University of Missouri Bulletin Law Series

Volume 21 *March 1921* Article 5

1921

Notes on Recent Missouri Cases

LAW SERIES

Published four times a year by the University of Missouri School of Law.

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MARCH, NINETEEN HUNDRED AND TWENTY-ONE

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, Collected Legal Essays, p. 269.

NOTES ON RECENT MISSOURI CASES

PRACTICE—DECLARATION OF LAW—DEMURRER TO EVIDENCE. *A. Jaicks Co. v. Schoellkopf et al.*[1] In an action on six tax bills against certain city lots owned by defendants, the defense was that the paving for which the tax bills were issued was not done in compliance with the specifications of the paving contract. At the close of conflicting testimony as to the quality of the work plaintiff asked for the following declaration of law: "The court, *sitting as a jury,* declares the law to be that, under the pleadings and testimony in this case the judgment must be for the plaintiff" etc. (Italics supplied.) The declaration was given, defendant excepting.

The expression, "sitting as a jury," as italicized above is useless and possibly harmful. The court as a jury does not declare the law. The

1. (1920) 220 S. W. 486.

court *as a court* declares the law to the court *as a jury*. It is unfortunate that the word "court" is used in two different senses. Perhaps it would be better to say that the court, i.e., the judge, declares the law to himself as a jury. If the person who drew the instruction had the opinion that the court in declaring the law acts in any different capacity in the event that there is a jury of one, viz, the trial judge, as distinguished from a jury of twelve, then he had a fundamental misconception. In any event it will avoid confusion if the expression "sitting as a jury" is omitted even in the event of the trial judge occuping a dual *rôle*.

Upon appeal the Supreme Court in an opinion by Bond, J., held that the declaration of law was erroneous because it excluded from the court sitting as a jury any consideration of the conflict in the evidence. On a motion for rehearing,[2] an opinion *per curiam* was rendered holding that the declaration was erroneously given, also that the opinion of Bond, J., was erroneous; that the declaration of law did not exclude consideration of the conflict in the testimony, but that the trial court had passed on the evidence of the defendant and erred in deciding that it was totally insufficient to sustain the defense.

The *per curiam* opinion further says, "the instruction given for the plaintiff is in effect a peremptory instruction, and in effect was a demurrer to the evidence offered by the defendant." Again, "In other words, it was a demurrer to the evidence." Such use of legal terminology does not aid in clarifying but serves to confuse.

It was at one time held in Missouri[3] that a declaration of law, (by the court before whom the case was tried without a jury) "that on the pleading and evidence the plaintiff is entitled to recover" means merely that the court finds for the plaintiff. But in *Patterson v. K. C. F. S. and M. R. Co.*,[4] where there was a trial before the court, without a jury, it was held in a case where there was a contested issue of fact that a finding for the paintiff was erroneous upon a declaration of law that upon the pleadings and evidence plaintiff is entitled to recover. It is now understood that a declaration of law, where there is a trial before the court, is for the purpose of showing the appellate court upon what theory of law the trial court has proceeded.[5]

Viewed in this light it is apparent that the declaration of law in the principal case was erroneously given because there was substantial evidence to sustain the defense and the trial court by its declaration shows that it acted upon the hypothesis that there was not substan-

2. (1920) 220 S. W. 486.
3. *Hess v. Clark* (1882) 11 Mo. App. 492.
4. (1892) 47 Mo. App. 570.
5. *Butts v. Gunby and West* (1909) 135 Mo. App. 28, 115 S. W. 493; *Hellmuth v. Benoist* (1910) 144 Mo. App. 695, 129 S. W. 257; *Hall v. Smith* (1910) 149 Mo. App. 379, 130 S. W. 449; *Zahm v. Royal Fraternal Union of St. Louis* (1910) 154 Mo. App. 70, 133 S. W. 374; *Schoen & Co. v. Huguuin* (1911) 156 Mo. App. 68, 135 S. W. 967.

tial evidence to sustain the defense. That error was all that was needed to justify a reversal of the judgment and to say that the declaration of law has the effect of a demurrer to the evidence or is a demurrer to the evidence adds no light on the subject.

The Missouri Code of Civil Procedure[6] contains no provision for a demurrer to the evidence. While the common law demurrer to the evidence is not expressly abolished, the status of that demurrer following the decisions of *Gibson v. Hunter*[7] and *Fowle v. Common Council of Alexandria*[8] leaves little room for doubt that the references in the Missouri cases to a demurrer to the evidence do not mean the common law demurrer to evidence. What is usually meant by this expression is a motion for a directed verdict, and it is submitted that it is desirable to call this motion by its proper name.

On the whole, it seems that the *per curiam* opinion was not clarifying. Bond, J., used unfortunate language in saying that "the court, in effect, excluded from its view any consideration of the conflict in the evidence." He reached the correct result, however.

R. E. M.

PRACTICE—PRIVILEGE OF NON-RESIDENT WITNESS. *Bledsoe v. Letson.*[1] The St. Louis Court of Appeals in the above case laid down the rule that a non-resident witness attending court in Missouri was not privileged from service of civil process. The facts in the case are: A, a resident of Illinois, was attending court in Missouri for the purpose of testifying in a civil suit, and while so doing was served with a summons in an action of deceit brought by B.

At common law suitors, witnesses and other persons interested in a suit were privileged from *arrest* during their actual attendance at court, including their coming and going.[2] A *capias* could then be secured on almost any kind of complaint and most cases were started in that way.[3] The rule had its origin in an effort to protect the courts in the orderly administration of justice. It was the arrest that interfered with the court[4] and the privilege in many instances, tho not in all, was limited to freedom from arrest.[5] The service was not always set aside but the defendant was released upon giving common bail which was equivalent to an entry of appearance in the suit.[6] The non-resident

6. R. S. Mo. 1909, Chap. 21, Art. V. Pleadings.
7. (1793) 2 H. Blackstone, 187. (H. of L.)
8. (1826) 11 Wheaton 320. (U. S. Sup. Ct.)
1. (1919) 215 S. W. 513.
2. Tidd, Practice, 3d. Am. Ed. p. 195; 3 Blackstone, Lewis Ed., 289.
3. 3 Blackstone, Lewis Ed., p. 282.
4. *Cole v. Hawkins* (1738) 2 Stra. 1094.
5. *Poole v. Gould* (1856) 1 H. & N. 99.
6. Black's Law Dictionary-Title-Common Bail; Long's Case (1658) 2 Mod. 181.

witness, however, was not only privileged from arrest but also from service of process.[6a] The reason for the rule was to promote justice by encouraging the foreign witness to come into England and give his testimony. For as Lord Mansfield said: "The service of the subpoena abroad would be an useless form; he cannot be punished for not coming; if he comes at all, then it must be voluntarily."

The doctrine of privilege was early adopted in the United States and liberally extended to freedom from service of civil process. The development of the American rule has been along a different line than at English common law, because in many instances the distinction made in the English cases between freedom from arrest and service of process was overlooked. The privilege at common law was that of the court and the claim of the party was of minor importance. But in the United States it was recognized that many of the parties would not come to the forum as the individual regarded it desirable that he be sued in his own jurisdiction. The privilege is invoked to protect this policy as well as to aid the court in the administration of justice.[7] That it is a personal as well as a judicial privilege is evident from the decisions holding that the persons protected may waive the privilege.[8]

That a witness is immune from service while attending trial in a state other than that of his residence is almost universally recognized by the American courts.[9] There is a conflict of authority as to whether a non-resident suitor is entitled to a like exemption. Some courts while allowing it to a non-resident witness deny it to a suitor,[10] but the great weight of authority declares both parties and witnesses are alike entitled to the privilege,[11] tho it is obvious much can be said against extending the privilege to the case of the non-resident suitor.

The rule laid down in the principal case is directly opposed to the great weight of authority, American and English. The court in its opinion made no attempt to justify its decision upon reason or the weight of authority, but relied soley upon previous decisions of the Missouri Supreme Court. This was all that was said on the question: "Taking up the question of the overruling of the defendants' plea in abatement, we are satisfied that the plea was properly overruled. See *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726; *Christian v. Wil-*

6a. *Walpole v. Alexander* (1782) 3 Douglas 45.

7. *Halsey v. Stewart* (1817) 4 N. J. L. 420; *Jacobson v. Hosmer* (1889) 76 Mich. 234, 42 N. W. 1110.

8. *Sheehan & Loler Trans. Co. v. Sims* (1889) 36 Mo. App. 224.

9. *Kauffman v. Kennedy* (1885) 25 Federal 785; *Sherman v. Gundlach* (1887) 37 Minn. 118, 33 N. W. 549; *Chittenden v. Carter* (1909) 82 Conn. 585, 74 Atl. 884.

10. *Baldwin v. Emerson* (1888) 16 R. I. 304, 27 Am. St. Rep. 741; *Guynn v. McDaneld* (1895) 4 Idaho 605, 43 Pac. 74.

11. *Andrew v. Lembeck* (1888) 46 Ohio St. 38, 18 N. E. 483; *Hale v. Wharton* (1896) 73 Federal 739; *Junesson Bank v. McSpadden* 5 Biss. 64, Federal Cases No. 7,582; *Breon v. Miller Lbr. Co.* (1909) 83 S. C. 221, 65 S. E. 214; *Diamond v. Earle* (1914) 217 Mass. 499, 105 N. E. 363.

liams, 111 Mo. 429, 20 S. W. 96; *State ex rel v. Moore,* 164 Mo. App. 649, 147 S. W. 551." (Becker, J.)

The first case relied upon is *Christian v. Williams* [12] which is authority only for the proposition that a *resident* defendant and witness attending court in a county in Missouri other than that of his own residence is not privileged. The next case, *Baisley v. Baisley,*[13] holds that a non-resident who has brought suit in this state against another non-resident is subject to service of civil process in a suit brought by the person whom he has sued.

The actual decisions were not very sweeping, but owing to the fact that they are based upon a Missouri statute[14] they are capable of being construed so as to entirely abolish privilege. *Christian v. Williams* was brought under the first section of the statute and the court based its ruling upon the words "was found." The statute was interpreted to mean that the only requirement for getting service on a non-resident was to find him in the county. *Baisley v. Baisley* was brought under the fourth section of the statute which does not contain the words "was found." Nevertheless, the decision was in part placed upon that ground. Sherwood, J., evidently realized that the reading of the words "was found" into the fourth section was more or less arbitrary for he gave the additional reason that the defendant had voluntarily brought suit in the state and cited the case of *Bishop v. Vose,*[15] a leading American case, holding that such a party was not privileged. The decision can be justified upon the latter basis. The defendant had voluntarily come into the state asking the aid of its judicial machinery in enforcing his claim and there would be no injustice in compelling him to assume the burdens,[16] and have causes against him tried by the same court.

The full effect of placing the decisions solely upon the statute is seen in the position taken by the Court of Appeals in *State ex rel v. Moore.*[17] That case proceeds upon the theory that the effect of the statute is to abolish all privilege in that it makes no exceptions. This is carrying the doctrine further than Sherwood, J., thought it could be carried. In *Christian v. Williams,* after holding the defendant was not privileged, he said: "Of course these remarks do not apply to a case where a party is induced by fraud or compelled by criminal process to enter within the boundaries of a county other than that of his residence." If *State ex rel. v. Moore* is followed to its logical conclusion the *dicta* in *Christian v. Williams* could not be law. The *dicta* is well supported by authority.[18] This is a clear exception to the statute and

12. (1892) 111 Mo. 429, 20 S. W. 96.
13. (1893) 113 Mo. 544, 21 S. W. 29.
14. Sec. 1, R. S. Mo. 1889, now Sec. 1751 R. S. Mo. 1909.
15. (1858) 27 Conn. 1.
16. *Guynn v. McDaneld* (1895) 4 Idaho 605, 43 Pac. 74.
17. (1912) 164 Mo. App. 649, 147 S. W. 551.
18. *Marsh v. Bast* (1867) 41 Mo. 493; *Capitol City Bank v. Knox* (1871) 47 Mo. 333.

the basis of the decision in *State ex rel. v. Moore,* i. e., there are no exceptions to the statute, is in direct conflict with the privilege extended to parties who are compelled by abuse of criminal process or induced by fraud to come into a foreign jurisdiction.

Christian v. Williams and *Baisley v. Baisley,* it is suggested, do not present a sound application of the statute. In the Revised Statutes of Missouri for 1879 the statute first appears in its present form and it is headed:[19] "Of the Place for Bringing Suits." What the Legislature intended to accomplish in revising and amending the statute was to provide a *forum* for bringing suits. The "place where" the suit could be instituted was pointed out but it was not intended to affect the other rights of the parties. In its interpretation the Supreme Court isolated the statute and lost sight of the principle that a statute should be construed with reference to coordinate rules and statutes. The most reasonable construction to place upon the statute is that it was intended to run parallel with and not in derogation to any common law principle. The Supreme Court of Indiana in holding that a statute similar to the one in Missouri did not destroy privilege said:[20] "If we should find a well established principle of law exempting non-residents who are in this state for the purpose of attending court as parties or witnesses, we should be bound to construe the statute with reference to that principle, for we could not hold that the Legislature meant to disregard it and establish a new rule."[21]

The Missouri Supreme Court has never directly passed upon the privilege of a non-resident witness, but if the principles enunciated in previous decisions are rigorously applied without regard for common law principles,[22] it will be held that he is not privileged. There is a sound reason for making an exception to the operation of the statute in the case of a non-resident witness. It should not be overlooked that the defendant in *Christian v. Williams,* even if wanted only as a witness, could have been compelled to appear and give his testimony.[23] The defendant in the principal case could only be invited.[24] Whether or not a non-resident witness gives his testimony is often a matter of accommodation. Public policy would seem to demand that his privilege of being sued in his own jurisdiction should not be forfeited because he goes into a foreign jurisdiction to give testimony in a case to which he is not a party. A citizen of this State who is asserting or defending his rights should be enabled to procure the attendance of all such per-

19. R. S. Mo. 1879, Sec. 3481.

20. *Wilson v. Donaldson* (1888) 117 Ind. 35, 20 N. E. 250.

21. For a discussion of the interpretation placed on the statutes see: Alderson on Judicial Writs, Sec. 120; *Hale v. Wharton* (1896) 73 Fed. 739, citing but not following *Baisley v. Baisley* and *Christian v. Williams.*

22. *Baisley v. Baisley, supra; Christian v. Williams, supra.*

23. R. S. Mo., 1909, Sec. 1764, R. S Mo., 1889, Sec. 2021.

24. Works, Courts and Their Jurisdiction, Sec. 37.

sons as are necessary to support or defend his rights without molestation of the witnesses.[25] He has no way of compelling a non-resident witness to appear in court and give his testimony and such a witness, if he is willing, should be allowed to approach the court free from fear of hindrance or subjecting himself to service of civil process. Otherwise he may not come at all.

It is submitted that an extension of the principle of *Christian v. Williams* and *Baisley v. Baisley* as made in the case reviewed is not desirable, but upon the contrary, upon reason and sound public policy the doctrine of those two cases should be restricted to the exact facts in issue in those cases.

I. C. N.

TRUSTS—CHARITABLE PURPOSE—DESIGNATION OF TRUSTEE. *Robinson v. Crutcher.*[1] This was an action by the heirs of Temple B. Robinson to have the fifth, sixth and seventh clauses of Robinson's will construed.[2] The trial court held that valid charitable trusts were created. This finding was reversed by the Supreme Court *en banc*[3] on the ground that there was no separation of the legal and equitable estates; that there was no bequest to "any natural or artificial entity;" but that the testator merely attempted to bequeath a certain part of his estate to the "capital" of certain public school funds.[4]

Apparently there is an error in the opinion of the majority of the Supreme Court in failing to give proper weight to that part of the seventh clause which directed his "executors to pay over to the *lawful custodians of the several public school funds* mentioned in this and the two preceding clauses of this will the several shares given to the said school funds as aforesaid." (Italics supplied) Concededly, the language of this provision is not artistic; that, however, is not a requirement with

25. *Halsey v. Stewart* (1817) 4 N. J. L. 420.

1. (1919) 277 Mo. 1, 209 S. W. 104.

2. The material portions of the will follow:

"4th: The residue of my property of whatsoever kind and wheresoever situate, I will and direct shall be divided into three equal parts.

"5th: One of such third parts I give and bequeath to the capital of the township school fund of T. 54, R. 10, in Monroe county, Missouri.

"6th: One of such third parts I give and bequeath to the capital of the public school fund of Monroe county.

"7th: One of such third parts I give and bequeath to the capital of the public school fund of the State of Missouri and I direct my executor to pay over to the lawful custodians of the several public school funds mentioned in this and the two preceding clauses of this will the several shares given the said school funds as aforesaid."

3. Walker, J., writing the opinion in which, Bond, C. J., Faris, and Graves, JJ., concurred. Williams, J., wrote a dissenting opinion in which Blair, J., concurred.

4. The following statement in the majority opinion seems not clear:

"Neither directly or by reasonable implication is a donee designated who can take the legal title to the funds bequeathed and thus authorize the appointment of a trustee." If a donee had been designated and he had become vested with the legal title, what occasion would there be for the appointment of a trustee? It there were a trust the donee himself would be the trustee.

wills. It is of course true that all the provisions in a will relating to a particular subject should be considered together and the intent of the testator ascertained without regard to crudities in expression.[5] If, then, the several clauses are read by a sympathetic eye, is it not plain that the testator meant to vest the *legal title* of the property bequeathed in the *lawful custodians* of the three separate school funds? There seems to be no dispute that the three school funds really existed and that actual human beings had custody of them at the time of the testator's death. It is equally true that the beneficiaries of the trust (even tho they were not expressly mentioned) are persons who would be benefited by the administration of the capital of the several school funds. And this is the point of view of Williams, J., in his dissenting opinion.

The answer of the majority of the court to the above reasoning is simply the statement that "it was the purpose of the donor to bequeath these shares of his estate to the *school funds themselves,* and not to the legal custodians of funds of like character." Was not the court unduly critical in deciding that the testator had an absurd and impossible intention? This decision and the one in *Jones v. Patterson*[6] indicate that the Supreme Court of Missouri does not look with great interest and liberality upon charitable trusts. This strict view has been regretted.[7]

If it is conceded that the majority opinion is correct in its conclusion that the bequests to the capital of the school funds are a nullity there still remains another angle of approach. There would seem to be no doubt that it was the *intention* of the testator to create a charitable trust for educational purposes.[8] The result would be, then, that there has been the creation of a trust except that a trustee has not been named.[9] Surely, it is too late to deny, and the majority opinion *appar-*

5. R. S. Mo., 1909, Section 583: "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them."

6. (1917) 271 Mo. 1, 195 S. W. 1004; 20 Law Series 53.

7. "Melancholy the spectacle must always be, when covetous relatives seek to convert to their own use the fortune which a testator has plainly devoted to a great public benefaction." James Barr Ames, The Failure of the "Tilden Trust," 5 Harv. L. Rev. 389, Ames Lect. Leg. Hist. 285.

"In *Robinson v. Crutcher,* bequests 'to the capital of' certain township, county and state school funds were held to fail because no trustees were named, although the testator directed his executor to pay over the bequests 'to the lawful custodians of the several public school funds mentioned.' The court was of the opinion that direct gifts to the funds were intended, which failed because a fund could not be a legatee; that there was no attempt to create a trust, and that the court therefore could not designate a trustee. On this reasoning a gift to the Harvard Endowment Fund instead of to the trustees of the fund would fail. *The technically of this decision can only be equaled by the decisions in New York that a direct gift to an unincorported charitable association cannot be upheld as a charitable trust.*" (Italics supplied.) Austin W. Scott, 33 Harv. Law Rev. 695. Compare 19 Harv. Law Rev. 202.

8. The majority opinion in conceding the "utmost" stated that, "it was the purpose of the donor to add money to money for the benefit of education." 277 Mo. 1. c. 9, 209 S. W. 1.c. 106.

9. It is true that the majority opinion makes the following declaration:

"The question here involved is not, as contended by respondent, the failure to name a trustee" etc. 277 Mo. 1. c. 10, 209 S. W. 1. c. 107.

ently concedes[10] that a charitable gift will not fail because of a failure to designate a trustee. *Schmidt v. Hess,*[11] an earlier Missouri decision, states the correct doctrine. There one R executed and delivered a deed in which the "Lutheran Church" was named as the grantee. There was no entity by that name. The plaintiffs as trustees of the Evangelical Lutheran Trinity Church brought a bill to vest title in the land in themselves and to restrain the defendants as trustees of the German Evangelical Central Congregation and others from interfering with their use of it. Said the court: "No doubt is entertained that the gift under consideration is a charity and falls within the meaning of the rules of chancery. (2 Sto. Eq. Jur., ¶1164, and cases cited.) And although in consequence of the non-incorporation of the church for whose benefit the grant was made, there was no one *in esse,* at the time of making the donation, capable of being the recipient of the trust; yet the use being a charitable one, a court of equity having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation." Accordingly, there was judgment for a decree vesting title in the property in the plaintiffs, as trustees of the Evangelical Lutheran Trinity Church.[12] This precedent furnished a correct solution of the principal case.

Shortly before the decision in the principal case, *While v. Mayor and Common Council of City of Newark*[13] was decided by the Court of Chancery of New Jersey. The facts in the latter case were even stronger against the valid creation of a charitable trust than they were in the Missouri case.[14] A contrary result was reached in New Jersey. In view of the fact that the opinion of the New Jersey Court is very clear it is wondered whether it was called to the attention of and considered by the Missouri court. The New Jersey court stated: "It is to be noted that the gift *is directly to the fresh air fund and not to a trustee.* As far as appears there is in Newark neither an incorporated nor an unincorporated body called the fresh air fund, and the evidence fails to show the existence of any permanent fund of that description." (Italics supplied.)

Nevertheless, the court held that the gift was to a charity and that

10. "If such a trust has been created it will not be permitted to fail because a trustee has been erroneously or uncertainly designated, but the court in the exercise of its inherent equity jurisdiction will appoint one." 277 Mo. 1.c. 9, 209 S. W. 1.c. 105. If the court meant that there could be no "trust" unless there was a trustee provided for in some indefinite manner then the statement seems too restricted. The authorities are collected in 14 L. R. A. (N.S.) 109.

11. (1875) 60 Mo. 591.

12. Compare *Lilly et al. v. Tobbein et al.* (1890) 103 Mo. 477, 486, 15 S. W. 618 (*dictum*); *Schneider v. Kloepple* (1917) 270 Mo. 389; 193 S. W. 834.

13. (1918) 89 N. J. Eq. 5, 103 Atl. 1042.

14. The will under consideration in the New Jersey case provided as follows:

"I give the interest of five thousand dollars to the *fresh air fund* of Newark to be used every summer for special needy cases that need to be sent right away not to go in the general fund, * * * the money I give to the

since the bequest was for a specific object, the court would nominate a trustee to administer the trust.

Nine years previous to the decision under review the Supreme Court of Iowa[15] passed upon the same proposition in point of principle.[16] The conclusion of the Iowa court also was just the reverse of the Missouri court. Apparently the decision was not cited by counsel and no mention of it is made by the Missouri Supreme Court. It was argued in the Iowa case that the bequest was invalid because "there is no such fund, and that the gift is not to any person, corporation, individual or thing capable of accepting it, and is therefore void for uncertainty." The court conceded "that the statute has not created a fund specifically designated as a 'county permanent school fund' " and made this obvious reply:[17]

"So also, tho no donee or trustee be named, or if one be named who is incapable of taking and holding the gift for charitable uses, the trust will not be allowed to fail, as a court of equity will supply the proper trustee." [18]

It is only necessary to contrast with the New Jersey and Iowa decisions one statement in the majority opinion of the Missouri case to understand the cause of the decision believed to be an unfortunate one. Says the Missouri court: "Hence, it would become necessary to sustain the same, to write into the will, otherwise clear and unambiguous, the names of the donees who would take legal title to the funds bequeathed." [19]

Yes, may be replied, this is necessary but it may be done, and should be done, and has been done time and again by the chancellor exercising equity jurisdiction. In every case where there is a failure to name a trustee the court will have to appoint some one who will become invested with the legal title.

The final conclusion seems to be that whichever point of view is

fresh air fund of Newark, N. J. to be put out at interest if not already invested." (Italics supplied.)

15. *Chapman et al. v. Newell* (1910) 146 Ia. 415, 125 N. W. 324.

16. The eighth or residuary clause of the will provided: "All the rest and remainder of my estate including the proceeds of the land sold, and after the payment of the legacies above named I give, devise and bequeath absolutely and without reservation to the permanent school fund of Louisa county, Iowa."

17. *Chapman v. Newell* (1910) 146 Ia. l.c. 422, 125 N. W. l.c. 327.

18. The liberal point of view of the Iowa court is shown by the following: "This devise does not attempt to treat the 'permanent school fund' as being in itself a person or corporation capable of receiving and enjoying the gift, but it is as if the testator had said, 'I devise and bequeath the remainder of my estate to increase the permanent school fund of Louisa county,' or 'I give and bequeath to Louisa county for a permanent school fund.' If, for instance, the will had contained a devise 'to the Schoolhouse Fund of the Independent School District of Wapello in Louisa County,' there would not be the slightest hesitation on the part of any lawyer in saying that this was a good devise to the independent district for the use or upon the trust therein expressed." Compare the provisions under consideration in the Missouri case, note 2, *supra*.

19. *Robinson v. Crutcher* (1919) 277 Mo. l.c. 9, 209 S. W. l.c. 106.

taken, the majority opinion is incorrect; and it is to be hoped that in the course of time the minority opinion will prevail.

A. N. BROWN.[20]

CERTIORARI FROM THE SUPREME COURT TO THE COURT OF APPEALS—SCOPE OF THE INQUIRY. *State ex rel. Kansas City v. Ellison.*[1] The Supreme Court of Missouri issued a writ of certiorari to the Kansas City Court of Appeals on relator's contention that the latter court had failed to follow the latest previous ruling of the Supreme Court in *Barnett v. Kansas City.*[2] The Constitution of Missouri, Section 15, Article 6, has been interpreted to give authority to the Supreme Court to quash a decision of the Court of Appeals if it conflicts with the latest previous ruling of the Supreme Court. In considering whether the decision in the *Barnett* case conflicted with the rulings of the Supreme Court, a question arose as to certain instructions given by the trial court for the plaintiff. These instructions were not set out in their entirety in the opinion of the Court of Appeals, but were only referred to therein. The question arose as to whether the scope of inquiry of the Supreme Court on certiorari extended to these instructions in their original form. In deciding this point the court laid down the general rule that on certiorari from the Supreme Court to the Court of Appeals, any written document referred to in the opinion of the Court of Appeals thereby becomes as much a part of the record for review as if it were set out in the opinion *in haec verba.* This doctrine of incorporation into the record for review of written documents referred to in the Courts of Appeals' opinions is a comparatively new ruling yet it seems to have been established by the decisions during the last few years. *State ex rel. National Newspapers' Association v. Ellison*[3] held that the original petition as presented to the trial court, when referred to in the opinion of a court of appeals, may be brought up and reviewed along with the opinion. Also, *State ex rel. Heine Safety Boiler Co. v. Robertson*[4] says that a previous opinion of the Court of Appeals in the same cause is incorporated into the record by reference thereto in the opinion under consideration and may be considered. *State ex rel. Central Coal & Coke Co. v. Ellison*[5] for the purpose of ascertaining the facts held that two previous opinions of the Court of Appeals referred to in the opinion under consideration might be considered. To the same effect is *State ex rel. Quercus Lumber Co. v. Robertson.*[6] *State ex rel. Hayes et al. v. Ellison*[7] held an order of publication to be incorporated by reference

20. Senior, School of Law, University of Missouri.
1. (1920) 220 S. W. 498.
2. (1919) 214 S. W. 240.
3. (1915) 176 S. W. 11.
4. (1916) 188 S. W. 101.
5. (1917) 270 Mo. 645, 195 S. W. 722.
6. (1917) 197 S. W. 79.
7. (1916) 191 S. W. 49.

thereto in the opinion of the Court of Appeals, and the original order was thereby brought up for review. *State ex rel. Curtis v. Broaddus*[8] was decided prior to those cases just cited. It laid down the rule that the entire abstract of the record as filed in the Court of Appeals may be brought up and examined on certiorari. The case is silent on the doctrine of incorporation and the rule seems to be too broad, because later cases hold that the bill of exceptions is not to be reviewed on certiorari by the Supreme Court to a Court of Appeals. On the other hand *State ex rel. Wahl v. Reynolds,*[9] goes so far as to state in the opinion that the scope of inquiry should be limited to the present opinion of the Court of Appeals that is under review, but the case is not a direct holding on that point and the dictum is not being followed. Neither does that case say anything about the doctrine of incorporation by reference. *State ex rel. C. R. I. & P. Ry. Co. v. Ellison*[10] held that the Supreme Court in determining on certiorari whether there is a conflict between the decision of the Court of Appeals and the last previous ruling of the Supreme Court will not look behind the recital in the opinion of the Appellate Court for a statement of the facts or evidence. *State ex rel. Dunham v. Ellison*[11] states that on certiorari to the Court of Appeals the Supreme Court will not examine the bill of exceptions for the purpose of ascertaining the facts because a case brought up for review by certiorari is not to be reviewed as if it were an appeal, but reviewed only for the purpose of determining conflict of decision. The last two cases represent the law regarding inquiry into the bill of exceptions for the purpose of ascertaining the facts and apparently stand undisputed.[12]

It is wondered, though, whether the final word has been said as to this feature of the inquiry. Frequently the most serious question in a case is whether there is any evidence to sustain the judgment below. Whether there is any evidence to sustain a complaint, though originally regarded as a question of fact for the jury in the early days of the modern jury trial, today is undoubtedly a question of law for the judge.[13]

It is obvious then that if a court of appeals erroneously decides that there is evidence to sustain a claim against a defendant when no such evidence exists—and this can only be told by examining the bill of exceptions—then it follows that a Court of Appeals can in reality fail to follow the rule of law as announced in the last decision of the Supreme Court. For as stated, whether there is any evidence of an as-

8. (1911) 238 Mo. 189, 142 S. W. 340.
9. (1917) 272 Mo. 588, 199 S. W. 978.
10. (1915) 263 Mo. 509, 173 S. W. 690.
11. (1919) 213 S. W. 459; (1919) 213 S. W. 804.
12. (1918) 200 S. W. 1042; (1919) 257 Mo. 19, 210 S. W. 881.
13. *Slades Case* (1648) Style 138; *Bushells Case* (1670) Vaughan 135; *Chichester v. Phillips* (1680) T. Raymond 404. "Buller, Justice. 1. Whether there be any evidence is a question for the judge. Whether sufficient evidence is for the jury." *Company of Carpenters v. Hayward* (1780) 1 Doug. 374.

serted right, duty, power or liability is a question of law. A decision that there is not evidence cannot be tested unless the evidence given at the trial is examined. If it will not be examined by the Supreme Court it would seem that a finding that there is evidence or that there is not evidence, which is a question of law, may be held differently by the Supreme Court and the Courts of Appeals. Such a condition is not desirable. Harmony of actual decision was intended by the Constitution and not mere lack of obvious conflict on the face of written opinions.

Summing up these decisions it seems clear that the scope of inquiry on certiorari from the Supreme Court to a Court of Appeals extends primarily to the opinion of the Court of Appeals; but when it is necessary to look further in order to throw more light upon whether there is a real conflict of decision, the Supreme Court has adopted the doctrine of incorporation into the record for review of written documents referred to in the opinion of the Court of Appeals. The effect of this has been to extend the scope of inquiry to the pleadings in the case, orders of publication, previous opinions of the Court of Appeals in the same cause, and finally by the principal case to the instructions given to the jury by the trial court whenever reference is made to these matters in the opinion of the Court of Appeals. Clearly the scope of inquiry does not extend to the bill of exceptions or the facts or evidence other than as recited in the opinion rendered by the Court of Appeals.

This doctrine of incorporation by reference is a fiction but it seems to bring about a desired result. The justification for the fiction is that it will tend to bring about harmony of actual decision rather than mere harmony of written opinions. If the scope of inquiry were limited to the opinion of a Court of Appeals it would often be impossible to tell from a cleverly written opinion whether there was a conflict in the application of a principle of law.

It is the actual application of legal principles that determines whether justice or injustice has been done in any particular controversy.[14]

JOHN P. RANDOLPH[15]

CRIMINAL LAW—RECEIVING STOLEN GOODS—GUILTY KNOWLEDGE. *State v. Ebbeller.*[1] This was a prosecution for receiving stolen goods. The lower court instructed the jury that by the term "knowing" was meant, "Such knowledge and information in his possession - - - - as would put a reasonably prudent man, exercising ordinary caution, on

14. For a general discussion see 6 Law Series 3 and 13 Law Series 30.
15. Senior, School of Law, University of Missouri.
1. (1920) 222 S. W. 396; annotated in 30 Yale Law Jour. 194.

his guard and would cause such a man exercising such caution, and under circumstances which you believe defendant received the property to believe and be satisfied that the property had been stolen." The Supreme Court held the instruction erroneous.

Under the various statutes in England[2] and in the states of this country[3] making the receiving of stolen goods a felony, knowledge on the part of the accused that the goods were stolen is essential to the offence. In defining this element three positions are logically possible. All of them have been set forth in reported cases. In a few of the earlier decisions[4] it was held that direct *personal* knowledge was necessary for conviction and this rule has been adhered to in at least one American jurisdiction.[5] The impossibility of proving such knowledge in the vast majority of cases, however, has lead to its repudiation in England.[6] This view has not been accepted generally in the United States.

In reacting against this impractical view, some courts have laid down the rule that where the defendant receives goods under such circumstances that a man of ordinary prudence and intelligence would believe them to have been stolen, he will be deemed to have guilty knowledge without proof of actual knowledge on his part.[7] Under this rule a conviction is possible in cases where the accused has no knowledge of any kind that the goods were originally obtained by theft or embezzlement. Mere negligence is permitted to take the place of guilty knowledge in determining criminal liability. The rule has been criticized in many American cases[8] and it would seem contrary to the general policy of the common law to punish a negligent act unless the negligent actor displays a disregard for human life or the personal safety of another. Moreover, the words of the statute "*knowing* them to have been stolen"[9] make it clear that the legislature intended to make knowledge the gravamen of the offence thereby requiring a specific intent to be shown. Legislatures might have created criminal responsibility for the mere receiving of stolen goods with a general criminal intent by the omission of the quoted words. In crimes of this class negligence is never allowed to take the place of a criminal intent[10]

2. 24-25 Vict. c. 96.
3. The provision in this state is Sec. 4554 R. S. 1909.
4. *Rex v. Densley* (1834) 6 C. & P. 399; *Regina v. Rymes* (1853) 3 C. & K. 326. The remarks in these cases, however, seem to be largely *obiter*. Perhaps the historical connection between misprision of felony and the receiving of stolen goods may account for the carrying over of this element from the former to the latter offence.
5. *Young v. Commonwealth* (1882) 4 Ky. Law R. 55, 11 Ky. Opin. 689.
6. *Regina v. White* (1859) 1 F. & F. 665; *Rex v. Dunn* (1826) 1 Moody C. C. 146.
7. *Commonwealth v. Finn* (1871) 108 Mass. 466; *State v. Feuerhaken* (1895) 96 Ia. 299, 65 N. W. 299; *State v. Druxinman* (1904) 34 Wash. 257, 75 Pac. 814; *Commonwealth v. Leonard* (1886) 140 Mass. 473, 4 N. E. 96. (*Semble*).
8. *State v. Roundtree* (1908) 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N.S.) 833; *Robinson v. State* (1882) 84 Ind. 452; *Cohn v. People* (1902) 197 Ill. 482, 64 N. E. 306; *State v. Alpert* (1914) 88 Vt. 191, 92 Atl. 32.
9. 4554 R. S. Mo. 1909.
10. May, Criminal Law, 3rd. Ed. Sec.

unless it is clearly necessary to carry out the legislative policy involved in the statute.[11]

In many jurisdictions a third view seems to prevail although it has not been formulated or defined with any particular clearness by the courts. According to this rule personal knowledge by the accused is part of the corpus delicti.[12] This knowledge need not be an exact acquaintance with the circumstances of the original theft or embezzlement of the goods.[13] It is sufficient to prove that at the time the accused received the goods, he *believed* from the circumstances under which he got them that they had been obtained by the person giving them into his possession through embezzlement or theft.[14] It would seem that if the reception of the goods under such circumstances as would place the average man on his guard is proved, the jury might, in the absence of countervailing evidence, reasonably conclude that the defendant had such a belief.[15]

They must be satisfied, however, that he actually did so believe, not that, measured by the norm of the hypothetical reasonably prudent man, he should have so believed. Under this view an actual guilty knowledge as distinguished from negligence on the part of the defendant must be found by the jury.

The instruction given by the trial court in the principal case embodied the second of these rules. The court seems to have followed a form which for some years has been in general use with the trial courts of this state. The existence of this custom is evidenced by the presence of this instruction in lists of instructions set out in the reports of cases in the Supreme Court.[16] In none of the earlier cases was the precise point raised on appeal. In *State v. Kosky*,[17] however, the point seems to have been decided. In this case the state relied on evidence that the accused knew that the boy from whom he took the goods was of dishonest character. The instruction was identical with the one in the principal case. It would seem that under these facts the giving of such an instruction by the trial court, if incorrect, would have been prejudicial to the defendant. The court said: "There was no error in the instructions." But there was no further discussion of

34; *Ogeltree v. State* (1856) 28 Ala. 693; *U. S. v. Moore* (1873) Fed. Case 15803.

11. *U. S. v. Thompson* (1882) 12 Fed. 245.

12. *State v. Roundtree* (1908) 80 S. C. 387, 61 S. E. 1072.

13. *Huggins v. People* (1890) 135 Ill. 243, 25 Am. St. R. 357, 25 N. E. 1002.

14. The best statement of the rule seems to be in *People v. Groves* (1918) 284 Ill. 429, 120 N. E. 277. Lowell, J., in *U. S. v. Moore*, Fed. Case 15803, in speaking of another crime, stated the principle applied here as follows: "Proof of the reasonable cause of belief may warrant a jury in finding knowledge but it is not the legal equivalent of knowledge."

15. See the following cases: *Adams v. State* (1875) 52 Ala. 379; *Blumenthal v. State* (1904) 121 Ga. 477, 49 S. E. 597; *State v. Goldblat* (1892) 50 Mo. App. 186.

16. *State v. Sakowski* (1905) 191 Mo. 605, 90 S. W. 435, 4 Ann. Cas. 751.

17. *State v. Speritus* (1905) 191 Mo. 24, 90 S. W. 459.

the point here involved. In so far as this case stands for the proposition that mere negligence will take the place of a true guilty knowledge it is overruled by the case under review.

The court in the principal case is silent as to the exact theory of guilty knowledge adopted in this state. Does it, then, intend to require proof of direct knowledge in the sense of the earlier English decisions on the point? It would seem that it does not. The court cited with approval certain Federal cases[18] which display a strong tendency toward the third rule stated above.[19] The Federal Court cited with approval *Cohn v. People*[20] where it is stated: "It is true, that proof of direct knowledge is not necessary, and that evidence of facts and circumstances sufficient to create in the minds of the accused a belief that the goods were stolen may amount to guilty knowledge of the fact."

The decision in the principal case fails to notice *State v. Goldblat*[21] which decided that proof that the accused obtained the goods from a young boy of known bad character at an abnormally low price, was sufficient to warrant the jury in finding that he had a guilty knowledge of the larceny of the goods. Under the theory above elaborated that case may be reconciled with the principal case. In the *Goldblat* case the jury could have found that the defendant had actual belief that the goods were stolen. Therefore it is believed that the case under review does not overrule the *Goldblat* case and that in Missouri the third view stated above is the rule that will prevail.

BEN ELY, JR.[22]

EVIDENCE—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS. *Gisel v. Gisel.*[1] In the above case the St. Louis Court of Appeals decided that in a divorce suit, the plaintiff-wife's testimony of a conversation between herself and husband, not within the hearing of a third person, in which he accused her of infidelity, was properly excluded as a confidential communication. The court apparently realized the undesirability of the holding and came to it with regret that it had no choice

18. *Kasle v. U. S.* (1916) 233 Fed. 878, 147 C. C. A. 552; *Peterson v. U. S.* (1914) 213 Fed. 920.

19. "It is not meant to say, however, that conviction cannot be established upon circumstantial evidence. While there was direct testimony, and specific denial, of guilty knowledge on defendant's part, yet there were in addition circumstances of more or less tendency to show as well as to refute such knowledge; the relevancy of such circumstances, when not too remote, cannot of course be rightly denied; but, apart from instructions as to whether the property was in fact stolen, no difficulty is perceived in applying the circumstances directly to the accused with a view of testing the question of notice or knowledge on his part, at the times he received the goods and chattels, that they had been stolen (if in fact they were stolen)." *Kasle v. United States* (1916) 233 Fed. 1. c. 886.

20. (1902) 197 Ill. 1. c. 485, 64 N. E. 1. c. 307.

21. (1892) 50 Mo. App. 186.

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1. (1920) 219 S. W. 664.

but to follow *Moore v. Moore*[2] and *Berlin v. Berlin*,[3] previously decided by the Supreme Court of Missouri.

The branch of the law of evidence involved in the decision of this point appears to be in confusion. The chief cause of this confusion has been the failure of the courts to clearly distinguish between: (1) The disqualification of husband and wife to testify for the other;[4] (2) the privilege against the giving of adverse testimony by one against the other;[5] and (3) the privilege involved here, i. e. the privilege against the husband or wife giving testimony as to confidential communications.[6] The American courts have repeatedly grouped the disqualification and the two privileges together in one sweeping and grossly inaccurate rule.[7] The decisions in this state cannot be excepted from this criticism.

In *Moore v. Moore, supra,* the decision was that a husband was a *qualified* witness where his wife was the opposing party in a divorce suit. The language of the opinion does express a limitation that "they are not allowed to testify in regard to the communications from one to the other" [8] but this appears to be nothing more than *dictum.*

In *Berlin v. Berlin, supra,* an action by the wife for support and maintenance, the wife was permitted to testify as to conversations between herself and husband and as to certain admissions made by him to her. Sherwood, J., in delivering the opinion of the court affirming the general term, which reversed the special term, said: "The witness was clearly *incompetent* as to any conversations had with defendant, or as to any admissions made to her by him." [9] At the same time it was made clear that there was no intention to question the rule that either spouse was a competent witness in a proceeding between spouses as to matters other than those set forth in the above quotation. As to the main point the court reasoned in this general and somewhat rhetorical manner:

> "Communications of husband and wife *inter sese* are privileged, and are sedulously guarded by seal of that absolute inviolability which the law places upon the hallowed intimacies of the marital relation. So strictly has the law, on the grounds of public policy, enforced the observance of this rule, that

2. (1872) 51 Mo. 118.
3. (1873) 52 Mo. 151.
4. Wigmore on Evidence, section 600, history of the rule; 601, policy of the rule; 603, theory of the common law rule; 604, waiver; 605, who is excluded; 606-609, on whose behalf; 610, effect of death and divorce; 612, exceptions; 619-620, statutory abolition.
5. Wigmore on Evidence, section 2227, history of the privilege; 2228, policy of the privilege; 2230-2231, who is prohibited as husband and wife; 2232-2233, what is prohibited testimony; 2234-2237, what testimony is anti-marital; 2239, anti-marital testimony admitted exceptionally; 2241-2243, exercise of privilege; 2245, statutory changes.
6. Wigmore on Evidence, section 2332, policy of the privilege; 2333, history of the privilege; 2334, marital disqualification and anti-marital privilege distinguished; statutory enactment; 2336-2338, scope of the testimony privileged; 2339, persons prohibited and entitled; 2341, cessation of privilege. See also 40 Cyc. 2353 par. 3 and cases cited.
7. Wigmore on Evidence, section 2334, the disqualification and the two privileges distinguished.
8. (1873) 51 Mo. l. c. 119.
9. (1873) 52 Mo. l. c. 152.

in no instance and for no purpose has its infraction ever been permitted; and on this point our statute is but declaratory of the common law."[10] (Italics supplied.)

In both cases the court failed to distinguish between (a) the *disqualification* at common law because of interest, (b) the *disqualification* of one spouse testifying *for* the other, (c) the *privilege* as to one spouse testifying *against* the other, and (d) the *privilege* for confidential communications between spouses. It has been thought in these cases that the statute removing the disqualification because of interest was in effect construed to remove the interest disqualification of the spouse in actions between spouses and also to prevent the exercise of the privilege as to one spouse testifying against the other.[11]

In *Moore v. Moore, supra,* it is not clear that anything besides the disqualification on account of interest was definitely considered by the court. In *Berlin v. Berlin, supra,* while the objection was to one spouse testifying against the other, it was stated as if that made the spouse *incompetent.* The disqualification but not the privileges made the spouse *incompetent* at common law. Furthermore, the court in *Berlin v. Berlin* apparently thought that no communications between spouses could be admitted as evidence. There was no such rule at common law. There was a *privilege* as to *confidential* communications, but it is to be remembered that a *privilege* is not the same thing as a *disqualification* and that all communications are not confidential. A disqualification is absolute and need only be called to the attention of the court by either party to be invoked, whereas a privilege can be asserted only by the one to whom it belongs.

Moreover, it soon became necessary for Sherwood, J., himself, to make a distinction between communications generally and *confidential* communications. In *Darrier v. Darrier*[12] an action by the husband against the wife to divest her of title to land, he was held competent to testify as to a communication from himself to the wife on the ground that the rule did not apply to communications not in themselves of a confidential nature. In *Henry v. Sneed,*[13] where the husband and wife had been induced by fraud to execute a deed of trust, it was held "the testimony of both husband and wife was, *ex necessitate,* competent as to their conversation, on two grounds: that those conversations were a part of the *res gestae,* and on the foot of fraud."[14] Apparently, the conversations between the husband and wife were of a confidential nature. It

10. (1873) 52 Mo. 1. c. 152.
11. Wigmore on Evidence, section 2245.
12. (1874) 58 Mo. 222, opinion by Sherwood, J.
13. (1889) 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580, opinion by Sherwood, J.
14. In *Sauter and Adams v. Scrutchfield* (1887) 28 Mo. App. 150 one of the issues was whether the wife had been supplied with the necessaries of life by her husband and it was held that a case of that kind should form an exception to the general rule. The fact that she had not been supplied with the necessaries

was observed by the court that the cause of action was not one between the husband and wife. But the court failed to observe that it was an adversary and not one of the spouses who objected to the evidence. It is not clear but apparently the husband and wife were the plaintiffs. Obviously, then, there could be no objection because one spouse was testifying *against* the other.[15] Whether they were *disqualified* because they were testifying *for* each other when both were parties in interest was not specifically considered.[16] Considered as a matter of confidential communication, alone, it could have been said that it was not a privilege that the adversary could assert.[17] Nevertheless, the court apparently treated the situation as an *exception* to the general rule concerning confidential communications between husband and wife.[18]

It is evident, therefore, that exceptions have been made to the broad proposition stated by Sherwood, J., in *Berlin v. Berlin.* Does an exception exist in divorce suits where the grounds urged to support the action can be proved only by the testimony of the husband or wife as to confidential communications? This precise question, apparently, has not been before the Supreme Court of Missouri since *Berlin v. Berlin,* if it may properly be said to have been before the court then. In *Miller v. Miller,*[19] Lewis, P. J., referred to the problem in this manner: "It has long been settled in Missouri, that charges of infidelity made by the husband without any just cause, are such personal indignities as the statute contemplates in defining the grounds for a divorce. . . . . If it be the policy of social regulations in this state, that the making of such charges may properly eventuate in the dissolution of the marriage tie, the question may be asked, how can that policy be sustained by a rule which, in many cases, closes the mouth of the only person who can testify to the injurious fact, and for whose especial protection the law was made?" [20]

The problem was met in a rather unsatisfactory manner in *Maget v. Maget.*[21] In a suit for divorce the wife testified concerning the abuse she sustained from her husband, of certain protests and declarations

of life was a matter peculiarly within her own knowledge and in the privacy of domestic life generally unknown to others. It was held that under the circumstances she was a competent witness *for* her husband-defendant. The court apparently saw no difference between the disqualification of one spouse *for* the other and the privilege as to one spouse testifying against the other. In *Moeckel v. Heim* (1896) 134 Mo. 576, 36 S. W. 226, a case involving fraud, *Henry v. Sneed* (1889) 99 Mo. 407, 12 S. W. 663, 17 Amer. St. Rep. 580 was cited and followed.

15. Furthermore, the adversary could not ask for the benefit of the privilege. Wigmore on Evidence, section 2241, note 5

16. See Wigmore on Evidence, section 613; *Buck v. Ashbrook* (1873) 51 Mo. 539. See also R. S. Mo., 1909, section 6359.

17. Wigmore on Evidence, section 2340.

18. Wigmore on Evidence, section 2338.

19. (1883) 14 Mo. App. 418.

20. (1883) 14 Mo. App. l. c. 420. The court states "that while both parties may testify in a divorce suit, neither should be permitted to relate private utterances of any description which have been addressed by the one to the other." l. c. 421. Despite the admission of such utterances the judgment, *nisi*, was affirmed because the error was harmless.

21. (1900) 85 Mo. App. 6.

made by her to him and of his replies thereto. Apparently the communications were confidential. The action of the trial court in granting a divorce was approved. The decision fails to distinguish between the privilege one spouse has to prevent the other from testifying against him or her and the privilege as to confidential communications. It would seem that both privileges were involved. The court discussed the problem as if the former privilege was the only one to be considered. *Moore v. Moore, supra,* was cited but it would seem that the *dictum* rather than the decision was in the mind of the court. *Berlin v. Berlin, supra,* was not cited and it was not observed that these two cases had removed the *disqualification* on account of interest in actions between the spouses, and the *privilege* of one spouse testifying *against* the other. At least, that seems to be the proper interpretation of those decisions.[22] The court in the *Maget* case made its decision on the basis of an exception to the privilege as to one spouse testifying *against* the other. A number of exceptions to this privilege were recognized at common law but it seems that this was not generally extended to divorce proceedings.[23] Furthermore, it would seem that the same exceptions should be recognized as to the privilege for confidential communications.[24] Therefore, the *Maget* case would seem to stand for an exception to the privilege as to confidential communications where the exercise of the privilege would work a cruel injustice upon one spouse in controversies between them.

It is not thought that this interpretation of *Maget v. Maget* necessarily conflicts with *Berlin v. Berlin, supra.* The latter case is obscurely reported and at most attempts to state a general doctrine. Several decisions by the Missouri Supreme Court sufficiently establish exceptions to the general language.[25] It does not appear that there was any compelling necessity for announcing an exception in *Berlin v. Berlin.* But in the case under review the failure to recognize an exception means that a rule of evidence deprives a person of the benefit of a rule of substantive law which is well established as a part of the social policy of the state.[26] If this point of view had been taken, the decision in the case under review would not have worked a possible injustice. While the

22. See note 11, *supra.*

23. Wigmore on Evidence, section 2239.

24. Wigmore on Evidence, section 2338, citing the following Missouri cases: *Henry v. Sneed* (1889) 99 Mo. 407, 12 S. W. 663; *Moeckel v. Heim* (1896) 134 Mo. 576, 36 S. W. 226, 17 Am. St. Rep. 580; *Rice v. Waddill* (1902) 168 Mo. 99, 67 S. W. 605.

25. See note 24, *supra.*

26. R. S. Mo., 1909, sec. 2370; *Miller v. Miller* (1383) 14 Mo. App. l. c. 420 (*dictum*); *Clinton v. Clinton* (1895) 60 Mo. App. 296; *Ashburn v. Ashburn* (1903) 101 Mo. App. 365, 74 S. W. 394 (*dictum*); *Rose v. Rose* (1908) 129 Mo. App. 175, 107 S. W. 1089. It may be noticed that confidential statements between the spouses were admitted in the last named case. Since the suit was uncontested there was no objection and the point is not discussed. It seems unsatisfactory to have a substantive right depend upon a contested case and an objection to the testimony. In *Miller v. Miller, supra,* it is suggested that a "vituperative epithet" and a "mere protest of a wife against her husband's conduct" could not be a confidential communication; but *quaere.*

distinction between the suggested exception and the decision in *Berlin v. Berlin, supra,* may be a fine one, still it forms the only apparent justification for the decision in *Maget v. Maget, supra.* Since the latter decision is highly desirable it is to be regretted that it was not discussed in the principal case and it is hoped that it will be upheld by the Supreme Court whenever the question is presented there.[27]

DUPUY WARRICK.[28]

27. In *Schweikert v. Schweikert* (1904) 108 Mo. App. 477, 83 S. W. 1095 it was said by say of *dictum* that private communications between husband and wife are not admissible but "where from the peculiar nature of the inquiry, the information sought is peculiarly within the knowledge of the wife, the necessity for her testimony may outweigh public policy and the rule disqualifying her as to such statements may be relaxed or suspended." In *Meyer v. Meyer* (1911) 158 Mo. App. 299, 138 S. W. 70, the exception as to the rule for confidential communications is stated in broad terms but nothing is gained by denominating the communications as "verbal assaults." In *Gruner v. Gruner* (1914) 183 Mo. App. 157, 165 S. W. 865 the same judge who wrote the opinion in *Meyer v. Meyer, supra,* announced by way of *dictum* a conclusion contrary to the one he wrote three years before and admitted that he had stated the rule "too broadly." See *Revercomb v. Revercomb* (1920) 222 S. W. 899 l. c. 905, a decision by the Kansas City Court of Appeals ignoring *Maget v. Maget.*

28. Junior, School of Law, University of Missouri.—Ed.