Ga. 103). The fact that a juror considers suicide as conclusive evidence of insanity is good cause for a challenge (2 Dill 572, note).

[28]*Ritter* v. *Mutual Life Ins. Co.* (1895) 69 Fed. 505; *Grand Lodge Order of Mutual Aid* v. *Weitling* (1897) 168 Ill. 408, 68 Am. St. Rep. 123, 48 N. E. 59.

[29]IV Cooley's Briefs on the Law of Insurance 3245.

[30]*Moore* v. *Conn. Mutual Life Ins. Co.* (1874) 3 Flipp. 36.

[31](1843) 5 Man. & G. 639, 44 E. C. L. 335.

[32](1848) 5 C. B. 380, 11 Jur. 231.

[33]*Van Zandt* v. *Mutual Benefit Life Ins. Co.* (1873) 55 N. Y. 169; 15 Am. St. Rep. 215.

[34]*Cooper* v. *Ins. Co.* (1869) 102 Mass. 227, 3 Am. Rep. 551.

[35]*Hathaway* v. *National Life Ins. Co.* (1875) 48 Vt. 335.

[36]*Masonic Life Assoc.* v. *Pollard's Guardian* (1905) 89 S. W. 219, 28 Ky. Law Rep. 335.

[37](1875) 48 Vt. 336.

[38]84 Am. St. Rep. l. c. 547; Vance on Insurance p. 521.

[39]Conscience and will overpowered. *Knickerbocker Life Ins. Co.* v. *Peters* (1875) 42 Md. 414. Act free from all immorality and action entirely blameless. *Life Assoc. of Am.* v. *Waller* (1886) 77 Ga. 533. Incapable of form-

sured to realize the moral quality of his act.[40] This rule has been followed in Illinois,[41] Michigan,[42] Indiana,[43] Texas,[44] Ohio,[45] Washington,[46] and Minnesota.[47] Jurisdictions following this rule have qualified it by holding that where the deceased was driven by an irresistible insane impulse to take his life, it was not intentional suicide.[48]

A third rule has been adopted in a few jurisdictions that in as much as suicide is a criminal act, self destruction should occur while there is mental capacity to form a criminal intent to relieve the insurer from liability.[49] This test would seem equivalent to the Federal rule. A man unconscious of the moral consequences and effect of his act cannot commit a felony, tho he may take his life with the set purpose of doing so and conscious of the physical consequences.

In criminal cases Missouri courts have adopted knowledge of right and wrong as the test of insanity which will form a defense, tho they have specifically rejected the uncontrollable insane impulse.[50]

Where an insurer has not contracted for liability in case of intentional injuries a construction which holds an injury intentional where there was a knowledge that the act would produce the result may be valid. But mental unsoundness rarely attains such degree that the sufferer does not know that fire will burn, knives cut, or water drown him. The intent to live is not formed on the knowledge of these results alone. It is as complex as life. The consequences of suicide to "himself, his character and his family"—the right and wrong of the act are far more important in forming the intent. Since an accidental act is spoken of as

ing a rational judgment with regard to self destruction. *Hiatt* v. *Mutual Life Ins. Co.* (1873) 2 Dill. 572, note.

[40](1872) 15 Wall. 580, 21 L. Ed. 236.

[41]*New Home Life Assoc.* v. *Hagler* (1862) 29 Ill. 437.

[42]*Blackstone* v. *Standard Life Ins. Co.* (1889) 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

[43]*Michigan Mutual Life Ins. Co.* v. *Naugh* (1891) 130 Ind. 79, 27 N. E. 393.

[44]*Mutual Life Ins. Co.* v. *Walden* (1894) (Tex. Civ. App.) 26 S. W. 1012.

[45]*Schultz* v. *Ins. Co.* (1883) 40 Oh. St. 217.

[46]*Knapp* v. *Order of Pendo* (1905) 36 Wash. 601, 79 Pac. 209.

[47]*Scheffer* v. *Ins. Co.* (1879) 25 Minn. 534.

[48]*Ins. Co.* v. *Terry* (1872) 15 Wall. 580; *Knapp* v. *Order of Pendo*, 36 Wash. 601, 79 Pac. 209. The leading statement of the rule and one which is often used verbatim as an instruction, is found in *Ins. Co.* v. *Terry*, *supra*. In *Ritter* v. *Ins. Co.* (1895) 28 U. S. Ap. 612, 70 Fed. Rep. 954, an understanding of the moral consequences is said to be such understanding as a sane man would have of the effect of the act on himself, his character, and his family, and the wrongfulness of it. In *Manhattan Life Ins. Co.* v. *Broughton* (1883) 3 Sup. Ct. 99, Judge Gray approves the Federal rule, declaring it simpler in that it does not involve the subtle and vexing question of how much the exercise of will can be attributed to a man so unsound mentally that he cannot distinguish right from wrong.

[49]*Phadenhauer* v. *Germania Life Ins. Co.*, (1872) 7 Heisk. 567, 19 Am. Rep. 623; *Bagley* v. *Alexander*, East's Notes, Case 79, Morley's India Dig. 352.

[50]*State* v. *Pagels* (1887) 92 Mo. 300; *State* v. *Riddle* (1912) 245 Mo. 451.

contrary to the intent it would seem that it should be contrary to those elements which constitute intent and it is submitted that when insanity has overthrown the knowledge of moral consequences and of right and wrong, self destruction is not in any just sense an intentional act,—but rather is contrary to intent and an accident.

J. A. W.

PROHIBITION—RIGHT OF STATE TO A CHANGE OF VENUE FROM JUDGE ON GROUND OF PREJUDICE. *State ex rel Attorney General* v. *John G. Slate.*[1] This case seems to be the first instance in which it has been held in Missouri that the state over the objection of the defendant may take a "change of venue" in a criminal case on the ground of prejudice of the judge.

This was a proceeding in prohibition in which it was sought to have a preliminary rule made permanent restraining the judge of the Circuit Court of Cole County from exercising further jurisdiction in the case of State v. Scott.[2] Scott was charged with embezzlement and grand larceny. The Attorney General at the direction of the Governor had assumed control of the prosecution. Before the jury was impaneled an Assistant Attorney General filed an affidavit alleging that the judge was prejudiced against the prosecution and particularly against attorneys conducting the case for the state. They then moved that a different judge be called to preside at the hearing of the case in accordance with section 5201 R. S. 1909.[3] The court overruled the motion. Whereupon, application was made to the Supreme Court for a writ of prohibition.

Respondent contended that irrespective of prejudice the state is not entitled to a "change of venue" in a criminal case. In its decision the Supreme Court held that the writ of prohibition should issue to prevent a judge who was prejudiced against the prosecution from exercising jurisdiction.

The respondent relied on section 22, Art. 2 of the Constitution[4] which guarantees to the accused "a speedy trial before an impartial jury of the county," contending that this clause constituted a bar to the state

[1](1919) 214 S. W. 85.

[2]Circuit court of Cole county, Missouri. Case No. 1879.

[3] "If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 5198, and no person to try the case will serve when elected as such special judge, the judge of such court shall in either case set the case down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request another circuit or criminal judge to try the case x x x."

[4] "Rights of Accused in Criminal Prosecution—In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county."

from a "change of venue" without the consent or against the objection of the accused. The position of the relator was, that, without denying this proposition on the question of a change of venue from the county, it did not apply to a change from the judge.

The distinction would seem obvious[5] and has been repeatedly drawn in Missouri. Thus it is proper to refuse a "change of venue," when the statute directs the calling in of another judge;[6] or to refuse a transfer to another court in the same county when a "change of venue" is directed.[7]

From the language of section 5198 R. S. 1909[8] it would seem rather obvious that no distinction is intended to be made between the rights of the state and of the accused when the ground of the application is that the judge is "in anywise interested or prejudiced." By expressly mentioning the defendant in the fourth class of cases in which a judge is deemed incompetent, the logical conclusion is that the legislature intended in the other classes to grant the right either to the state or to the defendant. This conclusion is well nigh irresistible, in the light of the decision of the Supreme Court in the case of *State ex rel* v. *Wear*.[9] In that case the court held that prohibition would issue to prevent Judge Wear from exercising jurisdiction in a case in which his son was defendant.

The question which would seem still to remain open is: *In what manner shall the fact of prejudice and bias be determined?* Is it sufficient that the prosecution shall make an affidavit alleging prejudice?

[5] "Venue, a neighborhood, place or county in which an injury is declared to have been done, or fact declared to have happened. 3 Bl. Com. 294. Venue also denotes the community in which an action or prosecution is brought to trial, and which is to furnish the panel of jurors. To 'change venue' is to transfer the cause for trial to another county, or district." Black's Law Dictionary. *Moore* v. *Gardner* (1851) 5 How. Prac. (N. Y.) 243; *Armstrong* v. *Emmet* (1897) 16 Tex. Civ. App. 242, 41 S. W. 87; *Sullivan* v. *Hall* (1891) 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556; *State* v. *McKinney* (1869) 5 Nev. 194.

[6] *State* v. *Parker* (1888) 96 Mo. 382, 9 S. W. 728.

[7] *State* v. *O'Bryan* (1891) 102 Mo. 254, 14 S. W. 933.

[8] "When Judge deemed incompetent to try case—when any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said cause is being tried is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or, fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

[9] (1895) 129 Mo. 619, 31 S. W. 608.

Doubtless in such circumstances a trial judge would ordinarily decline further jurisdiction and would exercise his right to call in another judge or call a special election under section 5201 R. S. 1909. But suppose the judge denies the allegations of prejudice? Is it contemplated that he shall hear evidence and determinine the fact of his own prejudice? It would not seem to be in accord either with the dignity of a judge or with fundamental notions of justice that a man should sit in judgment on his own case.[10] In the fourth class of cases mentioned in section 5198 R. S. 1909 where the defendant alleges prejudice of the judge the legislature has determined the question by providing the exact procedure. The filing of the affidavits in the form prescribed by the statute raises no issue of fact and the court has no discretion.[11] In the first three classes of cases no procedure is prescribed. In the case under consideration the application for a writ of prohibition alleged that the circuit judge was prejudiced, and not merely that the prosecuting officer *had filed an affidavit alleging prejudice.* On this allegation an issue of fact was formed and tried by the Supreme Court *exercising original jurisdiction.*[12] The court said:

"Some settled propositions as forewords are apposite. One of these is an axiom of the common law wholly applicatory by the closest analogy, which runs in substance that no man ought to sit in judgment on his own case. The other is that, if the objection of prejudice against the state be raised in a case, such objection must of necessity be raised by the sworn, elected, prosecuting officer of the state; that is, either by the prosecuting

[10]See *State* v. *Jim* (1832) 3 Mo. 147; *State* v. *Gates* (1855) 20 Mo. 401. In *State* v. *Witherspoon* (1910) 231 Mo. l. c. 716 the court said: "The law does not contemplate an issue of fact upon an application for a change of venue on account of the disqualification of the judge, to be heard and determined by the judge alleged to be disqualified and therefore, the evidence offered in support of the application, together with the agreed statement of facts, were not properly in the case and should not be considered. When the application is properly made and supported by affidavit as required by the statute the judge has no discretion. He cannot sit in judgment upon the question of his own disqualification, but must grant the change as applied for." It is true that in this case the application was made by the defendant and was based on the fourth class of cases in section 5198 R. S. 1909 in which the legislature has prescribed the method of making the application, but the reasoning of the court would seem to have equal application in a case where prejudice and bias in the trial judge were alleged by the state.

[11]*State* v. *Witherspoon* (1910) 231 Mo. 706, 133 S. W. 323; *State* v. *Spivey* (1905) 191 Mo. 87, 90 S. W. 81; *State* v. *Thomas* (1888) 32 Mo. App. 159. *Contra*: *State* v. *Sayers* (1875) 58 Mo. 585 under Act of 1873.

[12]Article x, Section 3 Constitution gives to the Supreme Court power to issue original writs. Prohibition was held to be an original remedial writ within the jurisdiction of the Supreme Court. *Thomas* v. *Mead* (1865) 36 Mo. 232.

attorney of the county wherein the cause is pending, or by the Attorney General of the State." [13]

But how "raised"? This case does not settle the point, but, in the light of the foregoing statement it would seem that the filing of an affidavit by the prosecuting officer alleging prejudice should leave the trial judge no discretion except to determine the sufficiency of the affidavit as to form. If this is not true it would follow that in such cases the trial judge must try the issue of his own prejudice. If he finds that no prejudice exists, then the state can apply for a writ of prohibition to the Supreme Court. While the Supreme Court clearly has original jurisdiction in such cases, arising out of its inherent supervisory authority over all the courts, yet is it contemplated that the question must always be settled by that body? And if so, should any distinction be made when the allegation of prejudice is made on behalf of the defendant (under the first three classes specified in Sec. 5198) or on behalf of the state?

JESSE E. MARSHALL.

[13] *State ex rel* v. *Slate* (1919) 214 S. W. l. c. 89.