University of Missouri Bulletin Law Series

Volume 25 *October 1922* Article 5

1922

Notes on Recent Missouri Cases

LAW SERIES

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

JANUARY, NINETEEN HUNDRED AND TWENTY-TWO

"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

TAXATION—CLASSIFICATION OF PROPERTY FOR PURPOSES OF TAXATION—SECURED DEBTS LAW. *State ex rel. Tompkins* v. *Shipman.*[1] *State ex rel. Doneghy* v. *Stephens.*[2]

In 1917 the General Assembly of Missouri enacted a revenue measure which commonly became known as the secured debts tax act.[3] The principal provisions of his act were as follows: certain kinds of intangible property, including obligations not payable within one year from the date of their issue, obligations of a state, county, city, etc., and obligations secured by pledges or deeds of trust were placed in a separate class for purposes of taxation.[4] A recording tax varying in amount in proportion to the face value of the instruments evidencing these obligations and the period of their maturity was to be charged on them.[5] They were to be exempt from further taxation.[6] The act was amended

1. (1921) 234 S. W. 60.
2. (1921) 234 S. W. 65.
3. Sec. 13137, R. S. Mo., 1919, approved Apr. 13, 1917. Laws of 1917 p. 539.
4. Sec. 1 of the act; sec. 13137 R. S. Mo. 1919.
5. Sec. 2 of the act, see 13138 R. S. Mo. 1919.
6. Sec. 2 of the act.

in 1921 so as to include obligations secured by mortgages on real estate and other minor changes were made at the same time.[7]

This legislation was the culmination of a long agitation brought about by economic conditions which will be discussed later and was enacted as a direct response to an appeal by the governor of the state. In May, 1921, the two cases under review were instituted in the Supreme Court of the state to test the validity of the legislation.[8] In the first case the argument of counsel turned largely on the point that the tax thus levied was a privilege tax and not a property tax in any sense. In the second case the brief on the part of the relator sought to establish the right of the legislature to classify subjects of taxation even where the tax was admittedly one on property.[9] The court held that the tax was clearly a property tax and it denied the right of the legislature to classify property and tax classes thus made at different rates. The court not only took the position that the general property tax is the only property tax permitted by the constitution,[10] but went further and defended it on economic grounds.[11]

The constitutional provisions involved are somewhat different in nature from those existing in other states and are contained in secs. 3 and 4 of Art. X of the state constitution. The first of these sections provides that taxation shall be "uniform *on the same class of subjects.*"[12] (Italics supplied.) The second provides that all property subject to taxation shall be taxed in proportion to its value.[13]

Are these provisions taken together to be interpreted to mean that all property in the state, of whatsoever nature it may be, must be taxed at the same rate and in the same manner? Or, can we take a somewhat more liberal view and construe them so as to allow classification of property by the legislature and a taxation of such classes at different rates so long as the taxation in each class is *ad valorem* and not based on some other standard? The latter construction, it would seem, would do no violence to the language, for, as long as value is the measure of taxation within the class the fact that the rate varies between classes does not prevent the tax from being proportional. The language of section three italicized above gives color to this construction.

7. Approved Mar. 29, 1921, Laws of 1921 p. 667.

8. Decided July 8, 1921. Motion for rehearing overruled Oct. 8, 1921.

9. Brief for relator.

10. 234 S. W. 1. c. 64.

11. 234 S. W. 1. c. 65.

12. "*Taxes for public purposes only —must be uniform.*—Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

13. "*Taxes in proportion to value.* —All property subject to taxation shall be taxed in proportion to its value."

Interpretation of Similar Provisions in Other Jurisdictions.

The analogies of these sections in the Missouri constitution which appear in the fundamental law of other jurisdictions are of two kinds: (a) provisions requiring that the rule of taxation shall be uniform[14] and (b) provisions requiring taxes to be levied in proportion to value.[15] In some states as in our own the two are combined,[16] with however many differing shades of phraseology. In interpreting the first of the provisions those states in which the matter is not complicated by the effect of the requirement of *ad valorem* taxation are practically unanimous in holding that the constitutional prohibition does not prevent a classification of property and the taxation of such classes at varying rates so long as the rate in each class is uniform.[17] Of course, under the fourteenth amendment to the federal constitution such classification must bear a reasonable and just relationship to the purpose for which it is made and must not be arbitrary.[18] The presence in a number of constitutions of the words, *"uniform upon the same class of subjects"* is held to place the legislative power to classify upon an even more assured footing.[19]

While there is dicta to the effect that the requirement that taxation shall be *ad valorem* does not in any way interfere with legislative classification,[20] none of the cases seems to be directly in point and the writer has found no case directly supporting this proposition. A case in Nebraska[21] takes the position that a classification is not proper and is forbidden by a constitutional provision somewhat similar to the provision under discussion. The wording of the section in that state, however,

14. Ark., Col., Fla., Ga., Ind., Kan., Ky., La., Mich., Minn., Miss., Mon., Nev., N. J., N. C., N. D., Oh., Ore., S. C., S. D., Tenn., Texas, Va., Wis., Wyo.

15. Ala., Ark., Col., Ga., Ill., Mass., Mo., Miss., Mon., Neb., N. C., N. D., N. J., Oh., Tenn., Texas, W. Va., Wash.

16. Ark., Col., Ga., Miss., Mon., N. J., N. C., N. D., Oh., Tenn., Texas, Va., W. Va.

17. *Ry. Co.* v. *Miami County* (1903) 67 Kan. 434, 73 Pac. 103; *State ex. rel.* v. *Smith* (1902) 158 Ind. 543, 63 N. E. 25, 63 L. R. A. 116; *Com.* v. *Bank* (1895) 168 Penn. 309, 31 Atl. 1065; *R. R. Co.* v. *Board of Assessors* (1908) (N. J. Court of Errors and Appeal) 69 Atl. 239 (*Semble*); *Chancellor of State* v. *City of Elizabeth* (1900) 65 N. J. Law 687, 52 Atl. 1130 (*Semble*). *Board of Assessors* v. *R. R. Co.* (1886) 48 N. J. Law 146 (*Semble*); *R. R. Co.* v. *Powers* (1906) 201 U. S. 245, 26 Sup. Ct. Rep. 459, 50 L. Ed. 744 (*Semble*).

18. *R. R. Co.* v. *Powers, supra,* note 17.

19. Such a clause is present in the constitutions of Penn., Col., Del., and Ind. See *Com.* v. *Bank, supra,* note 17 and other Pennsylvania cases.

20. See the New Jersey cases cited, *supra,* note 17.

21. *Western Union Telegraph Co.* v. *City of Omaha* (1905) 73 Neb. 527, 103 N. W. 84.

is somewhat peculiar and the case can hardly be said to have a direct bearing on the question in Missouri.[22]

There is, however, one court, at least, which seems to stand squarely for the proposition that a requirement that taxation be proportional prevents a classification of property by the legislature.[23] In Massachusetts where the constitution empowers the General Court to levy "proportional and reasonable assessments, rates, and taxes . . . ,"[24] the provision was held to prohibit the enactment of legislation somewhat similar to the Missouri secured debt act on the ground that it involved a legislative classification of property.[25] In one state where the organic law commands that property "which may be taxed *ad valorem* shall be assessed for taxation at its fair cash value" . . . , it was held that the exemption of mortgages and the debts secured thereby from an *ad valorem* tax and the substitution of a registration tax was proper.[26]

It is to be noted that in none of these states is the requirement of *ad valorem* taxation combined with the provision that the taxes shall be *uniform on the same class of subjects,* as in our constitution. In the state of Georgia[27] this is the case and the decisions there furnish the only direct precedents for the instant case outside of Missouri.[28] In light of the literal meaning of the words, of the general state of the authorities, and of the economic considerations involved, it is submitted that the Georgia decisions are wrong and should not be followed.

Missouri Decisions

The constitution of 1820 contained no provision in regard to uniformity of taxation but did contain a requirement of proportional taxa-

22. The language of the Nebraska Constitution, art. IX, sec. 1, which is followed almost exactly in Illinois and Maine, is as follows: "The legislature shall provide such revenues as may be needful by levying a tax by valuation so that every person or corporation shall pay in proportion to the value of his or its franchises."

23. *Opinion of the Justices* (1915) 220 Mass. 613, 108 N. E. 570.

24. Art. 1, sec. 4.

25. *Opinion of the Justices, supra,* note 23.

26. *In Re the Okla. National Life Co.* (1918) 173 Pac. (Okla.) 376, holding a secured debts law constitutional.

27. The provision in Georgia is as follows: "All taxation shall be uniform on the same class of subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Art. 7, sec. 2.

It is to be noted that the last clause might be construed as requiring the principle of the general property tax to be followed. This portion of the provision is not found in the Missouri Constitution.

28. *Mayor* v. *Weed* (1890) 84 Ga. 1. c. 685, 11 S. E. 235, 8 L. R. A. 270; *Verdery* v. *The Village of Summerville* (1888) 82 Ga. 138, 8 S. E. 213, cited in the case under review.

tion very similar to that in the present fundamental law.[29] The same provision with minor verbal changes was carried into the constitution of 1865[30] and an enumeration of classes of property which could be exempted was added. In the constitution of 1875, sec. 3, art. 10 was added and a very elaborate schedule of maximum rates was placed in a new article on taxation and revenue.

The first case in which the question here involved arose was *Crow* v. *State*,[31] decided under the constitution of 1820. A special tax of a higher rate was levied on goods shipped into the state from foreign states for purposes of sale here. Though the tax was in name a license tax, it was held to be in reality a property tax. A majority of the court speaking through Birch, J., held that section 19 of article 13 (the analogue of section 4 of article X of the present constitution) forbade legislative classification.[32] In a lengthy opinion[33] he upheld the now long exploded economic theory on which the general property tax was supposed to rest. Napton, J., in a well reasoned dissenting opinion, interpreted the provision as prohibiting specific taxes rather than *ad valorem* taxes but as not to prevent discrimination in the rate of *ad valorem* taxes charged on different articles of property.[34] If the distinctions were arbitrary and unjust he argued the remedy was at the polls and not in

29. Constitution of 1821, art. 13, sec. 19, part of the Bill of Rights: "We declare . . . that all property subject to taxation shall be taxed in proportion to its value." This is the only provision on taxation in the constitution of 1820.

30. Constitution of 1865, art. 1, sec. 30, part of Bill of Rights: "We declare . . . that all property ought to be taxed in proportion to its value." Art. 11, sec. 16 (No property shall be exempt from taxation etc.)

31. (1851) 14 Mo. 237.

32. l. c. 255.

33. "Concerning the mere grammatical signification of the sentence, there can probably be no disagreement of opinion; and when it is considered in connection with the contemporary fact, that under the terms of our admission into the Union, the State was, on the same day the constitution was adopted, binding itself by ordinance to forbear to tax certain descriptions of property, and that in virtue of the residue of its sovereignty in that respect, 'all' other property was 'subject to taxation,' the sentence would seem almost historically, no less than verbally, to have been predicated upon the design which was entertained to repudiate and repress all favoritism or oppression, in the nature of class legislation, or otherwise, by ordaining that in Missouri, as in other States, a general *pro rata* assessment and taxation—as simple and comparatively unexpensive in its enactment and execution, as it was unvaryingly just and equitable in its design and in its consequences—should be interposed as the irreversible rule of action and of right in the State they are founding."

See also the attempt to justify the general property tax in the following paragraphs.

34. l. c. 324.

the courts.[35] Since the passage of the fourteenth amendment it may be added that a remedy is now afforded by that constitutional guaranty.[36]

In *Hamilton* v. *St. Louis County Court*[37] the Supreme Court upheld a law requiring St. Louis county to pay additional compensation to certain judicial officers. It was assumed that this would increase the county tax rate. The court in considering section 19 of the Bill of Rights[38] stated: "It is not necessary in this case to decide whether a different rate of taxation can be imposed upon different descriptions of property, all being taxed by an *ad valorem* tax. The idea of equality in taxation is certainly not the prominent idea conveyed by this clause; nor can we suppose that it was designed to be conveyed, when we consider that so many constitutions of other states previously adopted, contain clauses expressly enjoining equality in taxation, and when the insertion of a word or two in the clause would have expressed the idea clearly. It may be further observed that if equality in taxation is required by this section, then the provision in the first section of the tenth article, that the lands of non-residents shall never be taxed higher than the lands of our citizens, is entirely superfluous."[39] Of the cases decided under the constitution of 1865, a majority seem to turn on the question of exemption from taxation.[40]

In the present constitution the section requiring taxes to be proportional is joined with the requirement of uniformity of taxation for the first time.[41] The courts of the state have repeatedly interpreted the new section as permitting the classification of subjects of taxation.[42] The Missouri decisions, therefore, like most of those in the country at large left the precise question involved in the instant case undecided. The manner being *res integra,* the question of the economic policy involved becomes important.

Economic Principles Involved

The theory of taxation which underlies the decision in the instant case is one which has long been abandoned by economic science.[43] It is the theory that the rate of taxation and the manner of assessment

35. l. c. 325.
36. See note 18 *supra.*
37. (1851) 15 Mo. 3.
38. *Supra* note 29.
39. 15 Mo. l. c. 24.
40. See, for example, *Cook* v. *Stuart* (1885) 85 Mo. 575.
41. Secs. 3-4, art. 10.
42. *Ludlow-Saylor Wire Co.* v. *Wollbrinck* (1918) 275 Mo. 339, 205 S. W. 196; *Mass. Bonding and Insurance Co.* v. *Chorn* (1918) 274 Mo. 15, 201 S. W. 1122; *Express Co.* v. *City of St. Joseph* (1877) 66 Mo. 675, 27 Am. Rep. 382 (under constitution of 1865).
43. Washington University Studies, Humanistic Series, 1919; Seligman, Essays in Taxation, McMillian (1905) Chap. II; Adams, Finance, Henry Holt Co. (1898) pp. 369 etc.

should be the same on all classes of property.[44] The general property tax which originated as a land tax was early extended to other species of property in a crude attempt to establish primitive standards of economic justice. The impossibility of applying this kind of taxation to personalty becomes evident as soon as a given community attains any complexity of civilization.[45] If we levy our present 3% tax upon secured debts bearing interest of 4%, taxation becomes virtually confiscation. As it is practically impossible to discover the existence of such debts without the cooperation of their owner the practice of failing to declare much property of this kind follows and is almost universal.[46] Penitentiary sentences would not bring to light all such hidden property.[47] The suggestion reminds one of the futile attempt of a Roman Emperor to prevent similar tax dodging by the application of torture to suspected persons.[48] Even if the impossible could be performed and the general property tax be made to apply to such securities, money would seek investment in tax exempt bonds and in indebtedness bearing a high rate of interest.[49] The result of this would be a high interest rate to the individual borrower, and small municipalities and local governmental units would be unable to float their necessary long time 4% loans. Besides, the theoretical injustice of such inflexible taxation is obvious.[50] The rate of taxation to the individual should be based on his ability to pay. This in turn is to be measured by his income. To say that his possession of property without regard to the nature thereof, is a proper measure of his ability to pay taxes is impossible in the light of present economic knowledge. Legislative classification, therefore, is necessary in order that our system of taxation shall bear a reasonable correspondence to the facts of our present economic order.

44. See the view expressed by the court in the case under review, 234 S. W. l. c. 65, and the language used in the *Crow* case, *supra,* note 31.

45. Seligman, op. cit., p. 37 .

46. See the article cited from Washington University Studies, *supra,* note 43, and, in particular, a table of statistics from St. Louis county showing that in the cases of a large number of representative citizens the amount of personalty declared was very much smaller than the amount which they were shown to have possessed at their death by the records of the probate court.

47. 234 S. W. l. c. 65.

48. Seligman, Essays in Taxation, p. 42 note.

49. Such as federal bonds, farm loans, etc. As the high interest securities are held for the most part by the rich and the low interest securities are confined almost exclusively to the poor who cannot take the risk that usually accompanies high interest investments the tax is in reality regressive and falls on those who can least afford to bear it.

50. See authorities collected in note 43, *supra,* and in particular Adams, op. cit. p. 371 etc. For general discussion of the matter by an European authority, see Leroy—Beaulieu, Science des Finances, Vol. III, p. 498.

Conclusion

The decision under review may be justified upon the theory that the taxation of securities under the provision of the act was to be based on their face value and not their actual value.[51] But if it goes farther and is held to stand for the proposition laid down by the court—that legislative classification of property is improper—it involves economic consequences of a far reaching and most detrimental nature. The unfortunate results of this rule may now be obviated only by a constitutional amendment. It has been proposed in the Constitutional Convention to change section 4 by the substitution of the word "assessment" for the word "taxation."[52] Under a decision in Oklahoma this would make legislative classification possible.[53] But the matter should not be left open to doubt and if the provisions of section 4 are retained at all the power of the legislature to classify should be made plain.[54]

Hannibal, Missouri BEN ELY, JR.

CODE PLEADING—NECESSITY OF DISCLOSING WAIVER WHEN WAIVING TORT AND SUING IN ASSUMPSIT. *Duncan et al* v. *Smith.*[1] *Pitcock* v. *Higgins.*[2]

In *Duncan et al* v. *Smith et al,* the following statement was filed in the justice court:

"Jefferson City, Mo., Feb. 25, 1918.

"E. C. Smith to Emmet Duncan and James Kelly co-partners, Dr. To 40 bushels of soft corn at 50 cents per bushel, $20.00."

In the trial upon appeal in the circuit court, a motion for a directed verdict for defendant was sustained to evidence which tended to show

51. 234 S. W. 1. c. 65.

52. It has been proposed in the constitutional convention to adopt an amendment which unintentionally might bring about this result, for it is proposed to change the section to read that all property shall be assessed at one-half of its real value. The true object of this amendment would seem almost absurd, but incidentally it might bring about the result by the inadvertent substitution of words pointed out.

53. *Re Okl. National Life Co.* (1918) 173 Pac. 376.

54. By some section providing that the legislature may classify property for the purpose of imposing different rates on different subjects of taxation. The classification would still have to be based on some reasonable basis and would have to bear some relation to the facts of economic science. Otherwise, it would fall within the inhibition of the fourteenth amendment to the federal constitution.

In this review there has been no attempt to consider whether the legislation conflicts with section 22 of article 10 of the constitution. If so, an act could have been framed (it is believed) to have avoided this conflict.

1. (1920) 226 S. W. 621, K. C. Ct. of Apps.

2. (1922) 239 S. W. 870, Spg. Ct. of Apps.

that defendant's cattle had come upon plaintiff's land and had eaten and destroyed forty bushels of corn. The ruling below was affirmed by the Kansas City Court of Appeals.

The reason given for the decision by the Kansas City Court of Appeals was that the statement alleged a cause of action in assumpsit and consequently was not sufficient to advise defendant of the nature of the claim and to operate as a bar to another action on the same demand. The court stated that the right of plaintiffs to waive the tort and sue in assumpsit was doubtful, but that if they had such right they in some way should have disclosed in their statement that they had waived the tort and were suing in assumpsit.

Pitcock v. *Higgins* was an action begun in a justice of the peace court wherein the statement filed was as follows:

"March 13, 1920, one tire and inner tube	$15.00
May, 1920, one battery	50.00
One blow torch	8.50
Onetor Pitcock, labor	3.00
September 11 and 12, 1920, store account	2.45
Total	$78.95

The battery item, as the trial turned out, was the only item for consideration. Plaintiff recovered judgment for $35.00 in the circuit court, upon proof that defendant had committed certain acts of conversion in taking the battery, without permission, to another town to be charged and in refusing to get it and return it to plaintiff when requested to do so.

Upon appeal it was contended that the judgment should be reversed as plaintiff had sued on an account, as for a sale, and had proven a tort, viz, conversion. The Springfield Court of Appeals held plaintiff might "waive the tort and sue in assumpsit" citing a decision of the Supreme Court[2a] and one of its own decisions.[2b] *Duncan et al* v. *Smith et al, supra,* was not cited.

The right to waive a tort and sue in assumpsit seems to be well established in Missouri. That this was true under the common law system of pleading is shown by *Floyd* v. *Wiley,*[3] reported in the first volume of the Missouri reports. The court stated: "It does not lie in the mouth of the defendant to say he is a trespasser." This case was affirmed on a subsequent trial.[4]

2a. *Cowan* v. *Young* (1920) 282 Mo. 36, 220 S. W. 869.

2b. *Mathes* v. *Lumber Co.* (1913) 173 Mo. App. 239, 158 S. W. 729.

3. (1824) 1 Mo. 430.

4. (1826) 1 Mo. 643.

Sandeen v. *The Kansas City, St. Joseph and Council Bluffs Railroad Co.*[5] is cited in *Duncan* v. *Smith, supra,* as holding that a tort may not be waived and suit brought in assumpsit. The only question decided in the *Sandeen* case, as a critical examination will show, is one of jurisdiction of a justice of the peace court. The court there held that where a justice court has jurisdiction of tort cases only to the amount of fifty dollars, but has jurisdiction of contract cases involving a larger sum, a plaintiff may not waive the tort for the purpose of bringing the case within the jurisdiction of the justice court. It is true that Martin, C., a lawyer learned in the common law,[6] by way of dictum, seemed to be of the opinion that it is not permissible, since the adoption of code pleading, to waive a tort and sue on the contract, but he does not mention prior decisions of the Supreme Court which had held that as a matter of *substantive* law a tort may be waived.[7] In the later case of *Finlay* v. *Bryson*[8] the same learned judge stated that the right of plaintiff to waive a tort and sue in assumpsit is very generally conceded by the authorities, but that this will not be permitted when the result is to give jurisdiction over the subject matter to a court which otherwise would not possess it. The *Sandeen* case, it is submitted, is not an authority holding that a tort may not be waived.

Force et al v. *Squier,*[9] a Supreme Court decision in point, is not mentioned in *Duncan* v. *Smith, supra.* There the court held that the only question decided by the *Sandeen* case was one of jurisdiction. Plaintiff was allowed to recover on the following statement:

> "J. J. Squier in acc't with Chas. E. Force and E. S. Stewart, Dr. Nov. 4, to 45 loads screenings at $1.75. $78.75"

The evidence showed that defendant had converted certain screenings.

5. (1883) 79 Mo. 278.

6. Martin, Civil Procedure at Common Law.

7. It is true that the same court in *Link* v. *Vaughn* (1853) 17 Mo. 585, took the position that a tort could not be waived, but this case has not been followed in later decisions.

Coughlin v. *Lyons* (1857) 24 Mo. 533 held that the plaintiff might waive the tort and sue for so much money had and received.

Hale v. *Van Dever* (1878) 67 Mo. 732 approves the doctrine set forth in *Coughlin* v. *Lyons.*

Gordon v. *Bruner* (1872) 49 Mo. 570 held that the tort might be waived and suit brought for goods sold and delivered. ". . . one who has converted to his own use the personal property of another, when sued for the value of that property as sold to him, will not be permitted to say in defense that he obtained it wrongfully."

8. (1884) 84 Mo. 664.

9. (1896) 133 Mo. 306, 34 S. W. 574. *Edwards* v. *Albrecht* (1890) 42 Mo. App. 497 holds that the tort may not be waived, but misinterprets the *Sandeen* case as overruling the case of *Gordon* v. *Bruner, supra.*

It is true that *Crane* v. *Murray*[10] states that the pleading in some appropriate way, should have disclosed that the claimant had elected to waive the tort and sue in assumpsit.

In *Cowan* v. *Young*,[11] chiefly relied upon in *Pitcock* v. *Higgins, supra,* the Supreme Court affirmed the rule—as a rule of substantive law—that where defendant has converted plaintiff's personal property plaintiff may waive the tort and sue for the reasonable value of the property converted. There plaintiff filed a petition in the circuit court alleging that defendant wrongfully took possession of two hundred and forty-six head of cattle belonging to plaintiff, without paying for them, and that the cattle, when received by defendant, were reasonably worth $9,865, and that by reason of the foregoing facts defendant became indebted to plaintiff in the sum of $9,865.00, for which sum judgment was prayed. The judgment below for plaintiff was affirmed though defendant argued that under the petition plaintiff should not have been permitted to recover as the facts alleged showed conversion while the prayer was for the recovery of the contract price.

It seems well established by the foregoing authorities that it is permissible to waive the tort and bring suit in assumpsit.

But it may be asked, is pleading, in the form of the old com-

10. (1904) 106 Mo. App. 697, 80 S W. 280.

11. (1920) 282 Mo. 36, 220 S. W. 869. See the Law of Quasi Contracts, Woodward, Chap. XX. There the learned author says: "Is this obligation of the tort-feasor, enforceable in assumpsit, a primary obligation which results from the violation of another primary obligation, i. e. the obligation not to commit a tort? Or is it, like the obligation to pay damages, a secondary obligation arising upon the commission of a tort? As a matter of legal theory, it seems more reasonable to say that in these cases, as in those in which restitution is allowed as a remedy for the repudiation or substantial breach of a contract (*ante.* sec. 260), there is only one primary obligation, and that upon the violation of such primary obligation the person injured may elect to demand damages or restitution. If this is the true view, the topic of the present chapter belongs to the law of torts or of damages. But, as a matter of fact, the obligation to make restitution has been regarded generally as a primary one; and since, if it is primary, it obviously must be quasi contractual, a consideration of the subject in this book will not be out of place.

Sec. 271. (1) Essential elements of the obligation: (1) The commission of a tort.—The phrase 'waiver of tort,' commonly used to denote the election of assumpsit, is unfortunate. It implies that the *wrong* is waived, which is both inaccurate and misleading. To speak of a suit in equity for the specific performance of a contract as a waiver of the breach would hardly be more objectionable. As is pointed out in the preceding section there is in reality an election between alternative obligations resulting from the commission of a tort—an obligation to pay such damages as the plaintiff has suffered, and an obligation to pay for such benefits as the defendant has received. Whichever obligation is chosen to be enforced, there can be no recovery without proof of the commission of a tort."

mon counts, now permissible? The following cases are leading authorities in Missouri for the view that the common counts were not expressly forbidden by the code of civil procedure, but, on the contrary, are retained. *Pipkin* v. *National Loan & Investment Co.*[12] states: "The first count is in assumpsit for money had and received in common law form and good at common law, and is permissible under the code."

Williams v. *The Chicago, Santa Fe and California Ry. Co.*[13] holds that where plaintiff has fully performed his contract and nothing remains but the duty of defendant to pay the stipulated price thereunder, plaintiff may sue in assumpsit using the common count of *quantum meruit.*

Moore v. *Gaus & Sons Mfg. Co.*[14] holds that one who has fully performed his contract may declare on the common counts in assumpsit instead of on the special contract.

In *Fox* v. *Pullman Palace Car Co.*[15] it is stated by Judge Thompson of the St. Louis Court of Appeals that the judges who were called upon to interpret our code of civil procedure while it was yet new to the profession seemed unable to appreciate fully the spirit in which it was framed, and subjected it, in some respects, to an unfriendly interpretation. This resulted in preserving some of the abuses of the former system, which the code was intended to eradicate. One of these abuses was the rule which allowed a plaintiff, having a right of action arising upon a contract for the recovery of a definite sum of money, to ignore the contract which gave him the right of action and merely set up in his declaration that the defendant was indebted to him in a given sum of money had and received by the defendant to the plaintiff's use. This rule, he said, "was propogated by our Supreme Court as applicable to our reformed system of pleading in *Stout* v. *St. Louis Tribune Co.*[16]" Although Judge Thompson thought the better view was that the common counts no longer existed he nevertheless recognized that the Supreme Court had decided otherwise and so upheld a common count for money had and received.

Mansur v. *Botts*[17] holds that the common counts are permissible.

It seems therefore to be a well established principles in this state that the common counts are permissible under the code. Under the common law system of pleading there was formed a conception that, when the plaintiff had done everything he was required to do under an express contract and nothing remained but the defendant's obligation to pay, there was an implied promise of payment on the part of the defendant.

12. (1899) 80 Mo. App. 1.
13. (1892) 112 Mo. 463, 20 S. W. 631.
14. (1892) 113 Mo. 98, 107; 20 S. W. 975.
15. (1884) 16 Mo. App. 122.
16. (1873) 52 Mo. 342, 347.
17. (1883) 80 Mo. 651.

Indebitatus assumpsit became concurrent with debt upon a simple contract in all cases.[18] This developed because of the fact that in an action of debt wager of law was allowed, as the method of trial, and it was advantageous to the creditor to prevent the defendant and his *compurgators* from defeating the action by oath. Where there has been a part performance of a contract beneficial to defendant the courts also allowed plaintiff to recover the reasonable value of the partial performance in general assumpsit, unless the necessary implication from the terms and nature of the contract was that complete performance was a condition precedent to payment of all or any part of the consideration stipulated for, or unless the contract was void for illegality.[19] One purpose for which this was evolved was to allow general assumpsit to be brought instead of special assumpsit.[20] The common counts were used when this implied promise was chosen as the basis of the action.

When, after the adoption of the code, petitions containing the common counts were brought into courts the judges were compelled to decide whether or not these petitions sufficiently stated a cause of action. The decisions reached in these cases were evidently influenced by the fact that the courts thought that unless the common counts, which had been found so convenient under the older system, were carried bodily into the code, that part of the *substantive* law relating to promises implied in law would be destroyed.

For instance, the New York Court of Appeals, shortly after the adoption of the code of civil procedure, decided that since the common count of *indebitatus assumpsit* stated that defendant was indebted to the plaintiff for a certain amount and that the amount was due and that payment had been demanded, there were sufficient facts stated to constitute a cause of action.[21] Apparently it was not noticed that the legal effect of the facts is stated instead of the actual facts. The statement that defendant was indebted to the plaintiff is considered as a statement of a fact instead of a conclusion of law.

It is a matter of common knowledge that when persons become accustomed to certain habits it is very difficult to suddenly discontinue these habits. Since judges and lawyers are human beings they are subjected to the same weaknesses and frailities as those without the profession. When the code was adopted many of the practices which existed under the older system were transferred into the code. Among these was the use of the common counts.

18. Ames, Lectures on Legal History, page 149.

19. Martin, Civil Procedure, sec. 58.

20. Pomeroy, Remedies and Remedial Rights, sec. 543-4.

21. *Allen* v. *Patterson*, (1852) 7 N. Y. 476.

It has been seen that where there has been a tort, of a certain type, committed against him, plaintiff has the legal right to waive the tort and sue defendant as one who had agreed to buy something or to pay over money. It has been further seen that when one exercises the privilege and brings a suit which corresponds to the common law action of assumpsit he may make use of the common counts as they were developed in the system of common law pleading. This is an exception to the rule of code pleading that the *facts* that constitute the alleged cause of action must be set forth in the petition. In view of these two propositions it can hardly be said that when the tort is waived there must be a disclosure of the waiver. *It is permissible to waive the tort and sue in contract. It is permissible to use the common counts when suing in contract. Duncan et al* v. *Smith et al, supra,* seems to be without controlling authority for the statement that there must be a disclosure of the fact that there has been a waiver.

FRANK DOYLE[22]

TENANCY BY THE ENTIRETY—EFFECT OF DIVORCE. *State* v. *Ellison.*[1] A husband purchased land and had it conveyed to himself and his wife. The wife procured a divorce. The husband brought suit for partition and on her death it was continued against her heirs. It was held that the husband and wife took the land by entirety, but on divorce this was changed to a tenancy in common and the wife's heirs were entitled to an undivided half.

As to tenancy by the entirety Blackstone[2] says,

> "Joint tenants are said to be seised *per my et per tout,* by the half or moiety, and by all: that is, they each of them have the entire possession as well of every parcel as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another: but each has an undivided moiety of the whole, and not the whole of an undivided moiety. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the consent of the other, but the whole must remain to the survivor."

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

1. 233 S. W. 1065 (Mo. 1921)
2. 2 Bl. Com. (Lewis Edition) 648.

According to the above the estate by entireties was dependent on the fact that the law regarded husband and wife as one person, even though the consent of the two individuals who made up this legal person was necessary to alien it. The estate could be created only where the conveyance was made to a married couple. If made to a man and woman who subsequently married, they would hold as they did before marriage, either as joint tenants or as tenants in common.[3] Since husband and wife might thus hold property as joint tenants or as tenants in common, the character of the tenancy not being changed by marriage, it was argued there was nothing in the marriage relation itself to prevent such holding and, consequently, it has come to be the weight of authority that land may be conveyed to the husband and wife as joint tenants or as tenants in common.[4] If no intent is expressed the presumption is that they intended to take by entirety. The result is, as one author says, that the existence of such a tenancy is purely a matter of the intention of the one making the conveyance.[5] Hence, while this peculiar form of estate may have arisen because husband and wife were regarded by the law as one person, in many states it has become an established form of tenancy, without regard to the reason for its origin, for the law ordinarily does not now regard husband and wife as one person. Thus, while the tenancy arose because of this fictional unity it now persists after the reason has ceased to exist. Some states have held that the so-called "Married Women's Acts"[6] have had the effect of abolishing tenancies by entireties, but most states have held the contrary.[7] Among the latter is Missouri.[8] In a few jurisdictions such tenancies have been declared to be out of harmony with the modern law and are therefore no longer

3. See Tiffany, Real Property, 2nd ed. 646.

4. See cases collected in 21 Cyc. 1198.

5. See Tiffany, Real Property, 2nd ed. 647.

6. *Donegan* v. *Donegan* (1893) 103 Ala. 488, 15 So. 823; *Whyman* v. *Johnston* (1917) 62 Col. 461, 163 Pac. 76; *Lawler* v. *Byrne* (1911) 252 Ill. 194, 96 N. E. 892; *Robinson's Appeal* (1895) 88 Me. 17, 33 Atl. 652; *Semper* v. *Coates* (1904) 93 Minn. 76, 100 N. W. 662; *Clark* v. *Clark* (1875) 56 N. H. 105; *Green* v. *Cannady* (1907) 77 S. C. 193, 57 S. E. 832; *Thornley* v. *Thornley* (1893) 2 Ch. 229.

7. See cases collected in Tiffany, Real Property, 2nd ed. 650.

8. *Ashbaugh* v. *Ashbaugh* (1918) 273 Mo. 353, 201 S. W. 72; *Stifel's Union Brewing Co.* v. *Saxy* (1918) 273 Mo. 159, 201 S. W. 67. The peculiar view which the courts take of the statutes which give to married women power to contract and to manage and alien their own separate property is shown by the following quotation from the latter case. "That language is a clear and irrefutable statement of the conclusion that the Married Women's Acts are not intended to weaken or destroy that unity of husband and wife which treats them as equals, but that they do destroy that unity of the two which considers the wife as merged in the husband." The latter so called "unity" is of course the only one that ever existed. "That unity of husband and wife which treats them

recognized.[9] Missouri, however, is one of the states in which this form of tenancy persists with full force and vigor.[10] One may plausibly argue that this form of tenancy offers certain conveniences and advantages to married couples, which justify its retention in the law, although the technical basis for the tenancy, the language of the courts to the contrary notwithsanding, certainly no longer exists in this state. At any rate, so far it has seemingly had the full approval of the courts and has not been disapproved by the Legislature of the state.[11]

The principal case involves the question as to the effect of a divorce *a vinculo* on land held by the entirety, a question which has quite frequently arisen in this state as well as in other states where this form of tenancy still exists.[12] A few courts have held that a divorce does not affect the character of the tenancy, apparently regarding title as fixed and vested in the parties.[13] The great majority have held as in the principal case, that the tenancy by the entirety is changed by divorce to a joint tenancy or a tenancy in common.[14] Probably in all of the states it can fairly be said that the ancient conception that man and wife are legally one person no longer obtains.

On what possible theory can a decree of divorce which makes no mention of property held by the entirety produce such a change in the form of holding such property? The theory is stated by a Missouri court as follows: "As a legal unity of husband and wife was the only basis of the estate by entirety, the destruction of that unity by divorce nec-

as equals" necessarily is the opposite of unity of person if it means anything at all.

9. See *Whittlesey* v. *Fuller* (1853) 11 Conn. 337; *Kerner* v. *McDonald* (1900) 60 Neb. 663, 84 N. W. 92; *Sergeant* v. *Steinberger* (1826) 2 Ohio 305, 15 Am. Dec. 553; *Helvie* v. *Hoover* (1902) 11 Okla. 687, 69 Pac. 958.

10. The first decision seems to be *Gibson* v. *Zimmerman* (1849) 12 Mo. 385. Since then decisions have been numerous.

11. See *Hall* v. *Stephens* (1877) 65 Mo. 670, 675.

12. The doctrine that a divorce *a vinculo* destroys a tenancy by the entirety and converts it into another form of tenancy arose first in this country. Here such divorces have long been common. This was not the case in England. The first case apparently was *Ames* v. *Norman* (1857) 4 Sneed (Tenn.) 683.

13. *Re Lewis' Appeal* (1891) 85 Mich. 340, 48 N. W. 580; *Alles* v. *Lyon* (1907) 216 Pa. St. 604, 66 Atl. 81; *Davis* v. *Johnson* (1916) 124 Ark. 390, 187 S. W. 323.

14. The numerous cases will be found collected in Notes in 30 L. R. A. 333, 10 L. R. A. (N. S.) 463 and L. R. A. 1915 C. 396. Some of the Missouri cases are *Aeby* v. *Aeby* (1916) 192 S. W. 97; *Stifel's Union Brewing Co.* v. *Saxy* (1918) 273 Mo. 139, 201 S. W. 67; *Ashbaugh* v. *Ashbaugh* (1918) 273 Mo. 353, 201 S. W. 72; *Joerger* v. *Joerger* (1906) 193 Mo. 133, 91 S. W. 918; *Bender* v. *Bender* (1920) 281 Mo. 473, 220 S. W. 929; *Haguewood* v *Britain* (1917) 273 Mo. 89, 199 S. W. 950; *Russell* v. *Russell* (1894) 122 Mo. 235, 26 S. W. 677.

essarily makes the tenants by entirety tenants in common."[15] In other words, while husband and wife in Missouri do not necessarily take as tenants by entirety but only presumptively so take if the contrary is not expressed, the tenancy is dependent on unity of person and the destruction of that unity "necessarily" destroys the tenancy. Thus, it is assumed that there is an unity of the husband and wife.

If tenancy by the entirety still exists as the courts hold, then one can commend the result of the decision of the principal case so far as it goes, even if the reason by which that result is reached is subject to criticism. Most of us would probably agree that a wife who secures a divorce, particularly if she secures alimony, ought not have the benefit of property held by the entirety as if the marriage relation still existed. Therefore after the divorce there ought to be some way in which the interests of the parties in property held by the entirety could be equitably adjusted by the courts. The result reached in the principal case is probably more desirable than to leave the tenancy as it was, and so far the courts have not found a way to reach a better adjustment of such property interests in most cases. Where the purchase money has been furnished by the wife and applied to the purchase by the husband without her consent, a court of equity will declare a resulting trust in her favor, thus giving her the entire property,[16] but where the price has been furnished by the husband or voluntarily furnished by the wife the result realized in the principle case invariably follows if there is a subsequent divorce.[17] Perhaps it would be best to declare this peculiar tenancy can no longer be created because it arose on a conception of the marriage relation which was medieval and is now obselete. But if it be still recognized as valid then the result reached in the principal case would seem to be preferable to holding the tenancy survives the dissolution of the marriage.

P. M. P.

15. *Russell* v. *Russell* (1894) 122 Mo. 235, 238, 26 S. W. 677. As will be seen by reference to the cases in note 8 *supra,* the Missouri Supreme Court assumes the fictional unity of persons in its recognition of the tenancy by the entirety and when this is dissolved by divorce the tenancy falls with it. It then becomes a tenancy in common because of 2273 R. S. Mo. 1919, which provides that on conveyance to two or more persons they shall be presumed to take as tenants in common.

16. *Moss* v. *Ardrey* (1914) 260 Mo. 595, 169 S. W. 6; *Donovan* v. *Griffith* (1908) 215 Mo. l. c. 166, 114 S. W. 621.

17. See *Bender* v. *Bender* (1920) 281 Mo. 473, 220 S. W. 929, where the purchase price was furnished by the husband and *Haguewood* v. *Britain* (1917) 273 Mo. 89, 199 S. W. 950, where it was furnished by the wife.

TORTS—ACTIONS FOR WRONGFUL DEATH. *Grier* v. *Kansas City C. C. & St. Joseph Ry. Co.*[1] In the present case plaintiff as administrator for Ralph W. Grier's estate sued defendant company for ten thousand dollars, the action falling under Section 4217, R. S. Mo. 1919.[2] The facts show that deceased was a passenger on defendant's interurban railway, that the car in which he was riding was negligently driven at a high rate of speed around a curve, that it left the track and turned over pinning deceased under it, and that the latter died a short time thereafter from injuries received. Deceased, Grier, a lawyer with a lucrative practice, left no relatives and no evidence was adduced of pecuniary loss to anyone. In fact, instructions were given at the request of both parties withdrawing from the jury the matter of pecuniary loss.

The defendant asked for an instruction to the effect that plaintiff if entitled to recover at all, could recover no more than two thousand dollars. This instruction was refused and an instruction was given for plaintiff in these words: "In determining the amount you will award the plaintiff you may take into consideration the facts constituting the negligence, if any, on the part of the defendant causing the death of the said Ralph W. Grier, including the aggravating circumstances, if any, attending such negligence as is shown by the evidence." The jury returned a verdict for plaintiff for ten thousand dollars.

These rulings, both as to the refusal of the defendant's offered instruction and the allowance of that of the plaintiff, are held correct by the Supreme Court and the verdict for ten thousand dollars is affirmed because, so reads the decision: "It appears from the undisputed facts that the conduct of the defendant's motorman in the management of the train on which Grier was riding was so reckless and so grossly negligent as to show an utter disregard for the lives of the passengers entrusted to his care." This then, it would seem, is a holding squarely to the effect that the statute is penal up to ten thousand dollars, thus distinctly overruling the prior Supreme Court decisions holding it to be penal as to two thousand dollars but above that amount compensatory.

The varied course of this statute is set out by Ragland, C., who

1. (1921) 228 S. W. 454.

2. This was section 5425 R. S. Mo. 1909. It reads, so far as is material, as follows: "Whenever any person . . . shall die from any injury resulting or occasioned by the negligence, unskillfulness or criminal intent of any . . . servant or employee, whilst running . . . any . . . car or train of cars, or any . . . electric . . . car or train of cars . . . the corporation . . . in whose employ any such . . . servant (or) employee . . . shall be at the time such injury is committed . . . shall forfeit and pay as a penalty, for every such person . . . so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars in the discretion of the jury," etc.

wrote the opinion and in two prior notes in the Law Series on the subject.[3] Passed first in 1855, the section provided that the defendant, the premises having been found, "shall forfeit and pay for every such person or passenger so dying the sum of five thousand dollars." This statute was held to be purely penal.[4] Some decisions spoke of its compensatory features but these statements were *dicta,* the decisions of the courts being very clear that pecuniary losses to the party beneficiary were not proper elements for the consideration of the jury.[5] The section was amended in 1905 to read, "shall forfeit and pay as a penalty . . . not less than two thousand dollars, and not exceeding ten thousand dollars in the discretion of the jury."

It would seem reasonable that if before amendment of 1905 the section was construed as fixing a penalty it would continue to be so construed thereafter when the express words, "as a penalty" were inserted, and this view was taken in the first case in which the question was raised in the Supreme Court of the state.[6] The first Boyd case was a holding that can be reconciled with the present case.[7] The second,[7a] although it contains much argument to the effect that the statute is penal as to $2,000 only and compensatory above that amount, nevertheless approved an instruction (apparently without noticing its effect) permitting the jury, in assessing the amount of damages they would award a plaintiff above two thousand dollars, to take into consideration the facts constituting negligence on the part of the defendant. Reynolds, P. J., in a case arising soon after the amendment, said: "Section 2864 . . . (the section under consideration) remains as before in that it im-

3. 3 Law Series University of Missouri Bulletin 38. 18 Law Series University of Missouri Bulletin 45.

4. *Casey* v. *Transit Co.* (1905) 116 Mo. App. 235, 91 S. W. 419; s. c. (1907) 205 Mo. 721, 103 S. W. 1146 .

5. *Young* v. *St. L. I. M. & S. Ry. Co.,* (1910) 227 Mo. 307, 127 S. W. 19. See also for similar holdings, *Ervin* v. *St. L. I. M. & S. Ry.* (1911) 158 Mo. App. 1, 139 S. W. 498; *Mayes* v. *St. L. I. M. & S. Ry.* (1911) 158 Mo. App. 461, 138 S. W. 937; *Troll* v. *Laclede Gaslight Co.* (1914) 182 Mo. App. 600, 169 S. W. 337; *Nicholas* v. *Kelley* (1911) 159 Mo. App. 20. In construing section 8523 R. S. Mo. 1909, pertaining to death by automobile, section 5224 was thought to be penal.

6. *Young* v. *Railroad* (1910) 227 Mo. 307, 127 S. W. 19.

7. *Boyd* v. *Mo. Pac. Ry. Co.* (1911) 236 Mo. 54, 139 S. W. 561.

7a. *Boyd* v. *Mo. Pac. Ry. Co.* (1913) 249 Mo. 110, 155 S. W. 13. The instruction approved in this *Boyd* case (249 Mo. l. c. 120) reads in part: "and in determining the amount you will allow her . . . you may also take into consideration the facts constituting negligence on the part of the defendant causing the death." The apparent inconsistency in that decision is also pointed out by Reynolds, P. J., dissenting in *Lasater* v. *Ry.* (1913) 177 Mo. App. l. c. 545, where he argues strongly for the actual holding in the second *Boyd* case.

poses a penalty on one coming within its provisions, the only difference being that the penalty is any sum in the discretion of the jury, within the limits provided."[8] Lamm, J., said: "In one permissible view of the new statute, (and one most obvious) it is penal and nothing else. The lawmakers said so."[9] Surely, this is a cogent reason. The provision stating that the sum was to be assessed, within the limits provided, "within the discretion of the jury" does not seem inconsistent with the idea of its being at the same time a penalty.

That phrase has, however, been the source of much difficulty and the decisions which hold the statute to be partly penal and partly compensatory are based upon it and the fact that a variable sum is provided for So, Graves, J., in a dissenting opinion, in a case arising subsequently to the case under review, states the argument in this form.[10] There are in this state no degrees of negligence; if, therefore, this is a penalty for negligence only there is nothing for the jury to find save want of due care under the circumstances; there is, therefore, nothing upon which the jury can exercise its discretion. It is true, as he states, that we have no doctrine of degrees of negligence, as such, but it has never been doubted that the law regards some conduct as more reprehensible than other conduct. Even though in two cases defendants are negligent, as to one there may be a mere failure to exercise ordinary care while the other defendant may be, as is said in the present opinion and quoted *supra,* "so reckless and so grossly negligent as to show an utter disregard for the lives of the passengers entrusted to his care." Though our basic rule of law, the very test of liability, is that one is responsible if he fails to use the degree of care that would have been used by an ordinarily prudent man under the same or similar circumstances, it is also unquestionably true that in two or more situations resulting in injury that there are wide variations from the norm of ordinary care. In one case defendant's conduct may be only slightly below ordinary care, while in another case his conduct may be greatly below ordinary care.[11]

8. *Potter* v. *Railroad* (1908) 136 Mo. App. l. c. 144.

9. *Murphy* v. *Wabash Ry.* (1910) 228 Mo. l. c. 86. Lamm, J., further says, though: "But when the whole statute is read and harmonized it might appear (by construction) that the minimum amount if left alone as nakedly and baldly penal, and that the discretion of the jury to go above that amount might be gauged on the theory of compensation, as pecuniary loss, or, if not that, as having regard to the aggravating or mitigating circumstances of the individual case." He expressly reserved the point, no brief being before him as to it. Later he concurred in the opinion by Brown, J., in the second *Boyd* case.

10. *Midwest National Bank & Trust Co.* v. *Davis* (1921) 233 S. W. 406.

11. Salmond on Torts, 3rd ed. p. 27. *McPheeters* v. *H. and St. Joe Rd. Co.*

Though Graves, J., is correct in his statement of basic principles in the common law of negligence, this statue is to be, and can be, applied with reference to what it provides, and the only question is, does it, or might it, provide a penalty for aggravated negligence. Section 4219, R. S. Mo. 1919,[12] certainly provides that in assessing the amount the defendant shall pay, the jury may consider the aggravating or mitigating circumstances attending such wrongful act, neglect or default. This clearly requires the very thing Graves, J., says is not legally possible. Section 4217 states that is to be a penalty. Why, we ask, should we limit that word's meaning or delete it?

Another argument is employed against the interpretation of the section making it purely penal.[12a] It is found in the second *Boyd* case,[13] by the way of argument, and in the two cases following it in the Supreme Court.[14] It is said that the statute, prior to the amendment of 1905, produced inequitable results in as much as it placed the same penalty upon a company for killing a vagabond, whose death was an economic benefit to his family, as it did for killing a most productive and generous citizen; that this inequitable result was contemplated by the legislature and that the amendment was an attempt to correct this re-

(1869) 45 Mo. 22; *Young* v. *St. L. I. M. & S. Ry. Co.* (1910) 227 Mo. l. c. 332. See 18 Law Series 48 and 19 Law Series 51.

12. "Damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 4217; and in every such action the jury may give such damages, not exceeding ten thousand dollars as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

12a. Perhaps the description should be, penal with compensatory features.

13. (1913) 249 Mo. 110 l. c. 123. After stating the argument outlined above the court by Brown, J., said: "If they" the legislators, "desired to reduce the recovery below $5000 or increase it above that sum solely on account of the mitigating or aggravating circumstances attending the killing, it would have been the most natural course for the lawmakers to have specifically directed that the lower amount of $2000 should be awarded for the death of parties through ordinary acts of negligence and the larger sum of $10,000 for death caused by acts of gross negligence or criminal conduct. No such guide for the jury is found in the statute as amended."

14. *Johnson* v. *Ry.* (1917) 270 Mo. 418, 193 S. W. 827. *Dunham* v. *Ellison* (1919) 278 Mo. 649, 213 S. W. 459. *Lasater* v. *Ry. Co.* 177 Mo. App. 534, with apparent reluctance follows the *Boyd* case, as it must have, misinterpreting, though, the actual holding, as it is pointed out by Reynolds, P. J., in his dissent. See also for similar holdings *Hartzler* v. *Met. St. Ry. Co.* (1910) 140 Mo. App. 665, 126 S W. 760, and *Williams* v. *Chi. B. & Q. Ry. Co.* (1913) 169 Mo. App. 468, 155 S. W. 64, and *Rollinson* v. *Lusk* (1920) 203 Mo. App. 31, 217 S. W. 328, and *Tibbels* v. *Chi. & G. W. Ry.* (1920) 219 S. W. 109.

sult by lowering the penalty in all cases and giving above this minimum penal sum damages as compensation. The Supreme Court in *Young* v. *Railroad*[15] had taken a different view of this matter, saying, in upholding the constitutionality of the amended section: "If there was never any difference in the circumstances attending the killing of different people by the negligent running of trains, etc., the legislature might prescribe a fixed amount as the penalty in every case, as indeed was done in the statute in question before the amendment; but experience seems to have taught the lawmakers that different circumstances covered different cases and they saw fit to provide that the jury might within the limits adjust the amount of the penalty to the circumstances of the particular case; the discrimination allowed is not against the particular defendant but on account of the circumstances of the particular case." The *dicta* in the case under review, though, would also permit the jury to consider the pecuniary loss resulting to the party entitled to sue as an aid in assessing the penalty. The argument as to this point also seems sound. There is no rule of law that provides that this shall not be done.

In this connection let us consider sections 4218 and 4219.[16] These two sections were passed with 4217 and all are death statutes, so called. Both 4217 and 4219 provide maximum sums of $10,000. Section 4219 provides, and did from the first, that "damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 4217." The three sections were, therefore, in the mind of the Legislature at the same time, and, we think, it is not straining reason to say that in so far as the legislature failed to make the sections different they are to be taken to have substantially the same meaning. They are different in that 4217 states that the wrongdoer "shall forfeit and pay as penalty." No such words are found in 4219. In 4217 the words are (following the statement that defendant shall forfeit and pay as a penalty not less than two thousand dollars and not exceeding ten thousand dollars), "in the discretion of the jury." In 4219 the provision is, "the jury may give such damages, not exceeding ten thousand dollars, as they may deem fair and just . . . " So far, then, there are two prominent points of dif-

15. (1910) 227 Mo. 307, 127 S. W. 19.

16. Section 4219 reads: "Damages accruing under the last preceding section shall be sued for and recovered in the same manner as provided in Section 4217, and in every such action the jury may give such damages, not exceeding ten thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

ference: (1) the extra words "as a penalty" in 4217, and (2) the fact that in 4217 the minimum is fixed at two thousand dollars. Section 4219 further provides as to the amount of damages that the jury shall fix as the recovery (not more than ten thousand dollars) by "also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default." If we add, then, to 4217 the further clause that the jury may consider "the mitigating and aggravating circumstances attending such wrongful act, neglect or default" that section would stand out boldly as penal. It would then have been most reasonable to have said that in 4217 the legislators have said that there shall be a penalty within the discretion of the jury, without setting out the very things the jury may consider; but that in 4219 they have given us the elements of the penalty and these may well be used in cases falling under 4217. This reasoning finds support in a Court of Appeals case in which Nixon, J., says: "In estimating the amount of compensatory damages, if any are allowed, under section 5425 (now 4217 R. S. Mo. 1919), it would seem proper to apply the rule given by 5427. It will not be assumed that the legislature intended to make a different rule in case of a death occasioned by the negligent act of a transportation company from that applied in case of a death occasioned by the negligent act of another corporation or person." [17]

If this reasoning be correct it follows that neither of the reasons raised against a penal interpretation of the statute is sound.

The *Grier* case has been followed in subsequent cases, one in the Supreme Court[18] and one in a Court of Appeals.[19] In the second case the court said: "If the jury find the defendant negligent as provided by section 4217, they must inflict a penalty of not less than $2,000. The discretion that the statute refers to is one that they exercise in fixing such damages at any sum between $2,000 and $10,000."

It is submitted that this interpretation of the statute is correct, and that it is the only interpretation that gives to the language of the act its plain, ordinary and usual meaning, the fixed rule of statutory construction.[20] Though one may doubt whether the jury in every case will fix the proper amount as the penalty, there is no doubt that the jury is a body of men that can perform this task, which is essentially the decision of fact and not the making of a rule governing human conduct. If there is a dissent from this view, because of the liberty it

17. *Hegberg* v. *St. Louis S. F. Ry.* Co. (1912) 164 Mo. App. 514, 147 S. W. 1. c. 208.

18. *Lackey* v. *United Rys. Co.* (1921) 231 S. W. 956.

19. *Bloomcamp* v. *Mo. Pac. Ry.* (1922) 236 S. W. 388.

20. R. S. Mo. 1919, Sec. 7058.

gives the jury in such cases, the fault should be found rather with the legislature than with the court's construction of the sections.[21]

C. L. C.

WILLS AND PROBATE LAW—PROOF OF EXECUTION BY ATTESTING WITNESSES. *Rayl* v. *Golfinopulos*.[1] The will of Charles S. Dunford was contested on the ground of undue influence and mental incapacity. A jury returned a verdict for contestant. The Supreme Court affirmed the judgment of the circuit court.

Appellant contended that he as proponent of the will had made out a *prima facie* case of mental capacity by proving the due execution of the will, and that since contestant produced no evidence of mental incapacity, it was error to submit the question to the jury with the instruction that the burden was upon the defendant to prove that testator was of sound and disposing mind at the time of execution.

There were three attesting witness to the will but only one of them, Theodore Rassieur, was produced. Rassieur identified his own signature and testified that those of the other two attesting witnesses were genuine. He stated, however, that he did not remember the occasion of the execution; that he did not remember whether Dunford was white or black. In fact he had "no recollection of the occurrence at all." Nevertheless, he asserted that all the elements of a good execution were present and that the testator was of sound mind. Otherwise he, Rassieur, (following his uniform practice) would not have signed the paper and the attestation clause upon it. This testimony formed the basis of defendant's claim of a *prima facie* case of Dunford's testamentary capacity. There was no effort made to procure the other attesting witnesses nor to take their testimony by depositions.

The Supreme Court of Missouri disposed of the above contention in a terse paragraph which held that the testimony of Rassieur was no proof of execution at all, but that it was a mere identification of the witnesses' handwriting which could as well have been done by someone else and that such evidence did not satisfy the statutes and the authorities.[2] Thus, it would appear that the Missouri Supreme Court has adopted the rule requiring all attesting witnesses to a will to be produced or accounted for in order to prove the execution of the will. The case under consideration obviously can stand for no further proposition than

21. Since this note was written, an opinion in another case, viz, *McDaniel* v. *Hines* (1922) (Mo.) 239 S. W. 471, has appeared, which should be read.

1. (1921) 233 S. W. 1069.

2. Citing R. S. Mo. 1919, Secs. 520-524 and *Bell* v. *Smith* (1917) 271 Mo. 619, 197 S. W. 128.

that upon a will *contest* all the attesting witnesses will be required. It would certainly not be authority for the proposition that all attesting witnesses must be produced or accounted for in order to admit a will to probate in the common form.

Upon the two above questions the authorities in the United States show a wide diversity.[3] The matter is regulated, at least in part, by statute in a large number of states.

In England two different rules apply. In the law courts it seems well settled that the rule is the same with wills as other attested documents and only one attestor need be called.[4] In chancery the doctrine seems fairly well established that all the *required* number of attestors must be produced.[5] The decisions, however, vary somewhat as to the strictness with which the rule is followed. In *Tatham* v. *Wright*,[6] however, the Lord Chancellor recognized the general principle but limited it to suits instituted by a devisee to establish a will and refused to apply it where an heir moved to set one aside. Nevertheless, the chancery rule seems to well recognized.

In Missouri the exact point in *Rayl* v. *Golfinopulos* under consideration seems to have been up for decision on very rare occasions. Cases are numerous in which the mental capacity of testator and the question of undue influence are at issue, and the courts have at times spoken of the necessity of calling the attesting witnesses to prove execution. A Missouri Appeals case decided in 1880 contains a statement that the rule here and in England is that all the subscribing witnesses in a will contest must be produced or accounted for.[6a] The question in that case arose over a directed verdict. Both attesting witnesses had testified. One testified that he did not believe the testator was in his right mind when he signed the paper. It would seem, therefore, that the statement is a mere *dictum*.

In *Graham et al* v. *O'Fallon*[7] the Supreme Court at an early day made a contrary declaration:

"One of these (subscribing) witnesses will be enough to establish the due execution of the will if he can prove that he saw the other witnesses subscribe it in the testator's presence. For the law, which requires the best evidence, does not require all the evidence which might be given."

3. Wigmore on Evidence, Sec. 1304.

4. *Wright* v. *Tatham* (1834) 1 Adolphus & Ellis 3.

5. *Bootle* v. *Blundell* (1815) 19 Vesey, Jr., 494; *Grayson* v. *Atkinson* (1752) 2 Vesey, Sr., 454; *Ogle* v. *Cook* (1748) 1 Vesey, Sr. 178.

6. (1831) 2 Russell & Mylne 1.

6a. *Odenwelder* v. *Schorr* (1880) 8 Mo. App. 458.

7. (1834) 3 Mo. 507.

This seems an accurate statement of the rule which prevailed in the English law courts. The reason given for the rule is good enough. The English common law did not develop any general principle that a fact had to be established by any particular quantity of evidence.[8] On the other hand the inference that there is a general principle requiring the best evidence to be given must be regarded as unsound.[9]

The Missouri statutes are silent upon this exact point,[10] although it has been said that they by implication require the calling of all attesting witnesses.[11]

The Missouri Supreme Court has been cited as standing for the proposition that all the witnesses to a will need not be called.[12] *Lorts* v. *Wash*[13] was cited in support of the proposition. The contestants on appeal contended that the proponent should have been required to produce all the subscribing witnesses, but the Supreme Court held that though the appropriate procedure is to produce all the witnesses, yet it was not reversible error not to do so. *Mays* v. *Mays*[14] and *Craig* v. *Craig*[15] involve the proposition whether both attesting witnesses when called must vouch for the testator's capacity or vouch for all the details of execution in order to establish the will. Both cases answer the proposition in the negative,[16] but it does not appear that either court was called upon to decide whether or not both attesting witnesses must necessarily be called by the proponent.

Bell v. *Smith*[17] in 1917 is the turning point. The will was probated in South Carolina, through the evidence of only one of three attesting witnesses. The other two witnesses were not called or accounted for. The will devised some realty in Missouri and the Missouri Supreme Court under the statute then in force[18] tested the proof of execution according to the law of Missouri. The court held that proof at probate by only one attesting witness was insufficient under sections 550-554 of the Re-

8. Wigmore on Evidence, Sec. 1172.
9. Wigmore on Evidence, Sec. 1173-1174.
10. R. S. Mo. 1919, Secs. 520-524.
11. Wigmore on Evidence, Sec. 1304 (note).
12. 40 Cyc. 1305-1306.
13. (1903) 175 Mo. 487, 75 S. W. 95.
14. (1393) 114 Mo. 536, 21 S. W. 921.
15. (1900) 156 Mo. 358, 56 S. W. 1097.
16. This view is also approved by *Morton* v. *Heidorn* (1896) 135 Mo. 614, 37 S. W. 504.
17. (1917) 271 Mo. 619, 197 S. W. 128.
18. R. S. Mo. 1909, Sec. 567. "Any person owning real or personal estate in this state may devise or bequeath such property by last will, executed and proved, if real estate be devised, according to the laws of this state, * * *" Amended in 1917. Present form may be found in R. S. Mo. 1919, Sec. 537.

vised Statutes of 1909.[19] However, the court refused to give an opinion as to whether any difference should exist between the proof required for probate in common form and probate in solemn form. The result of this holding would seem to require *all* attesting witnesses to be called in every probate, for it would be futile to require greater precaution at an *ex parte* hearing before a probate court than would be required in a suit to contest the will after probate in common form. The court stated that the exact question had never been before the Supreme Court. That is probably true, since all the decisions, apparently, previous to that time had arisen in cases of will contests,[20] whereas in *Bell* v. *Smith* the question arose as to the sufficiency of proof for probate in common form.

With the decision in *Rayl* v. *Golfinopulos* the doctrine in Missouri would seem to be settled. This rule closely resembles that prevailing in English equity courts. In view of the constant tendency to reduce legal principles to a rule of thumb, the chances are that the discretion and leniency which the chancellor exercises in applying the rule in England will be lost in law courts.

Whether or not the most desirable result will follow from adhering to such a rule is more or less a matter of conjecture. One must look chiefly to the purpose of the statutes requiring attestation by more than one person.[21] Mr. Wigmore states that the secondary object of such statutes is to provide "a precautionary supply of persons from whom a testifier is likely to remain available in spite of the accidents that might have totally destroyed the supply if there had been but one person provided in advance."[22] He further points out that the very purpose of such statutes is negatived by a rule which makes it essential to call all of the required number. There is manifestly no propriety in requiring two or three attesting witnesses in order that the probability will be greater that one remains available when the document is filed for probate, if at the latter time all the witnesses must be produced.

The rule represents one of a comparatively few instances in our system of law wherein it is necessary to establish a fact by a certain quantity of witnesses. In view of the general rule should the statutes have been interpreted as they have been? They are not clear but the fair inference from them seems to be that the witnesses should be produced or accounted for.

There is another problem, however. In Missouri, a will is required

19. Now R. S. Mo. 1919, Secs. 520-524.

20. *Lorts* v. *Wash*, *Craig* v. *Craig*, *supra*.

21. R. S. Mo. 1919, Sec. 507.

22. Wigmore on Evidence, Sec. 1304.

to have two attesting witnesses.[23] If a will is attested by more than two witnesses[24] and *two* attesting witnesses testify to everything essential for a proper execution of the will should it be required that *all* the attesting witnesses be produced or accounted for? Such would seem unnecessary but it is apparently, an open question in Missouri. The authorities seem to be in an unsatisfactory state.[25]

DELOS C. JOHNS[26]

23. R. S. Mo. 1919, Sec. 507.

24. Such was the fact in *Bell* v. *Smith* and *Rayl* v. *Golfinopulos, supra.*

25. Wigmore on Evidence, Sec. 1304 and cases cited. See *Dunkenson* v. *Williams* (1922) 242 S. W. l. c. 658. (Four attesting witnesses, two testified; other two in court room but not called; no comment on suggested problem.)

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