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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

CRIMINAL LAW—VENUE—JURISDICTION BY CONSENT OF PARTIES. *State v. Phillips.*[1] Criminal prosecution was commenced against one Phillips in the circuit court of Miller County. Upon his application in due form, the venue was ordered changed to the circuit court of Morgan County. Through error, the papers in the cause were sent to the circuit court of Moniteau County. The parties appeared and made no objection to the jurisdiction of that court; trial was had resulting in the conviction of the defendant and he appealed, raising for the first time in the appellate court, the question of the jurisdiction of the circuit court of Moniteau County. The cause was reversed by the Kansas City Court of Appeals for want of jurisdiction in the trial court, and was remanded with directions to transfer the papers to the circuit court of Morgan County for new trial, the court saying: "The circuit court of Moniteau County *had no jurisdiction over the subject matter* and jurisdiction over the subject matter cannot be waived or given even by consent." (Our Italics).

By jurisdiction is meant the legal power[2] of a tribunal to make an order or render a judgment of a specific kind in a given case,[3] thus changing existing

1. (1924) 261 S. W. 713.

2. For a definition of legal power in the sense here used, see Hohfeld, *Fundamental Legal Conceptions As Applied In Judicial Reasoning*, (1923) pp. 50 *et seq.*

3. In the present discussion the word will be used as meaning power to render a final judgment only. But of course a court may sometimes have the power to make an order of some kind in a case in which it does not have power to render judgment, *e. g.* in the case under review the court was directed to send the papers in the cause to the circuit court of Morgan county.

jural relationships between parties before it.[4] This jural power like all other juristic relationships is created by the action of a rule of law[5] upon certain operative facts.[6] The rules of law which determine what operative facts must be present in a given case before the court will possess legal power to render a judgment are the rules of the competence of the court.[7] Subject to limitations, if any there be, imposed by a superior federal constitutional[8] or international law,[9] these rules of competence are to be found in the law, constitutional, statutory, or judicial, of the court's own state[10] and such law may prescribe any rule of competence by the lawmaker deemed desirable.

Under certain circumstances where one of the operative facts necessary to confer jurisdiction of a cause upon a given court is absent, the presence of an additional fact, that of consent to the exercise of jurisdiction by the parties litigant, will under existing rules of competence suffice to vest the court with power to adjudicate the controversy.[11] Under other circumstances, absent one of such necessary jurisdictional facts required by the ordinary rules of competence, consent will not be held to supply the lack.[12] It is often said that consent of the parties will confer jurisdiction of the person but not of the subject matter.[13] This statement does not solve the present problem as it only raises further questions: What is jurisdiction of the subject matter, and what is jurisdiction of the person? Owing to the shifting meanings attached to these terms in the decisions of the Missouri courts,[14] it would seem that to dis-

4. See Barnett, *A Definition Of Jurisdiction*, (1914) 47 Am. Law Rev. 518, and in particular, p. 525; McBaine, *The Extraordinary Writ of Prohibition in Missouri*, (1924) 30 Law Ser. University Mo. Bull. 25, *et seq.*, where a number of definitions are collected; *Cooper v. Reynolds* (1870) 10 Wall. 308, 19 L. Ed. 931; *Munday v. Vail* (1871) 34 N. J. Law 418.

5. Hohfeld, *Op. Cit.* p. 32.

6. Operative facts are sometimes called constitutive facts or *facta probanda*. They are the facts because of whose existance law creates a legal right or other legal relationship between parties concerned. Hohfeld, *Op. Cit.* p. 32; Wigmore, (1924) Evidence (2nd Ed.) sec. 2.

7. Calvo, *Dictionaire du Droit International* (1895) Tit. Competence, p. 161: "This word designates in general, the measure of power imparted by the law to each public official, in a more restricted sense, the power which the law gives the judge to perform his offices within the limits which it points out. Jurisdiction is the power of the judge and competence is the measure of jurisdiction." (Our translation.)

8. Such as found *e. g.* in the Fourteenth Amendment. See *Pennoyer v. Neff* (1877) 95 U. S. 714, 24 L. Ed. 565.

9. That there may be such limitations, see Beale, *Jurisdiction of Courts over Foreigners*, (1912) 26 Harv. Law Rev. 193, 283.

10. Beale, 26 Harv. Law Rev. 193, 283.

11. See 15 C. J. 808, n. 57.

12. 15 C. J. 802, n. 6.

13. 15 C. J. 802 *et seq.* See the discussion in *Hadley v. Bernero* (1903) 103 Mo. App. 549, 78 S. W. 64.

14. The use of the terms in the following cases is very confusing: *State v. Phillips*, note 1, *supra*; *Cole v. Norton* (1923) 251 S. W. 723; *Title Guaranty v. Drennon* (1918) 208 S. W. 474; *Henderson v. Henderson* (1874) 55 Mo. 534; *Snitjer v. Downing* (1883) 80 Mo. 586; *Bray v. Marshall* (1877) 66 Mo. 122.

On the other hand, very careful and scientific definitions of the terms will be found in the following cases: *Ulrici v. Papin* (1847) 11 Mo. 42; *Chouteau v. Allen* (1879) 70 Mo. 290 *l. c.* 353; *Postlewaite v. Ghiselin* (1888) 97 Mo. 420, 10 S. W. 482; *State ex rel. Scott v. Smith* (1891) 104 Mo. 421, 16 S. W. 415; *Hadley v. Bernero, supra. E. g.* Barclay, J. in *Postlewaite's* case, *supra*, p. 424: "The circuit court at the time certainly had jurisdiction of the subject matter * * * by which is meant that that court had jurisdiction *of causes of the general class to which that action belonged.*" (Italics ours.) Willis, *Subject-Matter*, (1909) 9 Col. Law Rev. 419, and 423: "In positive law, 'subject matter' is the term used to denote the content—that is, the subjects or matters presented for consideration—of either the whole of the law or by some particular part of it, and these are always legal rights". "A court is said to have 'jurisdiction over the subject-matter' when it has power to hear, try and determine some right, not in a particular case but in every case of that class."

pense with them as far as possible for the purpose of the present discussion would lead to greater clarity of thinking. The solution of the problem can best be approached by a purely inductive study of the actual phenomena of existing law as disclosed by the exact facts of reported cases. The object of such inductive study is to determine the precise kind of cases in which consent of the parties will be held to confer jurisdiction otherwise lacking.

Under existing jurisprudence, one of the necessary jurisdictional elements which is in many instances required (in the first instance before consent of the parties has raised any question of waiver) is that of venue.[15] By this is meant that the case must be brought before the courts of some particular local civil subdivision of the state, *e. g.* in some county. Thus, it may be required that the action be brought where the cause of action arose,[16] where the *res* concerned is situated,[17] or where the plaintiff[18] or defendant[19] resides. In the case under review, it is this element of venue, the absence of which the parties sought to supply by their consent,[20] and the problem raised by the case is that of determining whether this situation is to be classified with those in which a jurisdictional element can be so supplied or with those in which waiver by the parties is denied such effect.

In civil cases dealing with jurisdiction conferred by consent great contrariety of opinion is found in the decisions of the Missouri courts. The result of the decisions seems to be about as follows:—In personal injury and personal property cases,[21] actions *ex contractu*,[22] and other actions of similar nature where the action is brought in the wrong county, and both parties appear and go to trial (thus consenting to jurisdiction or waiving the want of jurisdiction,

15. As will be shown later, these rules of venue are historically connected with the origin of the jury system but today, they are found in all of the statutory systems of civil and criminal procedure in our states, although in England under the Judicature Acts, they have ceased to exist. Cf. R. S. Mo. (1919) Chap. 12, Art III with 36-37 Vict. c. 66 (1878) and order XXXVI made in accordance therewith. See *Companhia de Mocambique v. British South Africa Co.* (1892) 2 Q. B. 358, 61 L. J. Q. B. 663, 66 L. T. R. (N. S.) 773 and same case (1893) A. C. 602.

16. *E. g.* in criminal cases, Constitution of Missouri, Art. II, Sec. 22; R. S. Mo. 1919, Chap. 25, Art I, Constitution of the United States, 6th Amendment. In cases brought against corporations, R. S. Mo. 1919, Sec. 1180.

17. *E. g.* actions concerning land, R. S. Mo. 1919, Sec. 1179.

18. *E. g.* divorce actions, R. S. Mo. 1919, Sec. 1802.

19. R. S. Mo. 1919, Sec. 1177.

20. If we look at the actual facts of the case under review, we can discover a possible line of distinction between it and cases in which proceedings have originally been brought in the wrong county and this defect waived by consent. The distinction is that here we have the circuit court of Miller county having complete jurisdiction of a cause and there at first glance seems some necessity to get rid of this jurisdiction before the circuit court of Moniteau could acquire any. This difference is more seeming than real. It proceeds from faulty analysis and in particular from the fact that we have been in the habit of thinking of jurisdiction as a kind of metaphysical entity—a sort of possession of a case or seisin of a case—which can and in fact must be handed on from one court to another just as seisin of land passed from one owner to another. If we look on it as a mere jural power to do a certain particular thing in relation to a case, this difficulty disappears to a large extent. Still a question of policy arises as to whether cases should be thus transferred from court to court without the permission of the judge. But here an order of the judge changing the venue had already been made. All of the counties involved were in the same circuit and it would therefore seem that there was at least an implied assent of the circuit judge.

21. *Bomer v. R. R. Co.* (1911) 152 Mo. App. 357, 133 S. W. 106; *Julian v. Kansas City Star* (1907) 209 Mo. 35, 107 S. W. 496. *Cf. Taylor v. R. R. Co.* (1878) 68 Mo. 397, *semble*, action of trespass *quare clausum fregit*.

22. *Scott v. Riddle* (1900) 84 Mo. App. 275; *Rippstein v. Ins. Co.* (1874) 57 Mo. 86.

both forms of expression being used interchangably), the court has jurisdiction to render a valid judgment. Consent, the courts say, confers jurisdiction.[23] In equity cases, likewise, even where the title to real estate is involved, defects of venue may be waived by consent of the parties.[24] But it is otherwise in the case of common law actions involving the title to land.[25] Upon this last proposition, however, some recent dicta look the other way.[26] In divorce cases, the law is not well settled but it has been said that local venue may be waived.[27]

The Missouri rule in regard to ordinary personal actions is in accord with the holdings in practically all American states.[28] The decisions in regard to cases at common law regarding land are, however, radically out of harmony with the great weight of common law authority.[29]

In criminal cases, applicable authorities are few. The instant case seems to follow pretty closely the ruling of the Supreme Court in *State v. Buck*,[30] although that case is not cited by the Court of Appeals in support of its decision. In *Buck's* case, a change of venue was taken in one of several companion cases* and the papers in the other cases were sent to the court to which the first was referred. No order had been made in any of these latter cases. The parties appeared and went to trial without jurisdictional objection. It was held that their consent did not avail to confer jurisdiction upon the trial court in the cases in which no order for change of venue had been made. There are a few decisions in other states in accord with the rule expressed in the *Buck* case and that under review.[31] On the other hand, the Federal Circuit Court of Appeals for the Eighth Circuit in the recent case of *Cole v. United States*,[32] expressly holds that a defect in venue in a criminal case may be waived by

23. As to what constitutes such waiver by appearance, see 4 C. J. 1229; *Feedler v. Schroeder* (1875) 59 Mo. 364; *Baisley v. Baisley* (1892) 113 Mo. 544, 21 S. W. 29.

24. *Chouteau v. Allen* (1879) 70 Mo. 290 *l. c.* 353 (foreclosure); *Ulrici v. Papin* (1847) 11 Mo. 42; *Real Estate Co. v. Lindell* (1895) 133 Mo. 386, *l. c.* 395, 33 S. W. 466 (fraudulent conveyance); *Johnson v. Detrick* (1899) 152 Mo. 243, 53 S. W. 891, *semble* (partition).

25. *Snitjer v. Downing* (1883) 80 Mo. 586; *Henderson v. Henderson* (1874) 55 Mo. 534; *Bray v. Marshall* (1877) 66 Mo. 122.

26. *Rodney v. Gibbs* (1904) 184 Mo. 1, 82 S. W. 187; *Sterns v. R. R. Co.* (1887) 94 Mo. 317, 7 S. W. 270 (equity suit).

27. See the remarks of Woodson, J., in his dissenting opinion in *Dorrance v. Dorrance* (1912) 242 Mo. 625, at 662, 148 S. W. 94.

28. *Nelson v. East Side Grocery Co.* (1915) 26 Cal. App. 344, 146 Pac. 1055; *R. R. Co. v. Suddeth* (1890) 86 Ga. 388, 12 S. E. 682; *R. R. Co. v. Soloman* (1864) 23 Ind. 534; *White v. R. R. Co.* (1903) 25 Utah 346, 71 Pac. 593; *Smith v. Morrill* (1898) 12 Col. App. 233, 55 Pac. 824; *Richardson v. R. R. Co.* (1908) 129 Ky. 449, 112 S. W. 582; *Pollard v. Dwight* (1808) 4 Cranch 421, 2 L. Ed. 666; *R. R. Co. v. McBride* (1891) 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Atlantic Corporation v. U. S. Shipping Board* (1923) 286 Fed. 222.

29. *Norton's Adm. v. Marksberry* (1887) 9 Ky. Law Rep. 424, 5 S. W. 482; *State v. Patterson* (1897) 17 Tex. Civ. App. 231, 42 S. W. 369; *Wolf v. McGough* (1911) 175 Ala. 297, 57 So. 754. There are numerous equity cases following the same rule as applied in the Missouri cases, *supra* note 24, see *e. g. Fletcher v. Stowell* (1891) 17 Col. 94, 28 Pac. 326. In California, the rules of venue in local cases depend upon the constitution and upon that ground the courts hold that questions of local venue are jurisdictional. *Herd v. Tuohy* (1901) 133 Cal. 55, 65 Pac. 139, a decision which is clearly erroneous since, if this reasoning is adopted, all change of venue statutes in land and criminal cases, depending upon waiver of constitutional rights by the parties, would be unconstitutional.

30. (1893) 120 Mo. 479, 25 S. W. 573, and (1891) 108 Mo. 622, 18 S. W. 1113.

31. *Fawcett v. State* (1880) 71 Ind. 590, 595.

32. (1924) 298 Fed. 86, 88. This was a contempt case but under the Clayton Act, the rules of criminal procedure were applicable.

consent of the parties. And there are a few state decisions which seem to support this rule.[33] On change of venue where an order of the court of original jurisdiction changing the venue has actually been made, the Missouri courts seem to hold that even the gravest irregularities in the proceedings leading up to such order are cured by the appearance and consent of the parties.[34]

Thus there are in this state, only two classes of cases, actions at common law involving the title to land and criminal cases, in which defects of venue may not be waived. In these two classes, there seems to be only one factor in common, which is uniformly absent of personal tort, contract actions and suits in equity. This is their common historical classification as "local actions". The fact that the rule here adopted in criminal cases is followed in some other states in civil penal actions affords added proof of this conclusion. It is therefore necessary to notice the historical origin of the distinction between *local* and *transitory* actions[35] and of the rules of venue in the former.

In the early formative period of our law the jury were not triers of the fact but rather official witnesses who decided the case not from the evidence furnished them by others but from their own personal independent knowledge of the facts in controversy.[36] It was therefore necessary that the jurors should be summoned from the place where the facts occurred or existed, since such jurors alone could have sufficient personal knowledge to reach an intelligent decision.[37] Where part of the facts of a case were foreign, since no jurors could be summoned from outside the realm, no trial at all was possible. The obvious hardship of this rule was felt first and most severely in cases of a commercial nature. It was therefore in actions *ex contractu*[38] that a way out was first found through the adoption of a fiction, *viz.* that of pleading the foreign facts with a fictitious English venue.[39] As these allegations of venue could not be denied by the defendant, under the rules of the court, the case would proceed to trial as if it had actually occurred in England.[40] In rationalizing this process the courts said that the venue was not really material in these cases and therefore could not be traversed as only material allegations could be traversed. The courts argued in a circle as follows: the facts are not issuable because not material; they are not material because the action is transitory; the action is transitory because the allegations of venue are not issuable. Because of the fact that through other reasons of policy the courts

33. *Lightfoot v. Commonwealth* (1882) 80 Ky. 516, 522.

34. *State v. Knight* (1875) 61 Mo. 373.

35. See the discussion by Hepburn in Cyc. I *et seq.*

36. See II Pollock and Maitland, *History of the English Law* (1895) 619; Thayer, *The Jury and its Development* (1895), 5 Harv. Law Rev. 249, 295, 357. Wigmore, *Evidence* (2nd Ed.) (1924) sec. 1800.

37. Bracton, *De Legibus* (*circa* 1216) f. 309 b., 316, and 319b. For the importance of the change from "fact" venue to "action" venue in this movement, see 40 Cyc. I *et seq.*

38. Y. B. 48 Edw. III. Hil. Pl. 6; Y. B. 20 Hen. VI. Pas. Pl. 21; Y. B. 32 Hen. VI Hil. Pl. 13. See Holdsworth, *The Rules of Venue and the Beginning of the Commercial Jurisdiction of the Common Law Courts* (1914) 14 Col. Law Rev. 551.

39. See in particular Y. B. 48 Edw. III, note 38, *supra*, and compare the discussion in *Companiha Mochambique v. British South Africa Co.*, note 15, *supra*.

40. 2 Blackstone, Comm. (Chitty's Ed.) 228. See 40 Cyc. 22, and 14 Col. Law Rev. 551.

did not want to assume jurisdiction of land[41] and criminal cases[42] arising out of England, and the further fact that in the history of the jury system no distinction between the cases of foreign origin and questions of merely local venue was made,[43] the fiction was not allowed in either of these last two classes of actions. As the Court of Chancery was a single centralized tribunal sitting for the most part in London, the rules of local venue were therefore impossible of application there. Moreover, the jury never was used in chancery, except in a few special cases and as a mere advisory body to the court, and hence the rules growing out of the history of the jury system had no place there.

Thus, if we regard the history of the rules of local venue, we see that they were founded upon the notion of the jurors as witnesses in the case—a notion which of course has no place in our modern system of trial by an impartial tribunal upon the testimony of witnesses subject to cross-examination. This being true, the distinction between real and personal actions, upon which the Missouri rule in regard to waiving venue in criminal and land cases is based, is seen to be without real foundation. But in criminal cases there are reasons of public policy, rarely expressed in judicial opinions indeed, but probably present in the back of the judicial consciousness, which have caused the old rules of local venue to persist and have led our constitution makers to include them in the fundamental law. Such are purely practical considerations. It is easier to get witnesses for both state and defense when the trial takes place at the scene of the alleged offense. Therefore, such a place of trial tends to a greater degree of accuracy in the result of the judicial proceedings. Expense is saved and the burden of the necessary expense incurred is placed upon those who are most benefited by the prosecution. The effect of punishment as a deterrent to future crimes is enhanced if that punishment occurs near the scene of the crime. However it may be said that the right to a trial at the place of the crime, resting as it does upon practical advantages, may be waived by the persons concerned, the state and the accused. In fact, the allowance of change

41. 26 Harv. Law Rev. 193 and 283. The reasons for this policy are found in the natural hesitation of one sovereign to adjudicate concerning the title to lands held from another sovereign. The control of and goes, it is thought, to the essence of sovereignty and any such interference would be highly impolitic and would violate the principle of equality of states.

42. Our own courts and legislature have universally assumed, at least until very recent times, that criminal acts committed in a foreign state had such an immediate connection with the sovereignty and public policy of that state, that they ought not to be punished except at the place where they were committed. Certainly the state where the act is committed ought not to be ousted of its jurisdiction but, if it fails to assume jurisdiction and punish the crime, it would seem that its public policy would not be adversly affected by a prosecution elsewhere, as at the domicile of the criminal or the place of his allegiance. This latter view seems general with the courts of continental Europe. See the decision of the Rumanian Court of Cassation in 51 Clunet 1133 (1924) and also a Greek case, 51 Clunet 1120 (1924). In our own jurisprudence there are signs that this European view is no longer regarded with the same degree of disfavor which formerly prevailed. Statutes allowing the prosecution of a thief, who has brought stolen goods into the State, present an example of this tendency.

43 As shown, the reason for the original rules of "fact" venue was the fact that the juror-witnesses or recognitors must come from the vicinage. This, of course, prevented the consideration in England of cases from beyond the seas. In later times, the courts attempting to rationalize these rules sought to explain them by inventing the doctrine in criminal and land cases explained above.

of venue, in spite of the constitutional provisions for a trial at the vicinage, rests clearly upon such a waiver.[44]

Thus from the standpoint of both history and policy, the rule that defects in venue in criminal and land cases cannot be waived is unjustifiable. It may, however, be urged in support of the actual decision of the court in the case under review, as distinguished from the reasoning about jurisdiction over the subject matter, that the right of the state, in criminal causes to a trial at the place of the crime is of such paramount importance because of the reasons of policy above outlined that the prosecuting attorney ought not to be allowed to waive it except within the exact scope of the change of venue statutes. The question is one of balancing the interests thus protected with the social interest in speedy justice in cases like that under review.[45] To the writer the balance of convenience seems to be strongly against the rule of the Phillips case.

The statement of the learned court, that the case was one of jurisdiction over the subject matter and that in the nature of things such jurisdiction could never be acquired by consent or waiver, seems out of harmony with those fundamental principles heretofore pointed out and may prove a source of future difficulties. In fact, some of the troubles inherent in this view of jurisdiction are seen in some recent cases in the same court cited by it in support of the decision.

In *Cole v. Norton*[46] the action was for personal injuries. From the assignment division of the Jackson County circuit court, it was sent to division 6. The judge in this last division, thereafter, made an order transferring the cause "by agreement to judges" to division 2. Thereafter, the judge in division 6 made a further order restoring the case to the general docket *i. e.* sending it back to division 1., which immediately reassigned the case to division 3. The parties appeared in this latter division and went to trial without jurisdictional objection. The court held that division 3 never had jurisdiction of the subject matter and therefore reversed the case. Another case of almost identical facts is, *Title Guaranty & Surety Co. v. Drennon.*[50] In none of the three cases, it is submitted, was there any real question of jurisdiction over the "subject matter," *i. e.* over the class of cases involved. With due defference to the learned court, the decisions in all three cases are, we believe, wrong, but the application of the court's theory of jurisdiction in the last two mentioned is productive of far more social evil than that in the former. All three seem to proceed upon an incorrect analysis of the jural concept of jurisdiction.

BEN ELY, JR.[48]

EVIDENCE—"TIME BOOK" AS REFRESHING RECOLLECTION —AS EVIDENCE TO GO TO JURY. *Mueller v. Rock.*[1] This was an action for work and labor performed. Plaintiff was employed as a carpenter by de-

44. For a good criticism of the theory of criminal venue, see Stephen, *History of the Criminal Law* 276 *et seq.* For an example of the persistence of the old ideas long after the historical conditions out of which they sprang had disappeared, see the reasoning of the Kansas City Court of Appeals in *In Re McDonald* (1885) 19 Mo. App. 370.

45. Pound, *Introduction to Legal Philosophy* (1922) 98, 99.

46. (1923) 251 S. W. 723 (K. C. Ct. of App.)

47. (1918) 208 S. W. 474 (K. C. Ct. of App.)

48. LL. B., U. of Mo. School of Law, 1922, and now a member of the Marion County Bar.

1. 249 S. W. 435.

fendant at 65c per hour. The work was done at intermittent periods and as plaintiff worked he kept a record of time worked on slips of paper which he copied into his "time book", sometimes weekly, sometimes daily. About 365 hours of labor was expended. The original slips were inadvertently lost before litigation was contemplated, and the "time book" constituted plaintiff's only evidence of the amount of time. At the trial an objection to plaintiff's use of the "time book" for purpose of "refreshing his memory" was sustained. Trial court also refused to allow "time book" to be offered in evidence. Plaintiff had no independent recollection of the number of hours.

The case came before the St. Louis Court of Appeals and an opinion was rendered by Daues, J. This court was of opinion that the "time book" should have been admitted in evidence, and also that plaintiff should have been permitted to "refresh his memory" from it while testifying.

No objection is found in the result of the decision. However, the basis upon which the court proceeded is not clear. The danger in such cases is that a great many different principles are liable to be confused. Among these is the hearsay exception of regular entries in the course of business; also the hearsay exception of "parties' account books"; and further, the entirely distinct principles of using a memorandum to "refresh the memory" of a witness, and using a memorandum as evidence to go to the jury, aptly phrased by Mr. Wigmore as "past recollection recorded."[2]

An analysis of the case under review shows that the "time book" cannot fall under the "regular entry" exception. This exception covers situations where the bookkeeping is done by a shopkeeper acting as his own clerk or by one or more clerks, the entrant being now unavailable because of death, insanity, absence from jurisdiction, or unavailable because of commercial inconvenience.[3]

The principal case may come under the "parties account book" exception, This exception arose in America, at least, because of the interest disqualification, and the purpose was to admit the shop-books of the small shop keeper who kept no clerks, but did his own book-keeping.[4] The scope of the exception as indicated by the English statute of 1609[5] includes the books of "divers men of trade and handicraftmen keeping shop-books." But the matter recorded, to

2. Wigmore, Evidence, 2nd Ed., section 734.

3. For cases of regular entries in the course of business by a deceased person, see: *Nelson v. Nelson* (1886) 90 Mo. 460, 2 S. W. 413 (record of advancements to children); Fulkerson v. Long (1895) 63 Mo. App. 268 (stub of check book); Bader v. Schult & Co. (1906) 118 Mo. App. 22, 94 S. W. 834 (mercantile establishment); In re Greenwood's Estate (1919) 201 Mo. App. 39, 208 S. W. 635 (private account book).

For cases admitting books without any clear and definite theory see: *Missouri Electric Light & Power Co. v. Carmody* (1897) 72 Mo. App. 534 (no showing whether all entrants available; argument whether book of original entry); *Gubernator v. Rettalack* (1900) 86 Mo. App. 184 (entrant was defendant testified concerning entry); *Jonesboro. L. C. & E. R. Co. v. United Iron Works* (1905) 117 Mo. App. 153, 94 S. W. 726 (time slips made by workmen in shop; no showing as to entrants being available); *Robinson v. Smith* (1892) 111 Mo. 205, 20 S. W. 29 (ledger, cash book, balance book of bank admissible; no showing as to entrants) *Avery v. Tucker* (1909) 137 Mo. App. 428, 118 S. W. 672 (books of milling company; entrant unaccounted for); *Anchor Milling Co. v. Walsh* (1891) 108 Mo. 277, 18 S. W. 904 (entries in regular course but apparently no recognition of any necessity principle); *Schwall v. Milling Co.* (1916) 195 Mo. App. 89 190 S. W. 959 (comes under the exception for entries in the regular course of business).

4. Wigmore, Evidence, 2nd Ed., sections 1074, 1518.

5. 7 James I, c. 12.

come within the exception, must be "proper and usual subject of charge on books of account".[6] Even though the exception was not recognized in Missouri prior to 1865 and even though there may be some doubt as to the entries being contemporaneous with the events, the case under review may be classified as a "shop-book" case.

Upon what other basis can the case be justified? The Court of Appeals said that the "time book" could come in as evidence, and also that the witness should have been allowed to "refresh his memory" from it. These two propositions, "refreshing memory" and "past recollection recorded," will, for sake of clarity, be handled separately. They are distinct principles and much confusion and misunderstanding has been caused by not recognizing the distinction.

Let us first take "past recollection recorded" (the memorandum as evidence). There are many situations where a witness has no distinct present memory of a transaction once observed, but he has a memorandum of the transaction made at the time. He can testify that the memorandum is a correct account of it, even if he is lacking in a present recollection of the facts recorded.[7] The case under review falls in this situation. The witness made the memorandum as he worked and since the work extended over some time, it is impossible that he should independently remember the specific days, their number, and the number of hours worked on each, there being, all told, some 365 hours.

Now courts allow such memorandum to come in as evidence to go to the jury. There are some prerequisites to be shown, however, before it is admissible. First, it is necessary to show the transaction was correctly recorded,[8] either by the witness himself,[9] or under his direction or with his approval at the time,[10] while the transaction was "fairly fresh" in the mind of the witness.[11] The original must be produced in court or accounted for.[12] Moreover, the opponent is allowed to inspect the memorandum and use it to cross-examine

6. R. S. Mo. 1919, Sec. 5411. See statute interpreted in *Anchor Milling Co. v. Walsh, Jones* (1903) 101 Mo. App. 270, 73 S. W. 899 (payments on note not proper subject of book account).

7. *Eberson v. Investment Co.* (1908) 130 Mo. App. 296, 109 S. W. 62; *State v. Patton* (1914) 255 Mo. 245, 164 S. W. 223; *Mathias v. O'Neill* (1887) 94 Mo. 520, 6 S. W. 253 (case of past recollection even though the term is not used). Faris, J. in the Patton case does not approve of part of the opinion by Goode, J. in the Eberson case dealing with a certain aspect of present recollection.

8. *Eberson v. Investment Co.* cited note 7 *supra.*

9. *Eberson v. Investment Co.*, cited note 7 *supra.*

10. *Anchor Milling Co. v. Walsh*, cited note 3 *supra* ("made by him or under his eye"). Perhaps the most satisfactory way to explain this decision is on the theory of "composite past recollection."

11. Wigmore, Evidence, 2nd. Ed., section 745, suggests the phrase "fairly fresh" as being more desirable than the more rigid tests of "contemporaneousness", "at the time," etc. Missouri cases use the following phrases: *Eberson v. Investment Co.* cited on note 7 *supra*, "while he knew them, made or verified a record of them;" *Borgess Investment Co. v. Vette* (1897) 142 Mo. 560, 44 S. W. 754, "contemporaneous with the fact"; *Gentry v. S. A. Rider Jewelry Co.* (1917) 194 S. W. 1057, "contemporaneous with the transactions recorded"; *Wells v. Hobson* (1901) 91 Mo. App. 379, "contemporaneous with the transaction"; *Shephard v. People's Storage & Transfer Co.* (1922) 243 S. W. 193, "contemporaneous with event."

12. *Wolff v. Matthews* (1889) 39 Mo. App. 376; *Cozens v. Barrett* (1856) 23 Mo. 544; *Smith v. Beattie* (1874) 57 Mo. 281; *Wilcoxson v. Darr* (1897) 139 Mo. 660, 41 S. W. 227; *Stephen v. Metzger* (1902) 95 Mo. App. 609, 69 S. W. 625; *Gardner v. Springfield Gas & Electric Co.* (1911) 154 Mo. App. 666, 135 S. W. 1023.

Carbon copies are originals: *Leschen v. Brazelle* (1912) 164 Mo. App. 415, 144 S. W. 893 (dictum); *Hay v. American Fire Clay Co.* (1913) 179 Mo. App. 567, 162 S. W. 666.

the witness offering it.[13] The copy may be made by another person as copyist. Then we have composite past recollection.[14] Both parties take the stand.[15] The original writer testifies to the correctness of the original, and the copyist testifies to the correctness of the copy.

Applying the above principles to the case under review, we find it is entirely congruous. The witness was on the stand and could testify that the memorandum was made while the matter was "fairly fresh" (daily) in his memory; that it was accurately recorded, accurately copied, and the original inadvertently destroyed. Hence it is submitted that an entirely proper result was reached upon that point.

We now come to the question of "refreshing his memory" from the "time book". On principle it seems that when a witness' mind is hazy concerning some transaction, it could be refreshed by a writing as well as by leading and suggestive questions, and such principle has been fully recognized.[16] However, if the refreshing of his memory by the writing is artificial and merely puts a story in the witness' mouth[17] it should not be allowed. The true test should be: does the memorandum or writing actually aid the memory and recall the facts that have now become indistinct by time?[18] The application of such a test is no doubt difficult and much should be left to the discretion of the trial judge. Any writing might be objectionable, and any might not, depending on the circumstances of the particular case that are not readily reviewable on appeal.[19]

But to protect the principle and prevent abuse, a few requirements have been laid down as requisite before the memorandum will be permitted to be used. It is held that the witness must have a memory of his own as to the specific facts independent of the memorandum.[20] That is, the witness must have a recollection that is merely hazy and incomplete. Where the

13. Wigmore, 2nd Ed., Sec. 753; *Abel v. Strimple* (1888) 31 Mo. App. 86, seems to be a case of present recollection.

14. *Stephan v. Metzger*, note 12 *supra* is an example even though the term is not used.

15. Wigmore, 2nd Ed., Sec. 750.

16. See numerous cases cited in notes *post*. See also *Ward v. Transfer & Storage Co.* (1906) 119 Mo. App. 83, 91, 95 S. W. 964 ("it is of no consequence . . . . what circumstance, or train of circumstances brought about a recollection.") A very liberal and refreshing point of view by Ellison, J.

17. For example, see *Steffens v. Bauer* (1879) 70 Mo. 399 (past recollection, if anything); *State v. Randolph* (1916) 186 S. W. 590; *Clymer v. K. C. Rys. Co.* (1919) 214 S. W. 423: "There was no need to refresh the witness' recollection as he showed no failure in that regard . . . . The method of using aids to refresh the recollection of a witness should not be used to substitute matter contained in the report for the witness' evidence as to what occurred;" *Eberson v. Investment Co.* note 7 *supra*, "a rehearsal by the witness of what the appraisers had done" (as recorded in the memoranda witness was using); *State v. Patton* (1913) 255 Mo. 245, 164 S. W. 223. Compare *Gass v. United Rys. Co.* (1920) 232 S. W. 161.

18. *Eberson v. Investment Co.*, note 7 *supra*. "The essential fact is that after looking at it, the witness has a present memory of the facts." For a case where there was a refreshing, see: *State v. Abel* (1877) 65 Mo. 357; also the following cases where testimony before a grand jury was used to refresh witness' memory at the trial: *State v. De Priest* (1921) 288 Mo. 459, 232 S. W. 83; *State v. Miller* (1911) 234 Mo. 588, 137 S. W. 887; *State v. Riles* (1918) 274 Mo. 618, 204 S. W. 1. For comments on the restriction on refreshing recollection see Wigmore, Evidence, 2nd Ed., sec. 759, n. 2.

19. *State v. Riles*, note 18 *supra*; *State v. Henson* (1921) 234 S. W. 832; Wigmore, Evidence, 2nd Ed., section 765.

20. *Steffen v. Bauer*, note 17, *supra*; *State v. Randolph*, note 17 *supra*; *Ludwig v. Lyon* (1880) 8 Mo. App. 567, ". . . he must then have a memory of his own as to the specific facts . . . . independent of the memoranda. Such memoranda are not evidence." (memorandum opinion).

21. See the quotation in *Clymer v. K. C. Rys. Co.*, note 17 *supra*.

witness shows no lack of present memory, no memorandum is needed to refresh his memory and none is permitted so far as Missouri cases go.[21]

There is much controversy and disagreement as to whether the memorandum used in "refreshing the memory" should have been made at the time of the transaction. Upon principle it should make no difference when the memorandum was made so long as the memory is actually refreshed. The error has arisen from confusing the rules of "past recollection recorded" with "refreshing the memory" rules. This confusion is shown in *Traber v. Hicks*,[22] where the court said, among other things: "He has the right to refresh his memory from written memoranda made at or near the time—."[23] It certainly appears logical that one's mind can be refreshed as fairly, if capable of being refreshed at all, by memoranda made one year after the transaction as if made at the very minute. Human experience surely dictates this reasoning. Some Missouri cases show that it is of no consequence that a time has elapsed between the transaction and the making of the memorandum.[24] Courts should be liberal in such situations by leaving much to discretion of the trial judge.[25]

Must the witness have been the author or one who supervised the making of the memorandum used to "refresh his memory"?[26] Again there is diversity of opinion, due to confusion of the present principle with the rules for "past recollection recorded." Logically, it should make no difference who wrote the memorandum so long as memory of witness is genuinely refreshed. The Missouri cases are divided.[27] Yet the weight of authority in Missouri favors allowing the use of the memorandum regardless of who made it. Perhaps much should be left to the discretion of the trial judge to determine. If it appears that the memorandum is merely putting a story in the witness'

22. (1895) 131 Mo. 180, 32 S. W. 1145.

23. See also *Gass v. United Rys. of St. Louis*, note 17 *supra*, "at the time". See also *Lumber Co. v. Realty Co.* (1910) 150 Mo. App. 61, 130 S. W. 822.

24. *Ward v. Transfer & Storage Co.*, note 16, *supra*; *Shepard v. People's Storage & Transfer Co.*, note 11, *supra* (opinion not clear as to date of event); see, also, *Weinberger v. Insurance Co.* (1913) 170 Mo. App. 266, 272, 156 S. W. 79.

25. *State v. Riles*, note 18, *supra*.

26. *Eberson v. Investment Co.*, note 7, *supra*, "If a witness has a recollection which is either revived or refreshed by reading a memorandum or document, it is immaterial who made the document, or whether it was made under the supervision, or even in the presence of the witness. The essential fact is that after looking at it, the witness has a present memory of the facts." This is an enlightening and wholesome view.

27. The following cases permitted memoranda to be used regardless of authorship: *Rose v. Rubeling* (1887) 24 Mo. App. 369 ("a witness may use a memorandum to refresh his memory, although it is not in his own handwriting, or made by himself, and although it may be a copy . . ."); *Tandy v. Wabsah Ry. Co.* (1922) 236 S. W. 1086. In *Taussig v. Shields* (1887) 26 Mo. App. 318, and *State v. Able*, note 18, *supra*, the witnesses had something to do with the making of the documents used to refresh recollection. See the quotation in note 26, *supra*. See also *Lay v. Railroad* (1911) 157 Mo. App. 467, 138 S. W. 884. See also *Cusack Co. v. Refining Co.* (1924) 261 S. W. 1. c. 729.

The following cases refuse to recognize the broad principle that authorship of memorandum is immaterial: *Traber v. Hicks* (1895) 131 Mo. 180, 32 S. W. 1145; *McKelleget v. Eckhard* (1877) 4 Mo. App. 589 (memorandum opinion). In *State v. Patton*, note 17, *supra*, court said, *obiter*, that witness could not refresh his memory from papers "of which he had no part in the making." Court refused to follow *Eberson v. Investment Co.* (see the quotation in note 26 *supra*) but cited *State v. Fannon* (1900) 158 Mo. 149, 59 S. W. 75. In *State v. Randolph*, note 17, *supra*, witness was not author of memorandum. He was not allowed to refresh his memory from it, but apparently on the ground that it would be impossible to refresh his memory under the circumstances, rather than on the narrow ground of authorship.

mouth, certainly it should be refused, whoever made it, even if made by the witness himself. Authorship ought to be merely one of the circumstances in the case to be considered by the trial judge in determining whether refreshing of memory was genuine or artificial. Flexibility and liberality should govern.

That the memorandum is a copy and not an original should make no difference whatsoever, since the true test is as to the actual refreshing.[28] Hence the original should need no accounting for.[29] The opponent should be allowed to have the memorandum to cross-examine and impeach.[30]

Now applying these principles to the case under review, it seems doubtful whether the appellate court was correct in holding witness could use the "time book" to "refresh his memory". Is it conceivable that a witness could scan a memorandum of work done on various days ranging irregularly over a period of time, differing in number of hours each, and then be able to say his memory had been refreshed, there being some 365 hours? In fairness to human intelligence, could a witness have his "memory refreshed" by a set of figures such as these? It seems impossible. All he could do was to read this off to the court.[31] He could not have remembered it even after a "refreshing." So as indicated above, this memorandum was properly admitted as evidence to go to the jury as "past recollection recorded"; but it seems erroneous to call it "refreshing the memory." No harm was done in this case by calling the process by the wrong name, since the memorandum was independently admissible. But loose nomenclature leads to inevitable confusion in many cases.[32]

Courts often admit evidence of the character found in the case under review without distinguishing these principles.[33] This has led to the adoption of spurious limitations on "refreshing memory" borrowed from the principle of "past recollection recorded", and also has led courts to call many cases "refreshing memory" which are clearly "past recollection recorded." This is further noticeable in *Abel v. Strimple*.[34] This was an action to enforce a mechanics lien for materials furnished consisting of "plumbing, sewering, and gas-fitting" for a hotel. The price of these materials was $3471.80. Witness Honig was in charge of the material furnished and with the assistance of the foreman, Kelley, made out "charging slips" of it. Honig and one Gerhard later compiled a memorandum of these slips. The memorandum was in handwriting of Gerhard. At the trial Honig "refreshed his memory" from the memorandum. The court said this was unobjectionable. But it is submitted that the court was confused here. Would it be possible for Honig to "refresh his memory" concerning over three thousand dollars worth of materials in these various items? Had Honig, Gerhard, and Kelley taken the stand in support

28. *Hockaday v. Gilham* (1920) 226 S. W. 991; *Rose v. Rubeling*, note 27, *supra*. *Winn v. Modern Woodmen* (1911) 157 Mo. App. 1, 137 S. W. 292 asserts a discretion in the trial court.

29. *Gardner v. Springfield Gas & Electric Co.* (1911) 154 Mo. App. 666, 135 S. W. 1023.

30. *Abel v. Strimple*, note 13, *supra*; *State v. Nardini* (1916) 186 S. W. 557; *State v. Miller*, note 18, *supra*.

31. *Anchor Milling Co. v. Walsh*, note 3, *supra*. After stating that a witness could refresh his memory under certain circumstances, the court used the following language: "Now in cases of an account composed of many items, all this (refreshing memory) means nothing more than reading the book in evidence. This we all know from daily experience in the trial courts. It is out of all reason to say that a merchant, or his clerks can recall each item of the account, and a fair-minded witness will generally decline the attempt."

32. Wigmore, Evidence, 2nd Ed. sec. 735.

33. *Anchor Milling Co. v. Walsh*, note 3, *supra*.

34. Note 13, *supra*.

of the memorandum, we would have had a case of "composite past recollection recorded." Honig and Kelley could have testified to the correctness of the "charging slips" and Gerhard as to the correctness of the copy. Since the "charging slips" were destroyed, the memorandum would have gone to the jury as evidence.

In *Shepard v. Peoples Storage and Transfer Co.*[35] the court is far from clear as to what it really means. In that case there was an action for conversion of household goods by the storage company. The court used the following language: ".... a witness may refer to a memorandum to refresh his memory and if he has no present memory of the facts, he may even read from the memorandum ..... There were 24 articles listed, and it would hardly be reasonable to require the witness to testify wholly from memory as to the reasonable market value at that time (of conversion)." The court was probably correct in saying that it would be impossible to testify from memory. But why call it "refreshing the memory" at all? It is impossible for a witness to have his memory refreshed as to complicated list of articles and values. Was it not a clear case of "past recollection recorded"? When the witness showed no ability to remember the various articles and values, she could have testified to the correctness of the memorandum. Then the memorandum could have gone in as evidence if it had been made while the event was "fairly fresh" in her mind. This may serve to explain why the court said that the witness could read from the memorandum. The court further said: "It is necessary in such cases that the witness should be able to testify that the entry in writing was made contemporaneous with the event, as was done in the case at bar, and that at that time she knew the memorandum to be correct." This limitation is applicable only to "past recollection recorded," and is not applicable to "refreshing memory" cases either on precedent in Missouri,[36] except in cases of failure to appreciate the two separate situations,[37] or on principle as mentioned above.

In *Lumber Co. v. Realty Co.* [38] a witness, during inspection of a house under construction, made a list of 55 items of materials furnished. At the trial he apparently "refreshed his memory" from the memorandum. The court did not disapprove of this, saying that he could not testify with certainty without it. Probably, this decision could be more satisfactorily explained on the basis of "past recollection recorded" unless the appellate court was unwilling to say that the trial court abused its discretion in holding that one's memory could be refreshed as to 55 items of materials. Perhaps this hesitation caused the court in this case to throw around it the limitation that the memorandum was unobjectionable since it was made during the inspection of the house.

35. Note 11, *supra*.

36. See cases cited in note 24, *supra*; also quotation in note 26, *supra*.

37. See cases cited in notes 22 and 23, *supra*; also the quotation in note 31, *supra*.

38. Note 23, *supra*.

39. The same confusion of principles is found in *Third National Bank v. Owen* (1890) 101 Mo. 558, 14 S. W. 632; *Hoffman v. K. C. Laundry Service Co.* (1922) 243 S. W. 232 (may have been past recollection); *Robertson v. Reed* (1889) 38 Mo. App. 32 (theory of past recollection seems to be ignored); Durnford v. Chicago B. & Q. R. Co. (1923) 246 S. W. 973. See also *Woerheide v. Kelley* (1922) 243 S. W. 158.

In *Hockaday v. Gilham*, note 28, *supra*, and *Rose v. Rubeling*, note 27, *supra*, it may be questioned whether the memoranda were not too extensive for the witnesses to *actually* keep in their memories the various items.

Throughout the Missouri decisions there is this tendency to confuse the two distinct principles of using the memorandum to "refresh the memory" and using it as evidence.[39] It is a failure to disentangle distinct principles, but a lumping them into the catch-all of "refreshing the memory". The case under review unfortunately shows the same failing. It is hoped, however, that in the future the courts will recognize more consistently the two principles involved and that the confusion due to loose nomenclature will be avoided.

J. GRANT FRYE[40]

PRACTICE—FUNCTION OF THE COURT AND JURY IN RECEPTION OF A CONFESSION—*State v. Parr*.[1] In the case cited above, wherein the appellant was charged with murder, the prosecution offered a statement made by a defendant containing certain incriminating facts. The admissibility of this confession was contested and the testimony proved conflicting as to whether it was made voluntarily. After hearing the preliminary evidence, the court admitted the confession, and passed the entire mass of evidence on to the jury under the instruction that it might consider the whole in determining what *credence* should be given to the confession or any part of it. This procedure, the Missouri Supreme Court sustained as proper, in an opinion by Walker, J.

The translation of Coke's maxim,[2]—all questions of fact are for the jury, all questions of law are for the court—is an often quoted statement. But not only is its application a difficult one, but its accuracy is questionable. It is fundamental in the common law that the admissibility of a given piece of evidence is for the court, though that question may entail the determination of certain facts preliminary to admission.[3] The orthodox rule of procedure has been that it is the court's function to rule on the admissibility of evidence, and the jury's function to determine its credibility. Of course under this view, it is perfectly proper for the court, after hearing all of the conflicting preliminary evidence on the question of admissibility of a confession, to refer the entire evidence to the jury. That body is then entitled to determine the credibility to be given the confession upon considering the whole of the evidence submitted to it.

In a distinct line of decisions this method has appealed to the Missouri Supreme Court as the proper course to pursue. As early as 1830, that body in *State v. Hector*[4] decided: "Whether a confession is sufficiently free and voluntary to be competent testimony, is a matter of law to be decided by the court and not by the jury." It also distinctly disapproved of the practice of leaving the admissibility of a confession to a jury. In *State v. Duncan*[5], the court clearly adhered to the orthodox view when it said that the lower "court left it to the jury to determine whether the confessions were voluntary or not, and

40. LL. B., University of Missouri, School of Law, 1925.

1. (1922) 296 Mo. 406, 246 S. W. 903.

2. "*ad quaestionem facti non respondent judices; ad quaestionem juris nonrespondent juratores.*"

3. Wigmore, Evidence (2nd Ed), sections 12, 487, 861 and 2550; Phipson, Evidence (6th Ed.), 11. See also Thayer, Preliminary Treatise, Ch. 5; 4 Harv. L. R. 147.

4. (1830) 2 Mo. 166, *l. c.* 167, 22 Am. Dec. 454, 18 L. R. A. (n. s.) 777 (n) *l. c.* 781.

5. (1876) 64 Mo. 262, *l. c.* 265, 18 L. R. A. (n. s.) 777 (n) *l. c.* 781.

in this the court committed an error." In *State v. Hopkirk*[6], Sherwood, J., held that the preliminary question of the admissability of confessions was one which belonged to the court alone, and in *State v. Brooks*,[7] the court in dealing with a confession used the words: "It was for the court to say what evidence should be received and for the jury to say what weight it should have when received." During the period covered by the cases enumerated, not a single Missouri decision that we have discovered suggests any rule of practice other than the orthodox one.[8]

But recently a distinctly different practice has grown up in many courts of this country by which some questions of admissibility are left to the jury. Especially is that true with reference to the admission[9] of confessions. And in *State v. Moore*,[10] the Missouri Supreme Court apparently adopted this view when it stated that the "admissibility of the confession in the case at bar was the dominant question before the jury". There was a reversal because no instruction was given to the jury on this subject. It is not now possible to explain how the court arrived at a decision entirely opposed to the line of decisions previously established. The reversal appears even more remarkable when it is observed that the opinion in *State v. Moore* was written by Sherwood, P. J., who had stated in *State v. Hopkirk, supra*, that the preliminary question of the admissibility of confessions was one which belonged to the trial court. It is doubtful whether Sherwood, J. in *State v. Moore* was influenced by this recent trend to submit certain questions of admissibility to the jury, for he does not refer to a single authority to sustain his conclusion.

Beginning with the opinion in *State v. Moore*, the authorities in Missouri on the respective functions of the court and jury in handling a confession are in a very unsatisfactory condition. *State v. Brennan*,[11] in which the opinion was by Gantt, J., turned the Missouri Supreme Court back to its original position, holding that the lower court properly refused an institution that before the jury should consider a confession, it must be satisfied that such confession was voluntarily made, because such an instruction would indicate to the jury that it could disregard the confession entirely even though admitted by the court. In arriving at the conclusion, Gantt, J., clearly analyzes the situation, stating: "The admissibility and competency of evidence is one thing, its credibility another. It is the province of the court to determine in the first instance the competency of the evidence offered, but it is the function of the jury * * * to pass finally upon its weight and credibility." Then followed *State v. Jones*[12] which, though it recognizes that it is proper for the trial court to make a preliminary investigation before admitting a confession, states: "The court properly required that all the circumstances attending the confession should

6. (1884) 84 Mo. 278.

7. (1887) 92 Mo. 542, *l. c.* 577, 5 S. W. 257, 330.

8. See also, for cases holding similarly: *State v. Patterson* (1881) 73 Mo. 695, *l. c.* 706; *State v. Kinder* (1888) 96 Mo. 548, 10 S. W. 77; *State v. Mc Kenzie* (1898) 144 Mo. 40, 45 S. W. 1117.

9. *U. S. v. Oppenheim* (1915) 228 Fed. 220, s. c. (1917) 241 Fed. 625, 154 C. C. A. 383; *Martinez v. People* (1913) 55 Colo. 51, 132 Pac. 64, Ann. Cases 1914 C 559; *State v. Storms* (1901) 113 Io. 385, 85 N. W. 610, 86 Am. St. Rep. 380; *People v. Barker* (1886) 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; *People v. Brasch* (1908) 193 N. Y. 46; 85 N. E. 809; Comm. v. Epps (1899) 193 Pa. St. 512, 44 Atl. 570; *State v. Rogers* (1914) 99 S. C. 504, 83 S. E. 971; *Cortez v. State* (1902) 43 Tex. Cr. Rep. 275, 66 S. W. 453.

10. (1900) 160 Mo. 443, *l. c.* 460, 61 S. W. 199.

11. (1901) 164 Mo. 487, *l. c.* 510, 65 S. W. 325.

12. (1902) 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786.

be proven to the jury, and then submitted the question along with all these facts to the jury, and required them to find whether the defendant made the confession voluntarily." This statement by Gantt, P. J., is capable of being misunderstood. If it be understood as meaning that the jury were to determine whether the confession was "voluntary" in order to determine the credence to be given the confession, then the statement accords with the decision by the same judge in *State v. Brennan, supra.* If, however, Gantt, P. J., meant that the jury were to determine the issue of voluntariness in order to determine whether the confession was admissible as an item of evidence, then Gantt, P. J., was not consistent with Gantt, J.

In *State v. Stebbins*,[13] the instruction to the jury on the subject of the defendant's confession can hardly be said to follow the earlier Missouri rule. It appears to state to the jury that the confession is to be considered by it *if* it first concludes that it was "freely and voluntarily made." The opinion is by Gantt, J., who seems to have become confused in attempting to reconcile *State v. Moore, supra*, with the earlier Missouri decisions. The curious point in *State v. Stebbins* is, that the instruction was given at the request of the prosecution. Defendant remained unsatisfied. The court decided that the instruction "was all that could be desired by the defendant." According to the orthodox rule, defendant was not entitled to as much as he got.[14] Since then, this same erroneous instruction has crept into other cases.[15] There is a dictum of doubtful import in *State v. Simenson*,[16] and the opinion in *State v. Thomas*[17] is badly confused.

Such are the authorities in Missouri on the subject[18] until the case under review, *State v. Parr*, in which the court apparently fell in line with the orthodox practice again. The Supreme Court of Missouri, once clearly an adherent of the orthodox doctrine, since the case of *State v. Moore* presents a rather uncertain line of authority. It is doubtful whether the court considers the admissibility of a confession a question for the court or for the court and then in turn for the jury. If the Supreme Court of Missouri has professed a tendency to relegate the derermination of the admissibility of a confession to the jury, what is to prevent it from extending the jury's powers to rulings on the admissibility of other items of evidence? That very step has been taken in other states.[19] Such a possibility warrants a thorough investigation of the consequences of such a substantial change in the practice of this state.

13. (1905) 188 Mo. 387, 87 S. W. 460. Mr. Wigmore states that this decision "faces both ways". Wigmore, Evidence (2nd Ed.), sec. 861, n. 3.

14. *State v. Duncan*, note 5, *supra.*

15. *State v. Brooks* (1909) 220 Mo. 74, 119 S. W. 353; *State v. Wansong* (1917) 271 Mo. 50, 195 S. W. 999.

16. (1914) 263 Mo. 264, 172 S. W. 601.

17. (1913) 250 Mo. 189, *l. c.* 215, 157 S. W. 330.

18. With the possible exception of a doubtful dictum in *State v. Ellis* (1922) 294 Mo. 269, 242 S. W. 952.

19. *Hartford Fire Ins. Co. v. Reynolds* (1877) 36 Mich 502 (the jury to disregard certain communications if they believed a confidential relationship existed); *King v. Hanson* (1904) 13 N. D. 85, 99 N. W. 1035 (a privileged letter; authenticity denied; left to the jury to decide authenticity). Many cases express the opinion that the jury also is to decide whether a statement submitted as a dying declaration is admissible: *People v. Thompson* (1905) 145 Cal. 717, 79 Pac. 435; *Jackson v. State* (1876) 56 Ga. 235; *Comm. v. Brewer* (1895) 164 Mass. 577, 42 N. E. 92; *State v. Scott* (1914) 37 Nev. 412, 142 Pac. 1053; *State v. Biango* (1907) 75 N. J. L. 284, 68 Atl. 125; *cf. State v. Monich* (1906) 74 N. J. L. 522, 64 Atl. 1016 and *State v. Leo* (1910) 80 N. J. L. 21, 77 Atl. 523.

Compare the following Missouri cases stating the orthodox rule as to admissibility of dying declarations: *State v. Sexton* (1898) 147 Mo. 89, 48 S. W. 452; State v. Zorn (1906)

It is believed that the orthodox practice is the better one. Already the jury system gives evidence of breaking down, of being unsuitable to our highly specialized urban life. We should not place more burdens upon it. It is enough to ask of the jury that it pass upon the credibility of the evidence and not upon its admissibility. Otherwise, there is too much danger of confusion. Nor is there any necessity for any further self-abnegation upon the part of American courts. There is no magic about a jury. Jurors are not trained in the difficult function of deciding contested issues. Much less are they able to properly separate in their minds the distinct problems of first determining admissibility and then in turn credibility.

R. C. COBURN[20]

202 Mo. 12, 100 S. W. 591; *State v. Thomas* (1915) 180 S. W. 886; *cf. State v. Crone* (1907) 209 Mo. 316, 108 S. W. 555. See, also, Wigmore, Evidence, 2nd. ed. sec. 1451.

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