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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

CONTRACTS—OFFER OF REWARD FOR INFORMATION LEADING TO CONVICTION OF AN OFFENDER—RIGHT TO REWARD ON DEATH OF CONVICTED PARTY AFTER ENTRY OF JUDGMENT OF CONVICTION AND APPEAL THEREFROM BUT BEFORE A HEARING ON THE APPEAL. *Scott* v. *American Express Company.*[1] Defendant offered a reward for first information leading to the arrest and conviction of the person who robbed a certain express messenger. Plaintiff gave information which led to the arrest and conviction of one Buntyn in Tennessee. Buntyn, on conviction, appealed and while his appeal was pending but before it was heard died. Under this state of facts, plaintiff claimed that he had earned the reward and brought an action in Missouri to recover the same. Plaintiff had judgment in the lower court, but the Springfield Court of Appeals reversed it, holding that plaintiff could not recover because "conviction" meant final conviction, and also because defendant's purpose in making the offer was to secure Buntyn's punishment. It was stated that in as much as there had been neither a final conviction, nor an attainment of defendant's end, plaintiff was not entitled to the reward.[2]

1. (1921) 233 S. W. 492.
2. (1921) 233 S. W. 1. c. 493.

The decisions of all courts seem to agree that an advertisement, offering a reward for the conviction of a criminal offender, is an offer, which looks to the formation of an unilateral contract, i. e. the advertiser contemplates as the acceptance of his offer, an act or a series of acts. If the expected act or acts are performed by any one with the intention of accepting the offer, a contract results, and the offerer will be bound to pay the reward.[3] But every offer, to ripen into a contract, must be accepted according to its terms, and therefore the difficult question in this type of case is to ascertain what is meant by "conviction". If what is done by the claimant of the reward has not led to a conviction in the intended sense of that word, there is no contract because the acts contemplated by the offerer have not been accomplished and there has been no acceptance of the offer within its meaning. Obviously the decision in the instant case is correct if "conviction" as stipulated for in the offer meant legal conviction, as there was no such occurrence until final judgment was entered, and the death of the convicted party pending the appeal abated "the prosecution and cause of action" entirely.[4] Is it proper then to hold with the court that "conviction" has this technical meaning in offers of this kind?

An accurate answer to the above question will depend on ascertaining what the ordinary offerer of a reward for a conviction reasonably expects to get by way of performance from the party who attempts to accept his offer. An offerer is not entitled to attribute an unusual meaning to his offer, or to say that it carried a meaning different from what it appeared to mean to a reasonably intelligent man. If an offerer has done that which the offer, reasonably interpreted, appeared to call for as an acceptance, the offerer will be bound, and there will be a contract even though the offerer desired the offer to demand something other than that which was performed, and did not wish to be bound contractually under the actually existing conditions. In determining whether or not there has been an acceptance of an offer, the question invariably is, what was the offerer's *objective* intent? The courts are not concerned with the latter's *subjective* intentions and expectations. What did the offerer, as reasonably understood, appear to ask for as an acceptance is the test, and if the offeree has accepted according to such a construction of the offer there is a contract.[5]

3. *Lovejoy* v. *Atchison, etc., R. R.* (1893) 53 Mo. App. 386; *Freeman* v. *City of Boston* (1842) 46 Mass. 56; *Furman* v. *Pike* (1848) 21 N. J. L. 310. See also *Harrard* v. *Dickerson* (1914) 180 Mo. App. 70, 165 S. W. 1135 (offer of reward for capture); *Cummings* v. *Clinton Co.* (1903) 181 Mo. 162, 79 S. W. 1127 (offer of a reward for arrest); *Smith* v. *Vernon Co.* (1905) 188 Mo. 501, 87 S. W. 942 (offer of reward for arrest).

4. (1921) 233 S. W. 1. c. 493. See *accord State* v. *Perrine* (1874) 56 Mo. 602; *Carrolton* v. *Rhomberg* (1883) 78 Mo. 547. See *U. S.* v. *Pomeroy* (1907) 152 Fed. 279.

5. Williston, Contracts, sec. 21.

In the ordinary case, when an offer is made for information leading to the conviction of a person, the normal purpose attributable to the offerer will be that of having the proper court take jurisdiction of the offender and finally enforcing the judgment after guilt has been established in the manner provided by law. If the offeree supplies the evidence requisite to secure such court action, and the proper officials procure the action, the offer has been accepted and the reward has been earned.[6] The offer cannot contemplate personal action by the offeree beyond this point and his own personal testimony if called for. Manifestly, it could not require any action on the part of the offeree other than this, as this is the only possible participation in the conviction that the latter could have. But in the usual case there must be this kind of court action, and until it is finally taken, there can be no contract with respect to the reward. So, it has been held that if the offender commits suicide before the trial there has been no acceptance of the offer, even though the information tendered by the offeree would have been sufficient for a conviction, if the offender had only lived and been placed on trial.[7] Such a decision is correct. It should make no difference that the cause of failure to convict was due to some matter beyond the control of the offeree. The offer was conditional and the offerer agreed to be bound only if the condition was complied with. Again, and for the same reason, it has been ruled that a plaintiff cannot recover the reward where there has been a conviction in the lower court, followed by an appeal still pending.[8] The rule, then, usually is that the reward has not been earned until the offender has been brought to justice and his case duly and finally disposed of on the basis of his established guilt.

It was said in the decision under review that the purpose of the offerer in making an offer of this kind is to procure the punishment of the criminal, and, therefore, unless punishment follows that the reward could not be claimed.[9] But this statement, taken alone, is too broad, and there are cases where the reward will be recoverable, even though the offender may not have been punished. Suppose that conviction follows

6. *Re Kelly* (1872) 39 Conn. 159; *Elkins* v. *Commissioners* (1898) 86 Kan. 305, 120 Pac. 542; *Crawshaw* v. *Roxbury* (1856) 7 Gray (Mass.) 374; *Porterfield* v. *State* (1893) 92 Tenn. 289, 21 S. W. 519; *Tobin* v. *McComb* (1913) 156 S. W. (Tex.) 237. Some courts are disposed to be still more liberal. Thus in *Rogers* v. *McRoach* (N. Y. Sup. Court.) (1909) 120 N. Y. Supp. 686, it was held that the plaintiff was entitled to a reward. He had furnished only a clue to the police who, acting thereon, arrested the criminal and caused his conviction. But see *Lovejoy* v. *Atchison etc. R. R., supra,* note 3.

7. *Fortier* v. *Wilson* (1883) 11 U. C. C. P. 495.

8. *Stone* v. *Wickliffe* (1899) 106 Ky. 252, 50 S. W. 44. See *Cornwell* v. *St. Louis etc. Co.* (1903) 100 Mo. App. 258, 73 S. W. 305.

9. (1921) 233 S. W. 1. c. 493. This is the general rule. See also *Fortier* v. *Wilson, supra,* note 7; *Re Kelly, supra,* note 6.

the offeree's action, but that sentence is suspended, or even commuted, or that the convicted party is pardoned. It would not be accurate in a case of this kind to hold that the offer had not been accepted. As a matter of fact it has been, because the offender had been "brought to justice" and the case had been finally disposed of on the basis of the latter's guilt. Indeed it would be correct to say that in every case where there has been a technical conviction, which has been followed by any possible legal result, which has not upset or invalidated the conviction, the reward should be regarded as due. In every such case there has been compliance with the terms of the offer, and if punishment of the offender has not ensued, this was not because there had not been a conviction, but because the law did not provide for punishment.[10]

In certain cases, at first blush, it may appear as if the plaintiff ought to be entitled to the reward even though there has not been a conviction. Such a holding may appeal to us as being proper in a case where a plaintiff has acquired all apparently essential evidence for a conviction, but, due to no fault of his own, no trial is had. Suppose that the offender dies before the trial or suppose that the state officials refuse to prosecute; in such cases our compassion is with the plaintiff and it might lead us to hold that he should recover the reward. This would seem especially to be the case where the alleged criminal dies before his trial. The principal case is analogous to those supposed. It is doubted, however, if there is any legal basis for deciding that the reward has been earned and it is believed that the holding in the case under review is sound. It is not perceived how a plaintiff can assert with any degree of success that the offer meant evidence which probably would have secured a conviction or have brought the offender to justice had final court action occurred. The offerer was interested not in possibilities but in the actual meting out of justice according to law to the man who committed the crime, which called forth the reward. If there was no conviction the purpose of the offerer was not accomplished; and if the offender died and conviction was no longer possible then there was no longer any purpose in the mind of the offerer to be subserved. This is the only reasonable interpretation which can be placed on such an offer, and for this reason there is no justification for a plaintiff claiming the reward under these conditions.

10. *Williams* v. *U. S.* (1868) 12 U. S. Court of Claims 192 (suspended sentence); *Wilmore* v. *Hensel* (1892) 25 Atl. (Pa.) 86. See also *Louisville etc. R. R.* v. *Goodnight, infra,* note 11. A peculiar case is *Buckley* v. *Schwartz* (1892) 83 Wis. 305, 53 N. W. 511. It was there held that plaintiff had accepted an offer to pay a reward for securing a conviction before a jury by obtaining a verdict of guilty even though an order in arrest of judgment was entered. The court held that the order did not set aside the verdict in a criminal case.

*Louisville & Nashville R. R. Co.* v. *Goodnight*[11] deserves separate consideration because of the peculiar situation there presented. Plaintiff in error offered a reward for the capture and conviction of each of the persons who aided in derailing one of its trains. Defendants in error procured the arrest of two of the offenders, Cornwell and Evans, and upon their evidence they were duly indicted. They confessed their guilt in open court. The company's attorneys were also employed in the prosecution of the offenders and they, together with the prosecuting officials of the Commonwealth, deemed it advisable to procure the dismissal of the indictments against Cornwell and Evans in order that they might more feasibly turn state's evidence and aid in the apprehension and conviction of others who had been associated with them in the commission of the crime and who were regarded by the prosecution as being more flagrant violators of the law. In pursuance of this scheme, the indictment was dismissed and Evans and Cornwell were set free. The defendants in error, nevertheless, claimed the reward. It was conceded that the freed persons were guilty, and in all probability could have been convicted upon their confessions and other evidence that defendants in error had procured. Plaintiff in error denied its obligation on the ground that there had been no conviction within the meaning of the offer. The court decided, however, for defendants in error on the extremely narrow ground that the company through its own attorneys in causing the dismissal of the indictments against Cornwell and Evans had itself prevented the performance of the contract by defendants in error and could not for this reason escape its liability. In this connection, the court said: "* * * if the happening of the event upon which their right to the reward depended was hindered or prevented by the act of the company, such hindrance was in law equivalent to the completion of the condition precedent, and the railroad company is liable on its contract to pay the reward, although it may have acted in the matter in the utmost good faith."[12] Perhaps such prevention ought to have been regarded as the equivalent of performance by defendants in error, or a waiver of such performance if caused by the company. It is conceivable, however, that the act of assisting in obtaining a conviction was not only a *condition* to claiming the reward but also a *part* of the acceptance of the offer. If this were the case there is reputable authority to the effect that the company's act of hindrance, if known to the offerees, would amount to a revocation of the offer and would thus prevent its being accepted in the future.[13] Moreover, it seems doubtful to the writer whether the company's attor-

11. (1874) 10 Bush (Ky.) 552, 19 Am. R. 80.

12. (1874) 10 Bush 1. c. 554.

13. *Biggers* v. *Owen* (1887) 79 Ga. 658, 53 S. W. 193; Langdell, Summary of Contracts sec. 4; Williston, Contracts, sec. 60. It has, however, been contended that in a case of an offer looking to the formation of a unilateral contract that the offerer ought not to be free to

neys could be regarded as acting for plaintiff in error while they were engaged in assisting in the prosecution of the offenders. They were engaged in a public duty, which they had voluntarily assumed, and they were obliged, by the very assumption, to further the state's interest to the exclusion of the company's. It would seem, therefore, that the basis of the decision may not be tenable either (1) because the company did not prevent the performance of a condition, or (2) because even conceding that plaintiff in error did prevent the conviction, participation in the conviction was not only a condition, but was also an act constituting acceptance of the offer, and preventing such act was in fact a revocation of the offer.

Conceding, however, both of the foregoing suggestions to be sound, the decision may still be justified and sustained, if it is possible to say that that which defendants in error did, even though it did not result in conviction, was what plaintiff in error reasonably appeared to desire as an acceptance of its offer. If a proper interpretation of the offer would lead a person to believe that the company was willing to pay for what was actually done as being the equivalent of a conviction it will surely follow that defendants in error earned the reward. In order to reach such a conclusion it will have to be said that the offerer expressed a willingness to pay for any disposition of the case by the state which might be predicate on the alleged offenders' practically certain guilt. If the offerer merely wanted the offeree to take such steps as to cause governmental action based on practically certain guilt, then the defendants in error did accept the offer. It would seem, though, that such an inter-

withdraw the offer if the offeree attempts to accept the same until a reasonable time for the performance of the required act has expired. It is said that there is a collateral obligation to hold the offer open under these conditions. See article by Professor McGovney 27 Harv. Law Rev. 644 and also articles by Professor Corbin, 26 Yale Law Journal 1. c. 194 *et seq*, and by Professor Ballantine 5 Minn. L. R. 94. In *Elkins* v. *Commissioners* (1912) 120 Pac. (Kan.) 1. c. 543 it was said in speaking of an offer of a reward: "It is not questioned, that upon any person seeing the published offer of reward and entering upon an attempt to gain it, there arose a contract between him and the Board of County Commissioners conditioned that if he effected 'the arrest and conviction' of the murderer, the county would pay him $300." The court evidently believed that the entry upon performance by an offeree bound the offerer to give the offeree an opportunity to earn the reward by bringing about the arrest and conviction of the offender. The quoted statement was not necessary to the actual decision.

See also *Smith* v. *State* (1916) 151 Pac. (Nev.) 512, holding that where the offer is for arrest and conviction a plaintiff may recover the reward, if he in arresting the alleged criminal kills him. The court stated that the killing was justifiable and that the death of the offender excused plaintiff from procuring his conviction. It was also said that there had been a substantial compliance with the condition of the reward. The reward was offered pursuant to statutory provision.

pretation of the offer is highly speculative and for this reason unwarranted. It must not be forgotten that an offerer is free to dictate his own terms and that an offeree assumes the risk of not meeting the same. While it is true that "conviction" as used in this type of offer must be liberally construed, still to say that the word means something short of final conviction, or adjudication of guilt of the offender is to attribute to it a distorted and unreasonable meaning.[14]

J. L. PARKS

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT. *State* v. *Johnson*.[1] The trial court gave the following instruction: "If the whole evidence in this case leaves the minds of the jury in such a condition that they are neither morally certain of the defendant's innocence, nor morally certain of his guilt, then a reasonable doubt exists, and the jury must give the defendant the benefit of such doubt and acquit him." The Supreme Court of Missouri condemned this instruction as "radically and incurably wrong". The reason given was: "The theory is that, unless the jurors are morally certain of the defendant's innocence, they cannot acquit on the ground of reasonable doubt. Such a doubt exists if, from a consideration of all the evidence they are not morally certain of the defendant's guilt."[2]

It is submitted that the words used by the trial judge do not justify the interpretation given to them. He told the jury that if they were certain of the defendant's guilt but still were not certain of his innocence—in other words, if their minds were in a state of complete indecision—they must acquit. The trial court apparently recognized that the jury might conceivably find themselves in one of three states of mind: (a) morally certain of the innocence of the accused; (b) morally certain of his guilt; or (c) a state of mind between these two extremes. He merely called attention to their duty if they found themselves in a state of uncertainty. It is in cases where this frame of mind exists and in such cases only that an instruction on reasonable doubt can legitimately have a decisive effect.

No clear statement of the present common law rule that proof in criminal cases must be "beyond a reasonable doubt" seems to have been formulated until the latter half of the eighteenth century. The term

14. The writer has been assisted in finding the authorities by George E. Woodruff, student in the School of Law.

1. (1921) 234 S. W. 794.
2. (1921) 234 S. W. 1. c. 796.

seems to have been judicially used first in *Rex* v. *Donnelly*.[3] The rule there announced was adopted in this country at an early date.[4]

In criminal as well as in civil cases the duty of adducing evidence which will avail to convince the tryer of the fact is upon the burden-bearer.[5] As long as the jurors are in a state of uncertainty the burden-bearer has not met that duty and the verdict must be for his opponent. An English Lord Chancellor put the matter thus in *Winans* v. *Attorney General*:[6] "I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof." It would appear, then, to be correct to instruct a jury that if they are in a state of uncertainty about the case they must find for the defendant.

Dicta and decisions have approved this rule. At a time when the rule of reasonable doubt was being first formulated, Smith, B., told an Irish jury in *Rex* v. *Flemming*[7] that: "If they had a doubt on the point whether the witness had committed perjury or not, if their minds were in a state of *oscillation,* they ought to acquit." (Italics supplied.) Chief Justice Shaw in *Commonwealth* v. *Webster*[8] used similar language: "- - - - what is a reasonable doubt? - - - - It is that doubt which, after the entire consideration of all the evidence has been taken, leaves the jury uncertain." An instruction embodying the same idea was approved in *Simmons* v. *State*[9] by the Supreme Court of Alabama.

Any attempted definition of the expression "reasonable doubt" is likely to confuse.[10] In *State* v. *Robinson*[11] our court has said: "It is

3. (1803) 28 Howell State Trials, 1. c. 1095. For History of the Common Law rule see 10 Am. Law Rev. 642, 1. c. 656. See also *Rex* v. *Flemming, infra,* note 7.

4. See e. g. Patterson, J., to the jury in *U. S.* v. *Lyon* (1798) 6 American State Trials 687 1. c. 694. "You must be satisfied beyond all reasonable and substantial doubt."

5. Wigmore, Evidence, sec. 2497-2498.

6. (1904) A. C. 287 1. c. 289, Hinton's Cases on Evidence, 1. c. 36.

7. (1798) McNally, Evidence on Pleas of the Crown, p. 2.

8. 4 American State Trials 93 1. c. 415. The case is also reported in 5 Cush. 295 and 52 American Decisions 711. In the last reports of the case the words here quoted do not appear. The report in American State Trials is the product of the ripest scholarship and would seem to be more authentic than the others.

9. (1909) 158 Ala. 8, 48 So. 606: "The doubt that justifies an acquittal must be reasonable doubt, such a doubt as leaves the mind of the jury, in view of all the evidence, in a state of reasonable uncertainty as to the guilt of the defendant."

10. *Hamilton* v. *People* (1874) 29 Mich. 173 1. c. 194; *Massey* v. *State* (1877) 1 Tex. App. 536 1. c. 570; *Bland* v. *State* (1878) 4 Tex. App. 15, 1. c. 17; *Abram* v. *State* (1896) 36 Tex. Crim. Rep. 44 (an extreme case); *McAlpine* v. *State* (1872) 47 *Ala.* 78; *People* v. *Huntington* (1903) 138 Cal. 261, 70 Pac. 284. Wigmore on Evidence, sec. 2497.

11. (1893) 117 Mo. 649, 23 S. W. 1066.

difficult to explain simple terms like 'reasonable doubt' so as to make them appear plainer. - - - - Every attempt to explain them renders an explanation of the explanation necessary." In *State* v. *Bond*[12] the simple definition of reasonable doubt as a substantial doubt, approved many years before in *State* v. *Nueslein*,[13] was declared to be sufficient, and further attempts at definition were condemned. Later the Supreme Court of Missouri held that: "It is not reversible error to give or refuse such a definition" i. e. one similar to one approved in *State* v. *Nueslein, supra.* The court also stated: "Such definition should not be used."[14]

The test suggested by the trial court in the case under review was that of moral certainty. The jury were told that if they were not morally certain of defendant's guilt they had a reasonable doubt and should acquit. The words, "moral certainty" have been held in other jurisdicdictions to be synonymous with reasonable doubt in a number of cases.[15] But at least one well reasoned opinion states that the term is too favorable for a defendant.[16]

The court in the case under review cited no authority in support of its position and failed to note *State* v. *David*.[17] There an instruction containing, in part, the same direction (though somewhat differently ex-

12. (1905) 191 Mo. 555, 90 S. W. 830.

13. (1857) 25 Mo. 111.

14. *State* v. *Sykes* (1912) 248 Mo. 708, 154 S. W. 1130.

15. *State* v. *Long* (1899) 72 Conn. 39, 43 Atl. 493; *Bone* v. *State* (1897) 102 Ga. 387, 30 S. E. 845; *People* v. *Chutuk* (1912) 18 Cal. App. 768, 124 Pac. 566; *Simmons* v. *State* (1909) 158 Ala. 8, 48 So. 606; *Bailey* v. *State* (1901) 133 Ala. 155, 32 So. 57.

16. *Territory* v. *Barth* (1887) 15 Pac. 673, 1. c. 676.

17. (1895) 141 Mo. 380, 33 S. W. 28. The instruction on reasonable doubt follows: "And if, upon a view of the whole case, you have a reasonable doubt of the guilt of the defendant, you will acquit him; but such a reasonable doubt as mentioned in these instructions, and which will authorize an acquittal on that ground, must be a substantial doubt of defendant's guilt, founded and based upon the evidence and all the facts and circumstances proven in the case, and not a mere possibility of innocence. If, however, the whole evidence in the case leaves your minds in such condition that you are neither morally certain of the defendant's guilt nor morally certain of his innocence, then a reasonable doubt exists and in such case you should give the defendant the benefit of such doubt, and acquit him." For an unknown reason this instruction is omitted in the official state report, but the approval of the instruction is the same in both reports.

The court stated that the instruction was "entirely different from the instruction condemned in *State* v. *Shaeffer*, 89 Mo. 271, 1. S. W. 293."

In that case the discussion of the instruction was not necessary to the determination of the case and admitted not to be so. It is difficult to understand how the instruction there given could have been detrimental to the accused. After all is said is there any logical difference between a conviction "beyond a reasonable doubt" and a conviction "to a reasonable certainty"? No doubt the former expression sounds more serious and is calculated to make a jury more careful than the latter. See *Pelitier* v. *Chicago*,

pressed) was given. The conviction was affirmed and the instruction was expressly approved by Gantt, P. J.

Without expressing a decided opinion that a refusal to give the instruction under review would be a reversible error of which defendant could complain, nevertheless, it seems that there is no objection if the instruction is given.

B. E. JR.

EASEMENTS—ACQUISITION BY PRESCRIPTION—PRESUMPTION OF A LOST GRANT. *Kuhlman* v. *Stewart*.[1] The plaintiff sought a permanent injunction restraining defendant from damming up a drainage ditch which ran through portions of the farms of both. Plaintiff rested his claim to relief upon an alleged easement acquired by prescription. The evidence did not show user for the the requisite period nor adverse user and for these reasons the result reached by the court seems correct. The following passage, however, appears by way of *dictum*.

"So that in this case proof of 30 *years* continuous use (were there substantial proof of this character) *might* authorize the finding that there was a proper grant, but for the express and positive evidence that the whole thing rests upon a parol agreement between Caroline Kuhlman and Elmer Price, one of the Price heirs. *The proof of the express parol agreement destroys all presumption of a grant. In other words, the proof shows that this ditch had its origin in an oral agreement, rather than in a grant, and with this direct proof in the record, there is no room for the presumption of a grant, which is the foundation of the doctrine of prescription, in such cases.* The oral agreement proven in this case shows a license rather than an easement."[2] (Italics supplied.)[3]

This language seems to admit of the construction that the Supreme Court of Missouri believes that a prescriptive right depends ultimately upon the existence of a grant; that if it be shown as a fact that no

*St. P., M. & O. Ry. Co.* (1894) 88 Wis. 521, 60 N. W. 250.

*State* v. *Schaeffer* (1886) 89 Mo. 271, 1 S. W. 293, is approved in *State* v. *Jackson* (1888) 95 Mo. 623, 1. c. 658, 8 S. W. 749 and *State* v. *Pierce* (1912) 243 Mo. 524, 147 S. W. 970.

1. (1920) 221 S. W. 31.

2. Observe also this statement: "An easement can only be created by grant." 221 S. W. 1. c. 33.

3. Why does Graves, J., imply that thirty years user is necessary? The analogy of section 1305 R. S. Mo. 1919, would suggest ten years as the proper length of time. Compare Ellison, J., in *House* v. *Montgomery* (1885) 19 Mo. App. 1. c. 182: "Applying these principles to the case before us, we would say that the period requisite to acquire an easement in this state is ten years, in analogy to our present statute of limitations."

See also *State* v. *Walters* (1879) 69 Mo. 1. c. 465 and numerous cases cited in note 23, *infra*.

grant was ever made then there is no prescriptive right, no matter how long the user.

We are confronted with this proposition: is the presumption of a lost grant upon the showing of open, adverse, and uninterrupted user under claim of right *conclusive* and therefore not a presumption at all but a rule of substantive law; or is it a true presumption which is dissolved by producing evidence that no grant has in fact been made?

At common law title to land lay in seisin, but easements being mere rights in land lay only in grant. As stated by a learned English authority, "Easements, being rights which are superadded to the ordinary common law incidents of the ownership of real property, can only be created by grant or statute."[4]

But at a very early date the common law courts recognized the desirability, indeed the necessity, of giving effect to long continued exercise of such rights in land even though no grant in fact existed. From this policy of giving effect to user came the old common law doctrine of prescription. If it could be shown that the right claimed had been enjoyed continuously for a time before which "the memory of man runneth not to the contrary" the court would presume the enjoyment to be referable to a right which had a lawful origin, viz, a grant.[5] And since it was impossible to produce evidence in refutation of this presumption it could not be questioned. Prescription, therefore, became at a very early date one means of creating an easement.

In 1275 the statute of 3 Edw. I, c. 29, provided that none should declare upon the seisin of his ancestor beyond the beginning of the reign of Richard I. (1189). Although this statute did not expressly include incorporeal hereditaments, the law courts adopted it, by way of analogy, as fixing the time of legal memory.[6] From this time forward a showing of uninterrupted enjoyment of a right in land from 1189 conclusively established the existence of the right claimed.[7] As time went on, it became a practical impossibility to make use of prescription in establishing the right because as the year 1189 receded the possibility of producing evidence of uninterrupted enjoyment from that date became more and more remote. In 1540 Parliament passed the second statute of limita-

4. Lord Halsbury, Laws of England, Vol. XI, page 243.

5. Lord Halsbury, Laws of England, Vol. XI, page 258; Gale, Easements, 8th Ed., pages 192, 193, 9th Ed., 188.

6. Gale, Easements, 8th Ed., page 188, 9th Ed., page 183, and authorities there cited. See in general: *Wallace* v. *Fletcher* (1855) 30 N. H. 1. c. 445; *Tracy* v. *Atherton* (1864) 36 Vt. 503; *Strickler* v. *Todd* (1823) 10 Serg. & Rawle (Pa.) 1. c. 63; *Coolidge* v. *Learned* (1829) 8 Pick. (Mass.) 504, and authorities there cited; *House* v. *Montgomery* (1885) 19 Mo. App. 170; *Anthony* v. *Building Co.* (1905) 188 Mo. 1. c. 719, 87 S. W. 921.

7. Gale, Easements, 8th Ed. page 188, and authorities there cited.

tions[8] shortening the period within which actions for the recovery of land could be maintained to sixty years. However, the common law courts declined to follow the precedent long established under the statute of 3 Edw. I,[9] and continued to require proof of enjoyment from 1189 to raise a right by prescription.[10] The hardship and injustice of this rule subsequently led to the introduction of a fiction. At first, it appears that a showing of user since the memory of "living man" was held to raise a presumption that the user had existed since legal memory i. e. 1189. This presumption, however, could be rendered useless by evidence of non-existence of the right claimed at any time during the period since 1189.[11] Later, the fiction of a modern lost grant was introduced. If it could be established that the right claimed had been enjoyed for

8. (1540) 32 Hen. 8.

9. The reason for this is not apparent from any of the authorities examined. In *Wallace* v. *Fletcher* (1855) 30 N. H. 1. c. 445, the learned Judge wrote: "In 1275, by statute 3 Edw. 1, writs of right were limited to rights actually enjoyed after the first year of Richard 1, (1189) and by analogy to the period fixed by that statute, it was held that time of legal memory reached to that date, and not beyond it. Being a fixed date, it was of course continually receding, until it became absurd, since it was practically impossible to prove any fact of so ancient a date.

"The courts might have held, when difficulties were found to result from this arbitrary rule, that the ancient law, which fixed the period beyond which actual memory did not reach, was still in force, or they might have availed themselves of the passage of the statute of 32 Henry VIII, which reduced the limitation of writs of right to three score years, to decide by analogy to that statute, as was done in the time of Edward I, that the time of legal memory was reduced to sixty years. It appears by Littleton, 170, that in his time it was seriously contended that the time of legal memory was not changed by the Statute of Edward I. And Rolle, C. J., was of that opinion, though he admits the practice was otherwise. 2 Rolle's Ab. Prescription, P. And many respectable authorities maintained, after the statute of 32 Henry VIII, that time of legal memory was sixty years, as *Rolle*, C. J., Sergeant *Williams*, 2 Wm. Saund. 175, n. a., Lord *Mansfield*, 2 Ev. Poth. 136, *Blackstone*, J., 2 Com. 31, *Abbott*, C. J., 5 B. & A. 215, and *Dallas*, C. J., C. B. Moore 558.

"From causes which are not now apparent, neither of these views prevailed, and the consequence was that no title to any easement could be supported upon proof of occupation and enjoyment, however long continued, if its origin could be shown." To like effect see *Coolidge* v. *Learned* (1829) 8 Pick. (Mass.) 1. c. 508. See also Jones, Easements, sec. 158. This section seems to be a superficial and unsatisfactory treatment of the English law.

10. Gale, Easements, 8th Ed. pages 189, 190; *Bryant* v. *Foot* (1867) 2 Q. B. per Cockburn, C. J., at page 181.

11. *Bryant* v. *Foot* (1867) 2 Q. B. per Cockburn, C. J., at page 181: "Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really

the period set by the statute of limitations for the bringing of real actions (at first sixty years and finally twenty years in England) the court would instruct the jury that they *might* infer a grant made in modern times but now lost.[12] This inference, of course, could not be made if the evidence showed that no grant had in fact been made.[13] Finally, the presumption came to be regarded as conclusive. That is, the court instructed the jury that if twenty years (or whatever the statutory period may be in the particular jurisdiction) uninterrupted, open, exclusive, and adverse user was shown they were bound to presume a grant once made of the easement claimed but now lost. This was attained in England in *Angus* v. *Dalton*.[14] Although this case has been regarded as settling the law in England in conformity with the rule stated, the opinions of the judges were by no means harmonious.[15]

The authorities in this country cannot be said to be altogether harmonious. However, it can be said that the well considered cases which review the authorities and discuss the principles involved are in substantial agreement. They recognize that the theory of a lost grant is wholly a fiction of judicial creation; and they are bold enough to frankly settle upon judicial legislation by which the statute of limitations is extended to incorporeal hereditaments.[16]

The question has been considered many times in Missouri and there seems to be (aside from the case under review) an agreement that Missouri follows the English and the better American rule.

existed." In this case Cockburn, C. J., Mellor and Lush, JJ., did their best to prevent the development from taking form in a hard and fast rule.

12. The earliest reported decision to this effect is that of *Lewis* v. *Price* (1761) 2 Wm. Saund. 175 a, per Lord Blackburn in *Dalton* v. *Angus* (1881) L. R. 6 App. Cas. at page 812.

13. *Watkins* v. *Peck* (1843) 13 N. H. 1. c. 370: "The adverse or exclusive use of water in a particular manner, for the term of twenty years, furnishes presumptive evidence of a grant." See comment on this case in *Wallace* v. *Fletcher* (1855) 30 N. H. 434.

14. L. R. 3 Q. B. D. 85, 4 Q. B. D. 162, 6 App. Cas. 740.

15. See excellent analysis of this case in Gale, Easements, 8th Ed. pp. 194-197.

16. In *Tyler* v. *Wilkerson* (1827) 4 Mason 397, 24 Fed. Cas. 472, Mr. Justice Story uses this language which has been widely quoted and followed:

"By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. . . . . The presumption is applied as a presumption juris et de jure, wherever by possibility a right may be acquired in any manner known to the law."

In *Wallace* v. *Fletcher* (1855) 30 N. H. 434, 1. c. 447, Bell, J., speaking for the Supreme Court of New Hampshire employs this clear and persuasive reasoning: "It was the wise course, prescribed by principle as well as by public convenience, to overrule the absurd decisions which sanctioned a fixed point in the early history of England, as the limit of legal memory, and at the same time to restore the principle upon which that decision appears to be made, that in cases where the Legislature have not fixed a precise rule of limitation, rights

In *Pitzman* v. *Boyce*,[17] Sherwood, P. J., considering a license, stated by way of *dictum*: "Though the statute of limitations has no reference to easements, yet, where a party has enjoyed an easement for such length of time as to confer title to land from the true owner to a disseizor, this adverse enjoyment will in law establish the right to the easement as against the owner of the servient estate." . . . .

But he added, "And such adverse user for the statutory period will give origin to the rebuttable legal presumption of a grant, even though the use in its inception was a trespass."

It is submitted that these propositions are contradictory. The authorities cited in support of the first proposition[18] do support it unequivocally (with the exception of Wood on Nuisances which is unsatisfactory) and of necessity negative the second. The last three cases[19] cited by the court involve the acquisition of an easement of a right of way by the public. This statement in *State* v. *Walters* gives the principle: "The public may acquire the right to the use of a road or easement over the land of another from long use of a road as such by the public, acquiesced in by the owner, and adverse occupancy and use of the same for a period of time equal to that prescribed by the statute of limitations for bringing actions of ejectment."

In *House* v. *Montgomery*[20] both licenses and easements are discussed. As to the latter, while it is recognized that there is a conflict of authority, the decision seems to favor the view that user for a period fixed by the statute of limitations is sufficient to establish the easement. Of course, the user must have the proper qualities.

In *Anthony* v. *Building Co.*[21] the court denied the existence of an

shall be acquired and barred by a prescription of such length of time as has been fixed by the Legislature as the proper limitation in analogous cases."

In *Tracy* v. *Atherton* (1864) 36 Vt. 503, Poland, C. J., states the proposition this way: "The statute of limitations does not extend to these incorporeal rights, but it has now become universally settled that an uninterrupted use of a way or other easement, under a claim of right, for the period of time fixed by the statute as a bar to the recovery of lands held adversely, gives the person so using it a full and absolute right to such easement, as much as if granted to him.

In *Strickler* v. *Todd* (1823) 10 Serg. & Rawle (Pa.) 63, 1. c. 68, the Supreme Court of Pennsylvania, (opinion by Duncan, J.) says: "It is well settled, that if there has been an uninterrupted, exclusive enjoyment, above twenty-one years, . . . . this affords a conclusive presumption of right in the party so enjoying it, and this is equal to a right by prescription."

17. (1892) 111 Mo. 387; 19 S. W. 1104.

18. Wood on Nuisances, sec. 704; *House* v. *Montgomery* (1885) 19 Mo. App. 170.

19. *State* v. *Walters* (1879) 69 Mo. 463; *State* v. *Wells* (1879) 70 Mo. 635; *State* v. *Proctor* (1886) 90 Mo. 334, 2 S. W. 472.

20. (1885) 19 Mo. App. 170.

21. (1905) 188 Mo. 704, 1. c. 719, 87 S. W. 921.

easement because there was a failure to show that the user was adverse and under a claim of right. The court stated, however, as follows: "When the evidence sufficiently shows the use of the privilege for a length of time equal to that prescribed by the Statute of Limitations for acquiring title to land by adverse possession, and that the use was adverse and under a claim of right with the knowledge of the landowner, the right to the easement is established."

The most effective statement of the prevailing doctrine was made in 1912 by Goode, J.,[22] as follows: "But an easement in the nature of a private way may be acquired by prescription or ten year's adverse use, which is equivalent to a grant. In most cases the law allows the prescriptive right on the fiction of a prior grant of which the evidence is lost. In this case a fictitious grant need not be presumed, as there is proof of a futile attempt at an actual grant. Old theories about prescriptions and presumed grants, though still alluded to in opinions for the sake of seeming consistency, don't have much force in modern law. The question of a prescriptive right depends on adverse use for the limitation period."

It will be observed that Goode, J., had before him a case where there had been a futile attempt to make an actual grant. Therefore, it was not possible to decide the case upon any *presumption of a lost* grant. This decision would seem clearly to represent the law of Missouri today.[23]

22. *Power* v. *Dean* (1905) 112 Mo. App. 288, 86 S. W. 1100.

23. *Smith* v. *Sedalia* (1899) 152 Mo. 283, 53 S. W. 907 (*dictum*); *Howard County* v. *C. & A. Ry. Co.* (1895) 130 Mo. 652, 32 S. W. 651 (bare statement that county acquired a prescriptive title to bridge by user for ten years; in fact user had been for twenty years at least); *James* v. *City of Kansas* (1884) 83 Mo. 567 (user of sewer for thirteen years gives a prescriptive right); *Field* v. *Mark* (1894) 125 Mo. 502, 28 S. W. 1004 (loose *dictum*).

*Autenrieth* v. *St. L. & S. F. Ry. Co.* (1889) 36 Mo. App. 254 ("But on the other hand, if the use by the plaintiffs, or the public, was adverse, continuous, and as a matter of right, for the period of ten years prior to the building of the defendant's railroad, then this road was either a public highway or was a private road belonging to the plaintiffs."); *Boyce* v. *Missouri Pacific Ry. Co.* (1902) 168 Mo. 583, 68 S. W. 920 (all defendant could acquire was an easement. "By analogy, upon the theory of an implied lost grant, the defendant has acquired by prescription an easement . . . . " l. c. 595. "So that although technically the statute of limitation does not apply to an easement, still by judicial interpretation the result is the same as if the statute did so apply.")

*Graham* v. *Olson* (1905) 116 Mo. App. 272, 92 S. W. 728 (*dictum*); *Sanford* v. *Kern* (1909) 223 Mo. 616, 122 S. W. 1051 (right of way, the outcome of an oral agreement, was used for fourteen years. Decision in favor of person claiming the right of way. Opinion somewhat confused in that the writer seems to think that an easement obtained by prescription is the same as a so-called irrevocable license.

The court also announces this *curious* doctrine: "In the first place Sanford's claim to an easement originated in contract. He was not an interloper, squatter or mere trespasser. This is impor-

It is good policy to bar stale claims.[24] The propriety in applying, by way of analogy, the period set by the statute of limitations for the bringing of actions to recover land to easements is apparent. The first statute of limitations was so applied. The reason for the departure from this precedent does not appear to be explained by the authorities and the weight of modern authority follows it.[25]

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tant as furnishing a foundation for a claim of right, because the Statute of Limitations borrowed to effectuate prescriptive rights, can only be invoked by a person claiming by right and not by wrong. No flux of time will ripen a bad title into a good one unless possession is blessed by a claim of right."

How is that declaration to be reconciled with this paragraph in the same opinion: "That a prescriptive right is, by a fiction of the law, deemed to rest in a grant, or lost deed, as the old learning teaches, is of small significance in modern jurisprudence; for it is settled law that the right to a way by prescription may be established in the same way as the title to land, to-wit, by adverse possession under a claim of right uninterrupted for ten years"? *Power* v. *Dean* approved.)

*Geisman* v. *Trish* (1910) 151 Mo. App. 714, 132 S. W. 298 ("The rule is that an easement in nature of a private way may be acquired by ten years' adverse use, and that a right thus acquired is a vested right.") *Leiweke* v. *Link* (1909) 147 Mo. App. 19, 126 S. W. 197. ("After the year 1847, when the limitation period of actions to recover real property was reduced from twenty to ten years, the public might have acquired an easement in the road by ten year's open, adverse and uninterrupted use under a claim of right."); *Dunham* v. *Joyce* (1895) 129 Mo. 5, 31 S. W. 337 (*dictum*).

*Daudt* v. *Steiert* (1918) 205 S. W. 222 (There was a claim of an easement of drainage but the court decided that there was nothing more than a license. In arguing against the existence of an easement, Walker, P. J., made this curious statement: "There must, however, be as a condition precedent to the establishment of an easement by prescription, clear proof of a well-defined oral agreement in regard thereto." Such seems to be contrary to the theory of prescription even including the fiction of a lost grant. For a grant was in writing.); *Schroer* v. *Brooks* (1920) 204 Mo. App. 1. c. 581, 224 S. W. 53 ("The objection to this deed was based altogether upon the theory that an easement lies only in grant. Such was the fiction of the common law, and where the easement had been enjoyed for a sufficient length of time, a grant of that easement was presumed, but a prescriptive right does not rest exclusively in grant, it may be established in the same way as title to land, that is, by adverse possession under a claim of right uninterrupted for ten years. The deed was sufficient to show the intent of the plaintiff to claim from Wolf Pen Hollow, southeasterly, etc., and the ten-year statute ran against the grantor in that deed.") See also *Novinger* v. *Shoop* (1918) 201 S. W. 64.

24. Tiffany, Real Property, 2nd. ed., sec. 514 and authorities there cited; Jones, Easements, secs. 161-162; 9 R. C. L. 783; Washburn, Easements, p. 106.

25. See 16 Harv. L. R. 438; 2 ib. 43-44; 7 ib. 234.