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Notes on Recent Missouri Cases

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"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

CONFLICT OF LAWS—TITLE TO CHATTELS UNDER CONDITIONAL SALE MADE OUTSIDE OF STATE. *Jerome P. Parker-Harris Co.* v. *Stevens.*[1] Plaintiff sold an automobile conditionally to one Martin in Tennessee, the contract of sale providing that title should remain in plaintiff until the agreed purchase price was paid, but Martin was given possession of the car. It was further stipulated in the agreement that Martin should not take the car out of Tennessee, without plaintiff's consent in writing, until the purchase price was paid, and it was agreed that if Martin did so remove it that plaintiff could proceed under the contract as if Martin was in default. After the sale, Martin, without plaintiff's consent, removed the car to Missouri, and there dis-

1. (1920) 224 S. W. 1036.

posed of it to one Stephens, who was a *bona fide* purchaser for value. The conditional sale was valid where made, and plaintiff's title under Tennessee law would have been good as against Stephens[2] although the conditional bill of sale was neither recorded or filed in Tennessee, such a proceeding not being required there by law. Both of the parties to the conditional sale were domiciled in Tennessee.

Plaintiff, having discovered that the car was in Missouri, brought this action against defendant, who claimed under Martin, to replevy the car, claiming that his title under the Tennessee conditional sale was good, and prevailed in Missouri as against that of defendant. On the other hand, defendant contended that plaintiff's title was not good in Missouri because Missouri had a settled policy against the sustention of secret liens and titles against innocent purchasers for value, where the property with respect to which the lien is claimed has been surrendered and the possessor clothed with apparent ownership. This argument apparently was based on the fact that the Missouri statutes[3] required the recording of all chattel mortgages and conditional sales of chattels given within the state. It was easy to argue from this that the statutes showed a policy against all unrecorded transactions of this kind and to contend that plaintiff did not have any rights to the automobile within Missouri, which would be superior to defendant's. The Springfield Court of Appeals, however, decided for plaintiff, holding that as a matter of comity plaintiff's title should be sustained. The court said that where the sale is valid where made, and the vendor does not assent to the chattel's being removed to another jurisdiction the vendor's title should be protected everywhere, unless there was a policy against the vendor's rights at some subsequent situs of the chattel. The court concluded that there was no such policy in Missouri, because there was no express statute dealing with such matters, and because the recording statutes of Missouri only purported to deal with local conditional sales. It was therefore stated that the law of the *place* where the sale was made would govern plaintiff's rights and title.

According to early continental writers on conflict of laws, questions relating to title to personal property were referred to, and determined by the law of the domicle of the owner.[4] There are *dicta* to this effect in some of the English cases[5] and the doctrine has had the support of some of the earlier cases in this country.[6] In the case of *Cam-*

2. *Grange Warehouse Association* v. *Owen* (1888) 86 Tenn. 355, 7 S. W. 457.

3. Sect. 2889 R. S. Mo. 1909. Sect. 2284 R. S. Mo. 1919.

4 Pothier, *Des Choses* 2 No. 3; Witxendorf, *De Stat.* 15 No. 11.

5. *Sill* v. *Worsdick* 1 H. Bl. 1. c. 690; *Doe. d. Birswhistle* v. *Vardill* 5 Barn & C. 438.

6. *Edgerly* v. *Bush* (1880) 81 N. Y. 203. For a Canadian decision applying the rule, see *Bank* v. *Corcoran*, 6 Ontario 527.

mell v. *Sewell*,[7] however, the Court of Exchequer Chamber held that title to goods, the property of a British owner, sold in Norway, was to be governed by the laws of the latter country. It thus applied the law of the situs of the goods, which in this case happened to be identical with the law of the place of the contract of sale. The rule that the law of the situs shall control questions of title has now become generally recognized in England,[8] in this country,[9] and on the Continent.[10] It has the support of most modern jurists.[11] The change in the law seems to be due to the rise of new economic conditions.[12] During the mediaeval period, the importance of chattels in the life of a country was practically negligible, but since the industrial revolution, the role which they play in national life has become of great importance, and their control by the state in which they are located is imperative; hence, the change in the rule of law, and the assertion of the principle that matters of title to chattels must be regulated by the law of their situs.

A sale is a transaction whereby title to chattels is transferred from one person to another for a money consideration.[13] By it the vendee steps into the shoes of the vendor, and is enabled to assume the same position towards the chattel which the vendor, whom he succeeds has occupied.[14] This passage of title, and the resultant rights as they concern not only the parties themselves, but also the state in which the goods are located are subject to the regulation of that state. There is a further theoretical consideration, which would force us of necessity to the same conclusion, namely, rights can arise only out of the application of law to certain states of facts, and the law to be applied must be that in force where the facts exist.[15] There must be a coincidence of law, which gives the right, and facts to which the law attaches. Now the essential facts out of which the rights of vendor and vendee arise

7. (1859) 5 Hurl & N. 728, 2 Law Times 799. An earlier English decision which seems to follow this rule is *Inglis* v. *Usherwood* (1801) 1 East 515.

8. *Alcock* v. *Smith* (1892) 1 Ch. 228; *Castrique* v. *Imrie*, (1909) 29 L. J. C. P. 350, 5 E. R. C. 899; *Embricos* v. *Anglo Austrian Bank* (1904) 2 K. B. 870; Halsbury's Laws of England 213.

9. *Oliver* v. *Townes* (1824) 2 Mart. (n. s.), (La.) 93; *Green* v. *Van Buskirk* (1868) 7 Wall 139, 19 L. Ed. 109, Lorenzen's Cases on Conflict of Laws 292; *Schmidt* v. *Perkins* (1907) 67 Atl. 77, 11 L. R. A. (N. S.) 1007 (N. J.). A Canadian case is *Stave Co.* v. *Still*, 12 Ontario 557. It seems to reverse the Corcoran case *supra*, note 6..

10. See authorities cited in Lorenzen's Cases on Conflict of Laws, p. 292, note.

11. Wharton *Conflict of Laws*, 3 ed. Vol. I, p. 674; Von Bar, *Theorie und praxis des internationalen privatrechts.* (Gillispie's Translation) 2 ed. 231.

12. Wharton *Conflict of Laws*, 3 ed. Vol. I, p. 615.

13. 35 Cyc 25; Williston's *Sales*, Sect. 2.

14. Holmes, *The Common Law*, Chap. X.

15. Huberus, *Prae. Juris Romani et hodierni*, Vol. II, lib. I, tit. 3., cited 3 Dall. l. c. 370 note.

as to property in the goods exist only at the situs of the goods, therefore, only the law there in force is the law which can create these rights. Accordingly the law of the situs of the chattels must govern as to property rights growing out of a sale.[15a]

It has been attempted to show that the matter of title to chattels, in its inception, according to modern authority, is one that is controlled by the law of the situs of the chattel at the time of the transaction, which it is claimed results in the passage of title. The difficult question, however, is to what extent will a title, valid by the law of that situs, be recognized and sustained if the chattel is removed by another jurisdiction? Suppose that A gets a good title in state 1 where the chattel then was; suppose that the chattel is removed to state 2; will A's title be valid there too, and will A be able to claim the chattel there? So far as principles of conflict of laws are concerned, A's title, outside of state 1, would not of necessity be good. The law of state 1 is not present in state 2 except as a fact, if proved, and has no force or effect there to give A any rights with respect to any chattels. This being the case, A's rights in state 2 will depend on the extent to which that state desires to give effect to the laws of another state and to recognize a foreign created title. As a general rule, one state is disposed to recognize a foreign title within its boundaries, and to sustain and sanction it. This is a matter of common courtesy due from one state to another; a matter of comity. But it is conceivable that state 2 might not be willing to sustain A's title. It might be that giving recognition to A's foreign title would be contrary to the policies of state 2, and if this were the case, A should have no rights to the chattel there, because comity would not compel state 2 to extend recognition to A's title.[16] Surely no state should or would recognize a foreign title if its policy deemed such a right against its best interests. It would seem then, that the question in all this class of cases is, does the foreign right, which is asserted, militate against the best interests of the state? Is there a policy against the sustention of such a title? If there is such a policy, the title ought not to be sanctioned, but if there is not, it should be.

Assuming that the title of a conditional vendor is good by the law of the situs of the chattel at the time that the sale occurs, that title might be questioned at a new and later situs of the chattel, by a *bona*

15a. The situation in the case of a conditional sale is essentially the same. The questions are, when does the vendee get full and complete title? What interests does the vendor retain, pending the performance of the condition? As against whom is the vendor's interest, if he has any, good? If the law of the situs of a chattel governs in the case of a sale, it must govern also in the case of a conditional sale.

16. *Marshall* v. *Sherman* (1895) 148 N. Y. 24, 42 N. E. 419; *Flag* v. *Baldwin* (1884) 38 N. J. Eq. 219, 48 Am. Rep. 308.

fide purchaser under one of the following general states of facts, (1) where there is a statute at the new situs, declaring the title of such foreign vendor to be void, or (2) where there is a statute at the new situs, which does not on its face purport to deal with the rights of a foreign vendor, but merely provides that the rights of a vendor under a similar bill of conditional sale, executed within the state, shall be void as against a purchaser for value unless the bill of condition sale is recorded. It has been said that under the first state of facts assumed the vendor's title would not prevail because the statute precludes its recognition.[17]

Where there is a statute at the new situs, regulating locally executed conditional sales, making them void as against a *bona fide* purchaser unless the bill of sale is recorded, it would be possible to hold that the statute has no bearing on the rights of a vendor under a foreign sale. It could be said that, as the statute purports to regulate local sales, sales made elsewhere than within the state were not affected by it. There is authority to this effect,[18] and where this is the rule, the rights of the foreign vendor would be good as against everyone, just as they would be at the original situs of the goods, where the rights were acquired. On the other hand, it might be said that the statute, even though it did not attempt to regulate titles under foreign sales, nevertheless showed a

17. *Hervey* v. *Locomotive Works* (1876) 93 U. S. 664, 23 L. Ed. 1103, Lorenzen's Cases Conflict of Laws 307. But *quaere* even in such case is it proper for the state to thus divest the title to a chattel present within its boundary without the consent of its owner. If it has jurisdiction of the chattel then clearly it may do what it will with the title. It was said by the Supreme Court of the United States in *Rose* v. *Hunsly* 4 Cranch 241, cited II Mores Dig. Inter. Law c. 7. that: "Whatever may be the municipal law under which a tribunal acts if it exercise a jurisdiction which its sovereign is not allowed by the law of nations to confer its decrees must be disregarded out of the dominions of that sovereign." Thus the courts of a sovereign may not exercise jurisdiction over the persons of foreign ambassadors, etc. IV Moore Dig. p. 622. Nor should the courts of a state get jurisdiction of the person of one present in that state because of fraud or violence, etc. May it not well be that international law imposes a like restriction on the obtaining of jurisdiction over chattels where they are present in the state without the consent of the owner? It is submitted that this is the proper explanation of the decision in *Edgerley* v. *Bush, supra,* note 6. Suppose that a plaintiff forcefully seizes a foreign defendant and brings him into the state and there serves him with a summons. No court ought to uphold jurisdiction thus gained even if the law of the forum issuing the summons permitted such procedure. Is not the analogy good in the case of chattels wrongfully brought into the territory of a sovereign? See 24 Harv. Law Rev. 567.

18. *Sharpard* v. *Hynes* (1900) 104 Fed. 499, Lorenzen's Cases *Conflict of Laws,* 203; *Drew* v. *Smith* (1871) 59 Me. 393, 22 Atl. 250; *Wooley* v. *Geneva Wagon Co.* (1896) 59 N. J. L. 278, 35 Atl. 787; *Studebaker Bros. Co.* v. *Mann* (1905) 18 Wyo. 358, 80 Pac. 151; *Dupont Powder Co.* v. *Jones Bros.* (1912) 200 Fed. 638; *Swain* v. *Schild* (1917) 117 N. E. 933. (Ind. App.)

policy against secret titles of conditional vendors, no matter where the title was acquired, and under such a holding, the title of a foreign vendor would not be treated as valid, but would be dealt with in the same way as the title of a domestic vendor under an unrecorded bill of conditional sale.

It is undoubtedly true that the statute, above referred to, does show a policy at the new situs against secret titles, and such policy might well be applied to all titles, domestic and foreign, if the application of the policy would not work too great an injustice to the vendor. If the foreign vendor, therefore, has assented to the removal of the chattel, covered by the sale, to the new situs, it would be proper to hold that the rights of an innocent purchaser of the chattel should be superior to those of the vendor. The vendor by assenting to the removal of the chattel, and its presence at the new situs, has in fact submitted the chattel to the jurisdiction of the laws of that situs. This being the case, the only logical holding would be that the vendor's title under the assumed facts was void. It would be altogether improper to allow a vendor, just because he has a foreign title, to escape the effect of policies in force at the new situs, he having himself assented to the placing of the chattel at this situs.

Suppose, however, that the vendor has not consented to the removal of the chattel to the new situs; ought the decision under these facts to be that his title is gone just because of the policy against secret liens? It would seem that, in spite of the policy at the new situs, the vendor's title ought to be protected, and held valid even as against a *bona fide* purchaser, because it would be clearly unjust to deprive a man of his property, when it has been removed against his will from a state where he had placed it. He has not in any way submitted the chattel to the jurisdiction of the new situs, nor is he responsible for its presence at the new situs. It is one thing to say if an owner send a chattel into a state that it shall be subject to the jurisdiction and policies of that state, but quite another that the chattel shall be so subject when it has come within the state illegally and against the owner's will. It would be unjust and against public policy to hold to this result under the last assumption. So when the chattel is at the new situs with the vendor's assent, the courts would for the most part, hold that the vendor's title was void,[19] but where it was at the new situs without the vendor's consent that it was good,[20] and such decisions are sound.

19. In *Boyer* v. *Knowlton Co.* (1911) 97 N. E. 137 there is a clear decision that the *lex situs* and not the *lex contractus* governs. See also *Southern Hardware Co.* v. *Clark* (1913) 119 C. C. A. 339, 201 Fed. 1. *Contra,* applying *lex contractus, Emerson Co. v. Procter* (1903) 48 Atl. 849 (Me.).

20. See *Edgerly* v. *Bush, supra,* note 6, and cases cited under note 18. *Con-*

It has been held that where the retention of title is void by the law of the situs where the goods were at the time of the sale, but valid by the law of a state to which they were later removed the latter law would apply.[21] Such a rule on principle seems to be wrong. The law which raised the rights under the sale was the law of the situs of the goods at that time; it was the only law which had jurisdiction over the matter of title. Limits might be placed on the recognition of a title good by the law of the original situs of the goods by the law of another and later situs, but the law of a later situs could not increase the rights originally gotten by the vendor. The law of such later situs had no application to the transaction by which the vendor's title, if he got any, was created.

The case under review is the only Missouri decision in which the question of the law governing foreign conditional sales has been raised. There have been, however, some cases involving the general question of foreign titles to chattels, which throw some light on the problem here under consideration. In the first case of the kind decided in the Missouri courts, *Smith* v. *Hutchinson*,[22] the Supreme Court held that title under a sale where possession was retained by the vendor was to be governed by the law of the state where the sale was made, and the property located at the time of the sale, rather than by the law of the state into which the goods were subsequently taken and the action brought. The court did not have to choose between the law of the domicile, the place of contract, or the situs. The later cases have all been mortgage cases. In *Feurt* v. *Powell*[23] and *Bank* v. *Metcalf*[24] the courts held the validity of a mortgage depended on the law of the place where the goods were located and the contract made rather than on the law of the forum, but in neither case was there an actual decision against the *lex domicilii* or *lex contractus*, and in favor of the *lex situs*. In *Bank* v. *Morris*[25] the court expressly applied the law of the situs. *Tower Brothers Co.* v. *Hamilton*[26] construed the validity of a mortgage lien and the recording of the mortgage by applying the law of this state,

tra: *Cunningham* v. *Surtain* (1895) 96 Ga. 849, 23 S. E. 420, which cites and follows the early line of cases applying the *lex domicilli* in questions of title to chattels; *Willys Overland Co.* v. *Chapman* (1919) (Tex.) 206 S. W. 978; *Judy* v. *Evans* (1903) 109 Ill. *App.* 134; *Chambers* v. *Consolidated Garage Co.* (1919) (Tex.) 210 S. W. 978. These last cases seem to go on the ground that the statutes evidence a policy which applies as well to foreign as to domestic vendors.

21. *Weinstein* v. *Fryer* (1890) 93 Atl. 257, 9 So. 856. *Contra*: *Davis* v. *Osgood* (1899) 54 N. H. 227, 44 Atl. 432.

22. (1861) 30 Mo. 380.

23. (1876) 62 Mo. 524.

24. (1888) 29 Mo. App. 384.

25. (1893) 114 Mo. 255, 21 S. W. 511.

26. (1904) 77 S. W. 1081. Compare *Fessenden* v. *Taft* (1889) 65 N. H. 39.

it being the situs of the goods, although the contract was made in Kansas. The validity of the mortgage debt as regards the rate of interest charged was properly tested by the *lex contractus,* this matter having nothing to do with the question of the title of the mortgagee. The rule mentioned above, that if the goods sold conditionally are brought into the state of the forum with the consent of the vendor, the vendor loses any rights which he had by the law of the goods' former situs, but which are denied by the policy of the law of the forum gains support from the analogous case (dealing with the rights of a chattel mortgagee) of *Geiser Mfg. Co.* v. *Todd.*[27] It was held in that case that the mortgagee lost his lien, when the goods were brought into this state with his assent as against a person in the position of an innocent purchaser for value.

In the instant case, the court was not forced by the facts before them to decide whether the domicilary law of the parties, the law of the place of the contract, or the law of the situs at the time of the conditional sale, governed the rights of plaintiff. All of these places were identical, hence the law of all was the same. There is *dicta* in the case to the effect that the law of the place of the contract should govern plaintiff's rights. In the light of the foregoing discussion, it is believed that this suggestion is unsound, and that the law of the situs of the chattels at the time of the sale is the proper law to apply in determining this question. But the actual decision in the case is correct for the reason that the situs of the chattel at that time and the place of the contract were one and the same.

B. E.

TORTS—VICIOUS DOGS—LEGAL CAUSE—LABILITY AT PERIL. *Clinkenbeard* v. *Reinert.*[1] Parents brought an action for the death of their minor child caused by rabies received from wounds inflicted by defendant's rabid dog. The Supreme Court of Missouri held defendant liable, even though defendant did not know and was not chargeable with knowledge of the rabid condition of the dog. The owner knew or should have known that the dog was vicious and disposed to bite mankind. The court states that the gist of the first count of the action was the keeping of the dog after knowledge of its vicious propensities, and the owner being under a duty to kill the dog was liable for an injury inflicted by the dog without proof of negligence. Woodson, J., dissented in part.

The petition also contained a second count basing a cause of action upon a city ordinance prohibiting the keeping of vicious dogs. The

27. (1918) 204 S. W. 287.

1. (1920) 235 S. W. 667.

court were unanimous upon the plaintiff's right to recover under this count. The particular set of facts appears to present a case of first impression although the principle involved is by no means new. The result obtained may be desirable but the reasoning employed, it is submitted, may be questioned. At common law the rule defining the liability of the keepers of dogs known to be vicious is stated to be: "But if one knowingly keeps a vicious or dangerous animal, which is accustomed to attack and injure mankind, he is prima facie liable for injuries done by it, without proof of negligence as to the manner of keeping it. The negligence on which the liability is founded is keeping such an animal with knowledge of its propensities. Thus it is evident that as respects the liability of the owner, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and is known by its owners to be so, and one which is *ferae naturae*. But while the ancient rule, as generally found stated, is that the gist of an action for injuries inflicted by a ferocious animal is keeping it, with knowledge of its vicious propensities, negligence or the want of negligence being deemed immaterial, to some courts a more accurate statement of the true principle governing the owner's legal responsibility seems to be that the gist of the action is the failure to keep such animals securely."[1a]

In the principal case the court has this to say on this point: "In the instant case the owners were long before the incident which brought about the horrible and untimely death of this little girl, fully advised of the vicious propensities of the dog. When so advised it became their absolute duty, for the protection of the public, either to kill or safely restrain their dog. A failure to do one or the other rendered them liable. The trend of our Court of Appeals is to require the killing of the vicious dog rather than his restraint. Much authority elsewhere is to the same effect, and we are disposed to and do adopt the more rigid rule of our Court of Appeals."[2] This view is well supported by the cases in this country and in England.[3] However, the authorities are by no means harmonious. Judge Cooley has this to say in his work on Torts:[4] "In *May* v. *Burdett*,[5] an action for an injury by the bite of a monkey was sustained, though no negligence was charged in the declaration. In Connecticut, this case has been cited as authority to the point that the keeping of a vicious dog, after notice of his evil disposition, is wrongful and at

1a. 1 R. C. L. p. 1089. To like effect. 3 C. J. 97; 2 Am. & Eng. Ency. of Law (2nd Ed.) 366.

2. The court cites *Speckmann* v. *Kreig* (1899) 79 Mo. App. 376; *O'Neill* v. *Blase* (1902) 94 Mo. App. 648, 68 S. W. 764; *Merritt* v. *Mitchell* (1909) 135 Mo. App. 176, 115 S. W. 1066.

3. The cases are collected in 3 C. J. 97.

4. Cooley on Torts, 2d. Ed. p. 411.

5. (1846) 9 Q. B. (N. S.) 101, 3 Eng. Ruling Cas. 108.

the peril of the owner, 'and, therefore *prima facie* the owner is liable to any person injured by such a dog, without any averment or proof of negligence in securing, or taking care of it'.[6] But admitting the *prima facie* case, may not the keeper show that the animal was kept by him with due care and for some commendable purpose,[7] and that he escaped under circumstances free from fault in him? The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems, therefore, safe to say that the liability of the owner or keeper for any injury done by them to the person or property of others must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge, but if, notwithstanding such care they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not lie."[8]

In *Scribner* v. *Kelly*[9] the court places liability of the keepers of animals squarely on the ground of negligence. Scrugham, J., speaking for the court, had this to say: "The liability of the owner or keeper of an animal of any description, for an injury committed by such animal, is founded upon negligence, actual or presumed. It is not in itself unlawful for a person to keep wild beasts, though they may be such as are of a nature fierce, dangerous and irreclaimable; but as the propensity of such animals to do dangerous mischief is well known, and is inherent and not to be eradicated by any effort at domestication, nor restrained except by perfect confinement or extraordinary skill and watchfulness, the owner or keeper of such dangerous creatures is required to exercise such a degree of care in regard to them as will absolutely pre-

6. *Woolf* v. *Chalker* (1862) 31 Conn. 121.

7. *Sarch* v. *Blackburn* (1830) 4 C. & P. 297 (*nisti prius*) ". . . . undoubtedly a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it."—Tindal, C. J.

8. Cooley on Torts, 2d. Ed. note 3, page 412. "As to the law respecting the keeping of wild beasts, we should say that the higher cultivation of the intellect of the mass of the people as compared with two or three centuries ago, and the recognition of wants in human nature then ignored, must have worked some changes, and that we must take up the common law of that period in this as in many other particulars more to locate accurately our point of departure than to fix definitely a stake to which we must tie and adhere. When wild animals are kept for some purpose recognized as not censurable all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him."

9. (1862) 38 Barb. (N. Y.) 14.

vent the occurence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit. Under such circumstances the occurence of the act producing the injury affords sufficient evidence that the owner or keeper has not exercised the degree of care required of him, and his failure to do so is negligence."

In that case the plaintiff sued to recover damages for an injury caused by the fright of the plaintiff's horse at the sight of the defendant's elephant which was travelling on a public thoroughfare. The court very properly applied the test of foreseeability. "In this case the injury resulted not from the act of the elephant, but from the fact that his appearance, as he was passing along the highway, caused the horse of the plaintiff to become frightened and unruly. To render the defendants liable for the damage that accrued, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the defendants knew or had notice of it; for if it is conceded that the elephant is of a savage and ferocious nature it does not necessarily follow that his appearance inspires horses with terror."[10]

It is submitted that the rule laid down in the *Scribner* case is desirable in that it furnishes a criterion long established in the law and capable of a fairly consistent and logical application. It is believed that were a like principal case presented where the dog is known to be vicious but not known to be diseased, most courts that have adopted the "liability at peril" doctrine, or the extreme rule stated in the case under review, i. e. that the keeping of an animal known to be vicious is wrongful and the keeper's duty is to kill it would, as indicated in *McCaskill* v. *Elliott* cited in note 8, *supra*, impose responsibility only for "all the harm *that he might reasonably have expected to ensue*",[11] and so not impose liability for rabies. (Italics supplied.) This is in fact no more than saying that the keeping of an animal after knowledge of its vicious propensities is negligence and that such a negligent wrongdoer will be liable for all the foreseeable consequences of his negligent conduct. Suppose A keeps a vicious watch-dog; B, an aged person who lives next door to A, is knocked down and injured or killed by the dog while the dog is pursuing

10. *Accord. McCaskill* v. *Elliot* (1850) 5 Strobharts Law (S. Carolina) 196, 53 Am. Dec. 706, holding that ". . . . every such animal (dog known to be vicious) the owner keeps at his risk, being, without regard to care or negligence, an insurer against all the harm that he might *reasonably have expected to ensue.*" (Italics supplied.)

This case illustrates an attempted couple of 'liability at peril' with 'foreseeability', which, it is submitted, in fact is nothing more than saying that the keeping of a dog after knowledge of its vicious propensities, is negligence, and that liability is then measured as in any other case of negligence i. e. foreseeability.

11. *McCaskill* v. *Elliott*, note 10, *supra*.

a thief who has been upon A's premises. Is it to be believed that an action will lie for the injury or death?

The so-called doctrine of absolute liability or doing at peril has appeared in other branches of the law. From the cases it would appear that it has very generally been either frankly repudiated or has become so decimated by limitation that it scarcely merits consideration as a principle of law. Notable among these cases is *Fletcher* v. *Rylands*[12] where it was laid down that one who collects water upon his land is under an absolute duty, at all events to restrain the water from escaping so as to damage. In the very next case to come before an appellate English Court[13] the rule was relaxed so as to exclude acts of *vis major* or the acts of other persons over whom the defendant had no control.[14] This broad principle has been very generally repudiated in the United States.[15]

And so in the case of fire, it is said that at early common law one set out a fire at his peril.[16] But under the modern law the decisions are practically unanimous in declaring the duty is to exercise care in the light of all the circumstances.[17]

It is curious to note that Blackburn, J., in his opinion in *Fletcher* v. *Rylands*,[18] rests the rule he there lays down as to confining water at peril upon the decisions defining the duty of keepers of vicious animals. The rule of liability at peril has broken down in the cases of fire and water. It is an arbitrary, unwieldly and illogical rule and it is believed the reason why it has not been more generally repudiated in the case of animals is that the element of useful property value in animals has not sufficiently appealed to the courts to incline them to a departure from the original rigid rule of liability at peril, as has been done in cases of fire and water as incident to the use of land. The results in the animal cases have been in most instances sufficiently desirable to permit the courts to gloss over the reasoning employed to support their decisions.

12. (1866) L. R. 1 Ex. 265, L. R. 3 House of Lords 330, 1 Eng. Ruling Cas. 235.

13. (1876) Court of Appeals. *Nichols* v. *Marsland*, 2 Ex. D. 1 (s.c. 46 L. J. Ex. 174.)

14. By a constant paring down by limitation little appears to remain of the broad principle laid down in *Fletcher* v. *Rylands*. In the case of *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, Privy Council, 1902, L. R., 1902, Appeal Cases 381, the court employs the curious devise of turning from the acts of the defendant to the use the plaintiff was making of his land in order to obtain an obviously desirable and reasonable result without absolutely repudiating the decision in *Fletcher* v. *Rylands*.

For a review of the English cases under *Fletcher* v. *Rylands* see note in 1 Eng. Ruling Cas. page 266.

15. Mr. Freeman, the editor of American Decisions, says in a note, 29 Am. Dec. 149, that "the doctrine is not adopted in this country". And Mr. Justice Holmes condemns it in 14 American Law Review p. 1.

16. Salmond on Torts, 3rd. Ed. 224.

17. Salmond on Torts, 3rd Ed. 226; Cooley on Torts, 2d Ed. 700.

18. See note 12, *supra*.

It is submitted that tort liability must flow out of two kinds of acts, (1) wilful acts, wrongful in themselves; (2) negligent acts. The doing of wilful acts renders the actor liable for all the *natural* consequences flowing from them without regard to anticipatibility. The test to be applied is one of physical causation. But the doing of negligent acts renders the actor liable only for the *natural and probable* consequences of his acts. The test applied in Missouri to determine liability for negligent conduct appears to be that of foreseeability.[19]

The facts in the instant case do not show acts wilful and wrongful in themselves. There is no wrong for which either a criminal or civil action will lie in keeping a vicious dog. It is true that the *dicta* in some of the cases go so far as to declare a vicious dog to be a public nuisance which may be abated by killing the dog, but it is believed that none of the decisions goes this far. In the cases examined the dog was running loose (this is certainly negligence) and had therefore become a nuisance through the negligence of the owner.

If the public welfare requires the absolute destruction of vicious dogs or animals fierce by nature (these classes of animals are universally treated together) it is the function of the legislative branch to meet this need. In the instant case a city ordinance had accomplished the result desired. Blair, J., and Woodson, J., concurred in the result only upon the count based upon the city ordinance. It is submitted that the opinion of Woodson, J., contains a more desirable statement of the law, and it is hoped, his position will be adopted when the point is again presented for decision. He says in part, page 670: " . . . . . no liability is shown upon the first count. My reasons for so stating are: The evidence conclusively shows that the deceased child would not have died from the effects of the dog bite had it not been afflicted with rabies, and the evidence also conclusively shows that the defendant had no notice or knowledge whatever that the dog had rabies before, or at the time, it bit the child. That being true, he was guilty of no negligence which caused or contributed to the injury which caused the death of the child, and therefore he is not liable in damages for the death that ensued therefrom."

D. W.

19. *Saxton* v. *Missouri Pacific Ry. Co.* (1903) 98 Mo. App. 494, 501, 72 S. W. 717: "Consequences must be probable as well as natural" - - "one which might reasonably have been foreseen by a man of ordinary intelligence and prudence." *Paden* v. *Van Blarcom* (1903) 100 Mo. App. 185, 192, 74 S. W. 124; *Aldrich* v. *St. Louis Transit Co.* (1903) 101 Mo. App. 77, 74 S. W. 141; *Feddeck* v. *St. Louis Car Co.* (1907) 125 Mo. App. 24, 102 S. W. 675.

CRIMINAL LAW—HUSBAND AND WIFE—PRESUMPTION OF COERCION. *State* v. *Bragg*.[1] In *State* v. *Kiethley*[2] the court was apparently of the opinion that in the prosecution of a woman for keeping a bawdy house there is no *presumption* that she was coerced by her husband even though he is present at the commission of the crime. On the other hand it was indicated that the defendant would have been entitled to an instruction that the jury in determining her guilt should take into consideration her relationship with her husband provided there had been a request for such an instruction. The decision under review is in accord.

The general rule is that whatever of a criminal nature the wife does in the presence of her husband is presumed in the absence of evidence to the contrary to have been done through his coercion.[3] There are certain exceptions to this general rule. It is generally conceded that there is no presumption in treason or murder[4] and probably in "other heinous offenses", as well as in those crimes peculiarly likely to be engaged in by women.[5] The problem that deserves consideration is: is there in crime, however trivial or gross, committed by a married woman in her husband's presence, any longer a valid reason for a presumption of coercion?

The answer to this question is not difficult. It has been stated that the rule is "an anomaly in our jurisprudence for which it is not easy to offer a perfectly satisfactory explanation";[6] that: "The contention that a wife has no more intelligence or responsibility than a child is now out of date. No one believes it",[7] and that "the presumption - - - having been created solely by judicial decision should be set aside in the same mode, since we have advanced from the barbarism upon which it was based."[8]

1. (1920) 220 S. W. 25.

2. (1910) 42 Mo. App. Rep. 417, 127 S. W. 406.

3. 1 Wharton Cr. Law, Secs. 96 & 97; 1 Bishop New Cr. Law Sec. 357 *et seq.*; *State* v. *MaFoo* (1892) 110 Mo. l. c. 16, 19 S. W. 222; *People* v. *Ryland* (1884) 97 N. Y. 126; *State* v. *Williams* (1871) 65 N. C. 398.

4. 1 Bishop New Cr. Law, Sec. 361. Mr. Bishop states that these crimes are commonly excepted and more than mere presence is required to raise the presumption. Mr. Wharton states as a matter of principle that if the presence of the husband is a good defense at all it is good in all classes of crimes. Apparently, he was referring to coercion, as a defense and not to any presumption. Mr. Bishop's analysis is more careful and, carefully read, does not state that coercion ceases to be a *defense* in cases of murder, treason or robbery. Compare *Bibb* v. *State* (1892) 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88, denying the *defense* of coercion in murder.

5. 1 Wharton Cr. Law, Sec. 99; 1 Bishop's Cr. Law, Sec. 361; *State* v. *Keithley* (1910) 142 Mo. App. l. c. 421, 127 S. W. 406; *People* v. *Wheeler* (1905) 142 Mich. 212, 105 N. W. 607.

6. Note to *Bibb* v. *State* (1892) 33 Am. St. Rep. 89.

7. *State* v. *Seahorn* (1914) 166 N. C. 373, 81 S. E. 689.

8. See note 49 Am. Law Rev. 447.

Also, in Kansas,[9] the court in a forward looking decision, repudiating the presumption, said: "But it cannot be right now under our present condition of society. And it is not the law. There was once a reason for the presumption; but that reason has long ago ceased to exist in Kansas; and when the reason for the presumption has ceased to exist, the presumption itself must also cease to exist."

Arkansas has perhaps abolished the presumption by statute[10] and in referring to this ruling Gantt, P. J., in *State* v. *MaFoo*,[11] said: "The statutory rule in Arkansas, *supra*, is more in accord with the spirit of the age in which we live." These authorities might be multiplied,[12] for this rule although undoubtedly the law in a majority of jurisdictions in this country, seems to be nowhere defended in reason, and is continually criticised.

The reason for its continued existence may lie in the explanation given by way of *dictum* by Beardsley, J., in *Blakeslee* v. *Margaret Tyler*,[13] to-wit: "The presumption in many, if not in most cases, probably rested upon a slender basis of fact, but generally prevailed, owing to the inherent difficulty of proving that it was not well founded."

When the reason for a rule fails the rule fails. Such has been the boast of the common law judges. The chief virtue of the system lies in its pliability and susceptibility to reason and change. There is none to deny that this rule has in reason failed; yet many courts still follow it. *State* v. *Miller*[14] shows to what extreme the rule has led us. The wife there at the request of the husband, who was in jail, secured a revolver and carried it to him. She was convicted on a statutory charge and upon

9. *State* v. *Hendricks* (1884) 32 Kan. 559, 4 Pac. 1050.

10. *Frell* v. *State* (1860) 21 Ark. 213.

11. (1892) 110 Mo. l. c. 17, 19 S. W. 222.

12. 1 Wharton Cr. Law, Sec. 96: "The difficulty, however, is in finding, in the present state of society, when the husband is as likely to support the wife if she is engaged in doing wrong, as the wife is to support the husband, any reason on which the presumption is to rest." See also *Smith* v. *Myers* (1898) 54 Neb. l. c. 6, 74 N. W. 277.

8. Har. Law Rev. 430: "This presumption of coercion in criminal cases seems to have preserved a place in our law long after all reason for it has passed away."

13. (1887) 55 Conn. l. c. 300, 11 Atl. 855.

14. (1901) 162 Mo. 253, 85 Am. St. Rep. 498, 62 S. W. 692. See also 15 Har. Law Rev. 234 for a criticism of this decision: "So far from following this tendency, the principal case seems to be an unwarrantable extension of the doctrine. The intention was formed, the execution of the crime begun and all but completed outside the jail, and the fact that the defendant came into her husband's actual presence simultaneously with the completion of the crime can hardly justify the presumption in question. - - - Even if coercion could be presumed, slight circumstances will rebut it, and the jury should have been allowed to decide whether the husband's helpless situation was sufficient to do so."

appeal the court allowed the point that there was a presumption of coercion, and that there was not sufficient evidence to justify the jury in finding that she was not coerced. If the test is alone coverture and presence, the decision, it is submitted, is sound, but if the test is ability to coerce, a likelihood that she was prevented from acting as a free agent the decision is nearly, if not quite, absurd.

It is submitted that the rule is unsound, illogical and cumbersome to justice. It should therefore be abolished. The statement of a North Carolina[15] court seems a sufficient justification. "- - - - the presumption - - - having been created solely by judicial decisions should be set aside in the same mode". There is no need for legislative interference. What society knows is absurd should not be a part of the law. It is to be hoped that when the matter again comes before the Supreme Court of Missouri the doctrine will be repudiated and coercion be required to be proved as a matter of fact.

C. L. C.

PRACTICE—DIRECTION OF THE VERDICT FOR THE PARTY BEARING THE BURDEN OF PROOF. *Quisenberry* v. *Stewart et al.*[1] Ejectment. The land in dispute was for some years within the fence boundaries of the land now owned by the defendant. The plaintiff put in evidence his paper title and then a survey, and this testimony showed that the disputed strip was within the description called for by the paper title. The defendant offered evidence that the fence was erected on an agreed line. It was held that the credibility of the defendant's evidence was solely a question for the jury. It cannot be said that defendant's evidence was unequivocal and wholly uncontradicted and, so, without question the actual decision of the court is sound. The case, however, is of interest because of its approval of a statement in *Hunter* v. *Wethington*:[1a]

"As this case will have to be retried, there is one other question to be noted. Defendant contends that as two witnesses testified to the adverse possession in defendant for ten years, the trial court could not do otherwise than to find for the defendant. This does not necessarily follow. The credibility of that testimony, although undisputed by direct testimony, was for the trier of the facts."

1. (1920) 219 S. W. 625. See also *Printz* v. *Miller* (1911) 233 Mo. 47, 135 S. W. 19, and *Johnson* v. *Grayson* (1910) 230 Mo. 380, 130 S. W. 673, holding a verdict will not be directed for plaintiff in a law case where the allegations of his petition are denied and he introduces oral evidence to support his cause of action. But see the following cases: *May* v. *Crawford* (1899) 150 Mo. 504, 51 S. W. 693; *Crawford* v. *Stayton* (1908) 131 Mo. App. 263, 110 S. W. 665.

1a. (1907) 205 Mo. l. c. 292, 103 S. W. 543.

This case is the last case in Missouri approving the doctrine that a trial court may not direct a verdict in favor of the party bearing the burden of proof though he may have sustained the burden with uncontradicted testimony.

There are two theories on which the courts today direct verdicts. First, the court may direct against the plaintiff only when there is no evidence in his favor.[2] Second, the court may direct against the plaintiff in case the jury as reasonable men could not possibly find for him, or as a Massachusetts court[3] puts it, in case the jury found for the plaintiff, the court would be compelled to set the verdict aside any number of times as being against the evidence.

Missouri, however, has adhered to a policy of great liberality in leaving questions of fact to the jury for final determination. And the rule in Missouri today is that the evidence must be construed in its strictest sense against the defendant, including all inferences that can be made against him, allowing no inferences for the defendant to offset, and if then there is evidence enough to support a verdict, the motion for a directed verdict must be overruled.[4]

Having then in mind the two theories on which a court will direct a verdict, the next question to arise is, should a court direct a verdict in favor of one bearing the burden of proof? According to the principal case the court should not. The grounds on which this decision is upheld are (1) that it is the province of the jury to pass upon the evidence,[5] and (2) that the jury should say whether they *believe* the witnesses.[6] It is contended that to take from the jury this question is to deprive the people of the right of trial by jury.[7] Is such a contention true?

No court will refuse to direct against the plaintiff, if he has not offered a scintilla of evidence,[8] yet many courts will not direct in his favor, though he has made a strong case, and there is not a scintilla of evidence against him.[9] Why? Does this seem to be a sound principle for the speedy and economical administration of justice? Can we truthfully say that a person is deprived of any of those rights assured by trial by jury if he has a verdict directed against him under such circumstances? He may ask for a new trial, or appeal the same as if the case had gone

2. *Way, Administrator, etc.*, v. *The Illinois Central R. R. Co.* (1872) 35 Ia. 585.

3. *Denny* v. *Williams* (1862) 5 Allen 1.

4. *Maginnis* v. *Railroad* (1916) 268 Mo. l. c. 675, 187 S. W. 1165.

5. *Luhrs* v. *Brooklyn Heights R. Co.* (1896) 11 App. Div. 173, 42 N. Y. Supp. 606. See 10 Harvard Law Review 453.

6. *Bryan* v. *Wear & Hickman* (1885) 4 Mo. 106.

7. *Woodin* v. *Durfee* (1881) 46 Mich. 424, 9 N. W. 457.

8. *San Antonio Traction Co.* v. *Levyson* (1908) 52 Tex. Civ. App. 122, 113 S. W. 569.

9. *Printz* v. *Miller* (1911) 233 Mo. l. c. 49, 135 S. W. 19.

to the jury.[10] In a jurisdiction where the second theory prevails he has lost nothing more than the possible chance of having the jury return a verdict in his favor, which must immediately be set aside as against the evidence.

But it is contended that this makes the court and not the jury decide on the truthfulness of the witnesses.[11]

In *Pleasants* v. *Fant*,[12] Miller, J., says: "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all of the evidence, the preponderating evidence is in his favor, that is the business of the jury, but conceding to all of the evidence offered, the greatest probative force which to the law of evidence it is fairly entitled to, is it sufficient to justify the verdict? If it does not then it is the duty of the court after verdict, to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside and a new trial granted."

If this reasoning be sound, and there are many cases[13] in accord, it must be conceded that the court can decide this point as well before verdict as after, and the jury is deprived of none of its duties by the court directing their verdict.

But it is sometimes contended that though a court may direct against the plaintiff, it cannot direct for him, because there must be an agreement of facts before the court is entitled to pass on them.[14] It is said that in the case of directing against the plaintiff, the defendant, by asking for the direction admits all of testimony of plaintiff as true and consents that the court may pass on it as a fact, but in case of the plaintiff asking for verdict, he cannot admit his own testimony as facts and consent for the defendant, hence it must be for the jury and not for the court to decide the question of fact.

It would seem that this objection may be overcome by applying a rule used in pleading, namely, that an averment not denied is admitted. If plaintiff offers an abundance of testimony, which the defendant neither attempts to deny, nor impeach the witnesses by whom it is offered, then may we not say that the defendant must admit the truth of plaintiff's testimony?

10. *Meyer* v. *Houck* (1892) 85 Ia. l. c. 327, 52 N. W. 235.

11. *Gannon* v. *Laclede Gaslight Co.* (1898) 145 Mo. 502, 46 S. W. 968.

12. (1874) 22 Wall. 116.

13. *Sprague* v. *Androscoggin County* (1908) 104 Me. l. c. 354, 71 Atlantic 889.

14. 12 Harvard Law Review 433.

In *Gannon* v. *The Laclede Light Company*[15] this point arose, and though the case was decided according to the rule announced in the case under review, there is a strong dissenting opinion by Marshall, J., in which Sherwood and Brace, JJ., concurred. He states that if there is no controversy over the facts, there is no question for the jury, and says: "If the facts are shown by competent evidence on one side, and the evidence is not contradicted on the other, and there is no attempt to impeach the witnesses, there is no *question* of fact involved in the case, but a simple question of law presented. To permit a jury to say that it will not believe competent uncontradicted and unimpeached testimony and to return a verdict in the teeth of such evidence, is to give the jury plenary power to take a man's life or property as caprice or willfulness may dictate."

There are many earlier decisions in the state which hold that a trial court may direct a verdict in favor of either party as pointed out in this dissenting opinion.

In *Morgan* v. *Durfee*[16] Sherwood, C. J., observed that it was not usurping the power of the jury for the court to direct in favor of either party, but rather that it was a duty which it should exercise, and which is often shirked. He speaks of it as a power of a trial court, seldom used, "owing to a pitiful and painful weakness in the dorsal region". A later review of this decision, in the Central Law Journal,[17] goes even further in commenting upon trial courts for refusing to direct a verdict in favor of either party.

There are quite a few decisions[18] holding that a trial court may direct a verdict for either party including the party having the burden.

The question after all is said is simply this: there are cases where it is evident to the judicial mind that there is such uncontradicted testimony that if the jury brought in a verdict in the face of such testimony, it would be the plain duty of the court to set aside the verdict as against the evidence. We submit that in such cases it would be a better and more practical rule for the court to direct a verdict. We further submit that it works no hardship nor does it deny any rights guaranteed by a trial by jury. The following reasoning by a well known author correctly states the matter thus:[19]

15. (1898) 145 Mo. 502, 46 S. W. 968, 47 S. W. 1. c. 916.

16. (1879) 69 Mo. 469.

17. 9 Central Law Journal 102.

18. *Woodstock* v. *Canton* (1897) 91 Me. 62, 39 Atl. 281; *Chanute* v. *Higgins* (1902) 65 Kan. 680, 70 Pac. 638; *Meyer* v. *Houck* (1892) 85 Ia. 319, 52 N. W. 235; *Webber* v. *Axtell* (1910) 110 Minn. 52, 124 N. W. 453; *Marshall* v. *Grosse Clothing Co.* (1900) 184 Ill. 421, 56 N. E. 807; *Donnan* v. *Donman* (1912) 256 Ill. 244, 99 N. E. 931; *McArthur Co.* v. *National Bank* (1889) 122 Mich. 223, 81 N. W. 92.

19. See 11 Mich. Law Review 198 for discussion of this subject by Professor Sunderland, a recognized authority on pleading and practice questions.

"The basic principle underlying the cases which deny the court the right to instruct the jury in favor of the party having the burden of proof, is, as already indicated, that the jury has the right to disbelieve all the witnesses even though the facts to which they testify are uncontroverted and inherently credible, and the witnesses unimpeached. Why the jury should be given any such license it is hard to understand. Juries cannot be permitted to exercise blind and unreasoning power to oppress litigants. They must conduct themselves as sensible and reasonable men. They cannot be suffered to base verdicts on caprice, conjecture, passion or prejudice."

P. M. P.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—INDICTMENT AND INFORMATION. *State* v. *Adkins*[1]. Accused was charged by information with murder in the first degree. He was convicted of murder in the second degree and appealed to the Supreme Court of Missouri. There the judgment was reversed and the cause remanded on account of an erroneous instruction. The fact that the word "the" before the word "state" was omitted from the conclusion of the indictment was held not to be reversible error even though the Constitution of Missouri provides " . . . and all indictments shall conclude, 'against the peace and dignity of the State'."[2]

Under early common law, indictments were framed according to fixed forms, established by statute or by custom and practice. Such resulted in part from the creation of many new offenses; in part from the development of the art of special pleading; and especially from the severity of the criminal law of the period. As a natural result there was an effort to pick flaws in the indictments. This resulted in the framing of complicated and formal indictments. The least departure from fixed forms would have been fatal.[3]

The conclusion of the indictment charging a common law offense was in a specifically required form for an additional reason. This part was to show to whom the forfeiture would accrue and was in these words: "against the peace of our lord the king (our lady the queen) his (her) crown and dignity". In view, then, of the requirement of formal indictments, even an immaterial departure from this phrased conclusion would have been error.

During the early part of the nineteeth century there was great improvement in England. Statutes were passed removing most of the

1. (1920) 225 S. W. 981.
2. Article VI, Sec. 38.
3. "The Indictments Act", Jour. Com. Leg. (1916) Vol. 16 N. S. p. 238.

technical requirements.[4] And although some statutory requirements remained, the courts became less strict and literal compliance with the statutes was rarely required. This reaction came with the decrease in the number of offenses and the lessening of the severity of punishment. Substantial compliance with the statutes became sufficient.[5]

Most of the states in this country have by constitution or statute required some fixed form for indictments, especially of conclusions of indictments. Nevertheless, it has been generally held that only substantial compliance with the required form is necessary.[6]

The Missouri courts have declared that substantial compliance with the formal requisities in indictments, as provided by the constitution or statutes, is sufficient. The difficulty has been to determine what is substantial compliance. In *State* v. *Lopez*[7] an indictment concluding "against the peace of the statute and of the statute in such cases made and provided" did not meet the constitutional requirement for a conclusion "against the peace and dignity of the State". In *State* v. *Mitchell*[8] the indictment was quashed for using the words ". . . did . . . disturb a congration", instead of "congregation". The court there said the word "congration" was not an English word. However they seemed to base their decision on their belief that such relaxation would tend to establish a precedent for disregarding required forms. In *State* v. *Waters*[9] the indictment concluded: "Against the peace and dignity of the State, and contrary to the form of the statutes in such cases made and provided by the State", instead of merely "against the peace and dignity of the State", as provided by the constitution. The court held that, as the words required were present, the remainder was surplusage. It was stated by Lewis, J.,: "The general doctrine is that, if the intent of the Constitution be substantially responded to in this part of the indictment, a literal transcript of the formula is not necessary". This principle was followed in *State* v. *Hays*,[10] were the words "of Missouri", following the word "State", were held not to vary, enlarge, or change the phrase or the sense. *State* v. *Schloss*[11] also held that words added to the required phrase were surplusage and that the required words being present, there was substantial compliance with the constitution. The court distinguished the case from *State* v. *Lopez, supra,* and *State* v. *Pemberton*,[12] in which

4. Jour. Com. Leg. Vol. 16 N. S. p. 239-247.

5. See *State* v. *Hornsby* (1884) 8 Rob. (La.) 554.

6. For a review of the American cases, see 22 Cyc., p. 244, note 93.

7. (1853) 19 Mo. 255.

8. (1857) 25 Mo. 420. Compare *State* v. *Duvenick* (1911) 237 Mo. 185, 140 S. W. 897, holding "agains the peace and dignity of the state" is sufficient.

9. (1876) 1 Mo. App. 7.

10. (1883) 78 Mo. 600.

11. (1887) 93 Mo. 361.

12 (1860) 30 Mo. 376. Indictment in two counts. First count omitted the en-

cases "neither the constitutional words, nor words of like import, were used".

In *State* v. *Campbell*,[13] the conclusion of the indictment omitted the word "the" before "State". The court adopted the principle laid down in *State* v. *Waters*, *supra*, that matters of substance and not of form would be required. Nevertheless, the court held that the omission of the word "the" was reversible error because the definite article "the" was necessary "in order to designate the particular state against which the offense is charged to have been committed". It is possible to argue that the court was of the opinion, also, that every constitutional requirement is a matter of substance and that any alteration of the form specified would be fatal. This seems not to be the generally accepted law.[14] *State* v. *Skillman*[15] was decided at the same term and follows *State* v. *Campbell*. *State* v. *Warner*[16] likewise follows and relies upon *State* v. *Campbell*.

The formal conclusion in an indictment does not serve the purpose that it did at common law. It is at most a debatable question if there is any purpose served by the conclusion of the indictment specified in the constitution of this state.[17] It is hardly probable that the accused does not know that he is accused of violating the laws of the State of Missouri since the indictment commences "State of Missouri", etc.

The purposes of an indictment are: first, to enable the accused to prepare his defense; second, to enable him to plead as a defense, his former conviction or acquittal, in case he is again prosecuted for the same offense; and third, to give the court opportunity to decide the case on the indictment without hearing the evidence.[18] It is clear that the omission of the word "the" in this instance will deny none of these rights. If, then, this omission deprives the accused of no information to which he is entitled, and if the word cannot be said to be a matter of substance, it remains that its presence serves at most to complete a mere rhetorical flourish, and its omission should not be reversible error.[19]

The decision under review marks a definite step in advance. The

tire phrase "against the peace and dignity of the State". See discussion in *State* v. *Stacy* (1890) 103 Mo. 11, 15 S. W. 147; *State* v. *Ulrich* (1902) 96 Mo. App. 689, 70 S. W. 933.

13. (1907) 210 Mo. 202, 109 S. W. 706, 14 Ann. Cas. 403.

14. *Pacific Railroad* v. *The Governor* (1856) 23 Mo. 353, 66 Am. Dec. 673; *State* v. *Foster* (1876) 61 Mo. 549; *Riesterer* v. *Land & Lumber Co.* (1900) 160 Mo. 141, 61 S. W. 238; *Creason* v. *Yardley* (1917) 272 Mo. 279, 198 S. W. 830. Compare *State ex rel.* v. *Hitchcock* (1911) 241 Mo. l. c. 464, 146 S. W. 40.

15. (1907) 209 Mo. 408, 107 S. W. 1071.

16. (1909) 220 Mo. 23, 119 S. W. 399.

17. See 50 Am. Law Rev. pp. 305-310.

18. See 24 Har. Law Rev. 290, "The Seventeenth Century Indictment in the Light of Modern Conditions".

19. See 68 Central Law Journal, p.

gratitude of the bar is due to Williamson, J., whose progressive mind sought for an opportunity to correct a point of view that has caused no inconsiderable lack of respect for law and legal institutions. The commendable opinion re-vitalizes the law of criminal procedure in Missouri.

Virgil Rathbun[20]

PLEADING—FALSE IMPRISONMENT—SURPLUSAGE. *Hill* v. *S. S. Kresge Co. et al.*[1] The court in the above case—an action for false imprisonment—made the following statement: "If plaintiff unnecessarily pleaded malice in his petition in connection with his request for actual damages, there is no question but that it would be necessary for him to prove and submit malice in his instructions covering such damages."

It is a general rule that anything in a petition that is unnecessary to the cause of action may be regarded as surplusage, and proof thereof is not necessary to sustain the cause of action.[2] It is an undenied rule that malice and want of probable cause are not necessary elements of false imprisonment.[3] It would seem then, by all the rules of pleading, that allegations of malice and want of probable cause in a petition for false imprisonment are surplusage and might be disregarded.

The statement quoted is, therefore, apparently fallacious and unsound in principle. It is interesting to trace back and see how the doctrine started and how such a statement has crept into Missouri law.

In the principal case the rule is merely laid down by the court and no reason or justification is given. We must then look to the citations given by the court to find the reasons for the rule.

There are two citations given and turning to the first, *Billingsley* v. *Kline Cloak Co.*,[4] we find that the rule there stated was not exactly as stated in the case under review but as follows: "We have already called attention to the fact that plaintiff alleged the arrest and imprisonment were without probable cause, and that she tried her case on that theory and she concedes that she must abide by that theory in this court."

Perhaps this conclusion is sound as the plaintiff had not merely alleged unnecessary facts in a petition but had adopted a theory throughout a trial that he later attempted to repudiate. The court in the case

421, for review and criticism of *State* v. *Campbell* (1907) 210 Mo. 202, 109 S. W. 706, 14 Ann. Cas. 403

20. Student, School of Law, University of Missouri.

1. (1919) 217 S. W. 997.

2. Pattison Missouri Code Pleading, 2nd Ed. Sec. 103. 24 Standard Encyclopedia of Procedure 580. *Hudson* v. *The Wabash Ry. Co.* (1890) 101 Mo. 13, 14 S. W. 15.

3. 12 Ann. Cas. 35.

4. (1917) 196 S. W. 415.

just quoted from cities five cases[5] and from Cyc[6] to support the rule. One of the cases cited is *Murphy* v. *McAdory,* the second citation given in the principal case.

Taking up the Cyc reference, we find a statement that it is sufficient to allege that the imprisonment was "against his will and illegally", but at the end of the paragraph, there is this sentence, "It has been held that if plaintiff alleges malice and want of probable cause, although unnecessary, he must prove those elements." It would seem that the court took this statement of the Cyc author, Judge E. A. Jaggard, formerly of the Minnesota Supreme Court, to be the law without considering the reasonableness or basis therefor; for looking at the Cyc footnote, we find but one citation, *Fuqua* v. *Gambill,* one of the five cases mentioned above. We must then turn to the cases mentioned for the basis of the rule.

Russell v. *Chester* and *Pritchett* v. *Sullivan* are the only cases cited that are not Alabama cases. The latter is a Federal case and cites the former as the sole authority for the point decided. The point decided in these cases, however, is not the point for which they are cited by the Missouri court. The cases hold that want of probable cause having been pleaded by plaintiff the defendant, an officer who arrested without a warrant, may, under the general denial, show probable cause on his part for believing a felony had been committed. That an officer may arrest without a warrant upon reasonable suspicion that a felony has been committed is pointed out in these cases. These cases are not in point and may be disregarded. This leaves three Alabama cases to support the rule. Two of them refer directly to the third, *Rich* v. *McInerny.* This case, then, would seem to have been the basis for the announced rule, and to it we must turn for the reasons supporting the rule.

From the opinion of Head, J., we find that in 1849 in *Ragsdale* v. *Bowles,*[7] an action for *malicious prosecution,* the averments of the complaint were, "that the defendant falsely, maliciously and without probable cause," etc., did certain things. The declaration was demurred to on the ground that it did not sufficiently aver the termination of the prosecution. The court held the count bad for malicious prosecution, but a sustainable count for false imprisonment. The court's conclusion evidently being that the words, "falsely, maliciously and without probable cause", were sufficient to show that the imprisonment was unlawful. It is clear that the court did not intend to say that these elements were essential to the action. Shortly after this case was decided, the Ala-

5. *Russell* v. *Shuster* (1844) 8 Watts & S. (Pa.) 308; *Fuqua* v. *Gambill* (1903) 140 Ala. 464, 37 Southern 235; *Rich* v. *McInerny* (1893) 103 Ala. 345, 15 Southern 663; *Pritchett* v. *Sullivan* (1910) 182 Fed. 480, 104 C. C. A. 624; *Murphy* v. *McAdory* (1913) 183 Ala. 209, 62 Southern 706.

6. 19 Cyc (339) 359.

7. (1849) 16 Ala. 62.

bama Code of 1852 was adopted. In it was contained a schedule of forms for various actions, and for the form for false imprisonment substantially codified the declaration of the Ragsdale case. The same form, save for the correction of a minor error, has been carried into the code of 1907.[8] But the code itself thus defines false imprisonment: "False imprisonment consists of the unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty."[9]

It appears that an essential difference exists between the elements of false imprisonment, as laid down by the code and the pleading form given in the code. Head, J.,[9a] in explaining says: "We are of opinion that it was not the intention of the legislature to make this form exclusive. We cannot suppose it was designed to abolish the probably graver offenses of false imprisonment, civilly actionable, which are not characterized by the elements the form makes essential. This question, however, is not now before us, since the present complaint pursues the form prescribed. - - - - Being alleged, these elements must be shown to have existed, to justify a recovery by the plaintiff."

The Alabama court did not attempt to lay down a general rule that malice and want of probable cause, if pleaded, must be proved. The court only held that where one pleads under an erroneous form placed in the Alabama Code, then he must abide thereby and prove his complaint though it does contain elements which would not otherwise be essential to his cause of action. This decision may be sound because of the peculiar situation that arises under the Alabama code. As a general proposition of law, it is submitted that it is not sound and that such a decision anywhere other than under the Alabama code is erroneous.

Standard Encyclopedia of Procedure[10] states the rule in almost the same words as Cyc but adds: "The better holding would seem to be to regard them merely as surplusage which need not be proved, or as inserted to enhance the damages." After citing all of the cases in accord it is noted that they are all controlled by the Alabama code.

In Annotated Cases[11] we find the proposition stated and five Alabama cases cited in support. The annotator then states that the view treating it as surplusage is probably the better rule and in support of it cites a California case[12], three Illinois cases[13] and a New York case.[14]

8. Section 5382, Form 19, Code of Alabama 1907, Vol. II—Civil.

9. Section 4238, Code of Alabama, 1907—Vol. II, Civil.

9a. *Rich* v. *McInerny* (1893) 103 Ala. 345, l. c. 354, 15 So. 663.

10. 8 Standard Encyclopdeia of Procedure 965.

11. 12 Ann. Cas. (l. c.) 36.

12. *Nerves* v. *Costa* (1907) 5. Cal. App. 111, 89 Pac. 860.

13. *Enright* v. *Gibson* (1906) 219 Ill. 550, 76 N. E. 689; *Hight* v. *Naylor* (1899) 86 Ill. App. 508; *Johnson* v. *Kettler* (1876) 84 Ill. 315. There Scholfield, J., said: "The objection that the

Ruling Case Law[15] mentions the holding and cites *Rich* v. *McInerny, supra,* in accord, and a Minnesota[16] case, *contra.*

From the above review it is found that of the five states in which this point has come up, Missouri is the only one to follow the Alabama case. The court in the principal case evidently accepted the first Missouri decision without question, but it is submitted that the statement is unsound in principle and is not supported by authority.

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declaration charges that the imprisonment was 'without any reasonable or probable cause whatever,' and that the court refused to instruct the jury that it was necessary to make proof of this, would be well taken were the action in case for improperly putting in motion regular process of the court; but the action is for trespass for imprisoning, etc., without legal process, and the *gist* is the unlawful, direct force, and the words, 'without any reasonable or probable cause,' were surplusage. The citation of authorities can not be necessary on a distinction so well established as this is in the elementary works."

14. *Ackroyd* v. *Ackroyd* (1869) 3 Daly (N. Y.) 38.

15. 11 R. C. L. Art 33, page 819.

16. *Nixon* v. *Reeves* (1896) 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506, perhaps not in point.