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Notes on Recent Missouri Cases

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

NOTES ON RECENT MISSOURI CASES

CONTRACTS—DURESS—THREATS TO ATTACH PROPERTY OF ONE PERSON FOR THE DEBT OF ANOTHER. *Security Savings Bank v. Kellems.*[1] This was a suit by attachment on two promissory notes signed by husband and wife. The woman defendant pleaded that her husband was indebted to the plaintiff and that the latter's attorney threatened that, unless she helped her husband take care of the debt, her home would be attached, thereby causing her annoyance, trouble, and expense; that these threats were repeated and that finally she consented to give a deed of trust on certain other property which she and her husband owned but that she objected to signing notes; that thereupon the threats of attachment were repeated and representations were made by the attorney that the deed of trust would not be good unless she signed the notes and that by signing she would not bind herself personally. Further allegations were made of her business inexperience, her special confidence in the attorney as a lawyer of wide experience and that finally she signed the notes sued upon by reason of the representations and threats. She prayed for a cancellation of the notes. A demurrer to the plea was overruled by the trial court and, after a reply of denial, judgment was rendered for the wife. An appeal was taken from the overruling of the demurrer and from the findings of fact. A majority of the Springfield Court of Appeals held that the answer set up a good plea of fraud although the misrepresentation was one of law, and that the trial court was justified upon the evidence in its finding for her on this issue. With this point of the case

1. (1925) (Mo. App.) 274 S. W. 112.

we are not here concerned. On the matter of duress the court ruled that the answer was bad, largely on the ground that a threat to do what one has a legal right to do, as to bring a civil suit or to levy an attachment, cannot constitute duress.

In *Wood v. Kansas City Home Telephone Co.*,[2] Graves, J., said:

"But what is duress? Some states have statutes giving definitions, but not so in Missouri. With us we must go to the common law, and such modifications thereof as have been made by the courts, if any such have been made. By the common law duress was divided into two classes, (1) duress by imprisonment and (2) duress *per minas*. (9 Cyc. p. 444.) . . . . . .

"But in modern practice the courts have gone much further and this later doctrine is thus stated by the same authority, 9 Cyc., p. 450: 'The modern doctrine holds that there is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by the threats of the person claiming the benefit of a contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Duress then, according to this class of cases, includes that condition of mind produced by the wrongful conduct of another, rendering a person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.' "[3]

The history of the gradual enlargement of the conception of duress is of interest as an illustration of the capacity of the common law, aided by the less rigorous and technical views of courts of equity, to adapt itself to meet the needs and comply with the sentiments of a less rough and more civilized society.[4] No one would contend at the present day that duress is or should be limited to duress by imprisonment or *per minas*.[5] At the present time, although there is, as might be expected, some divergence of view as to whether certain conduct constitutes duress, there is substantial unanimity of opinion that duress, owing to the varying forms in which it appears, cannot be entirely reduced to a set of hard and fast categories but that only a general test can be safely adopted. General and vague as the test afforded in the quotation from Judge Graves' opinion may be, it probably represents as definite a rule as can be formulated. Just as in the concept of due care in the law of negligence we have a general and vague standard to be fitted to the facts of the individual case, so too we have in the matter of duress a standard that must be applied to ever-varying sets of facts. All the circumstances must be taken into consideration and the decision must rest upon a sound judgment.[6] But just as

2. (1909) 223 Mo. 537, 557, 123 S. W. 6.

3. This language was quoted by the Supreme Court of Missouri with approval in *Miss. Valley Trust Co. v. Begley* (1923) 298 Mo. 684, 252 S. W. 76.

4. For a brief history of the enlargement of duress, see 3 Williston, Contracts, secs. 1601-1605.

5. The latter meant in the old common-law threats of imprisonment, of loss of life, of loss of limb, or of mayhem.

6. In the very early cases it was stated that to have duress by threats the threats must be such as to put a brave man in fear. Later it was said that the threats must be such as to overcome the will of a person of ordinary firmness. "The tendency of the modern cases, and undoubtedly the correct rule, is that any unlawful threats which do in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done, and which he was not bound to do, constitute duress. This follows the modern doctrine of fraud which tends to disregard the question whether misrepresentations were such as would have deceived a reasonable person, and confines the question to whether the misrepresentations were intended to

in the case of negligence the courts have been able to place certain conduct on one side or the other of the line, so with duress the courts have been able to pronounce definitely certain kinds of pressure duress and others not duress.[7]

In *Wood v. Telephone Co., supra*, Graves, J., also quoted with approval a statement from 9 Cyc. 448 that a charge of legal duress cannot be predicated upon "a threat of arrest, or arrest on civil process; or a threat of, or the bringing of, a lawsuit or civil process."[8] In *Morse v. Woodworth*,[9] the court said, as quoted by Graves, J.: "It has often been held that threats of civil suits and of ordinary proceedings are not enough (i. e. to constitute duress) because ordinary persons do not cease to act voluntarily on account of such threats." It is submitted that the proper reason is not assigned for this result, because threats to sue and to attach are apt to be peculiarly conductive to securing payments and compromises. The correct reason must rather be that such pressure is proper pressure. Civil actions with their accompanying processes are the appropriate machinery for settling civil disputes; therefore in the ordinary case it can hardly be considered improper to sue or to threaten to sue. Such conduct is not an abusive exercise of the legal machinery provided for the very purpose of collecting claims.

However, suppose there is exacted a contract, a deed, or a payment, under a threat to sue and to attach when the aggressor has not a valid cause of action nor reasonable grounds for believing he has a valid cause of action and

deceive and did so." 3 Williston, Contracts, sec. 1605. In a number of Missouri cases it has been asserted that the test is that of the man of ordinary firmness. *Brown v. Worthington* (1912) 162 Mo. App. 508, 142 S. W. 1082; *Link v. Real Estate Co.* (1914) 182 Mo. App. 531, 165 S. W. 832; *Wood v. Telephone Co.* (1909) 223 Mo. 553, *l. c.* 558, 123 S. W. 6, *l. c.* 12, and the case under discussion p. 79. But in *Miss. Valley Trust Co. v. Begley*, (1923) 298 Mo. 684, *l. c.* 696, 252 S. W. 76, *l. c.* 79, there is quoted with approval the following, which is plainly inconsistent with the man-of-ordinary-firmness test: "The rule as it now exists is that the question of duress is one of fact in the particular case, to be determined on consideration of the surrounding circumstances, such as age, sex, capacity, situation, and relation of the parties; and that duress may exist whether or not the threat is sufficient to overcome the mind of a man of ordinary courage; it being sufficient to constitute duress that one party to the transaction is prevented from exercising his free will by reason of threats made by the other, and that the contract is obtained by reason of such fact." This view is accepted in *Gate City Nat'l Bank v. Elliott* (1915) (Mo. Sup. Ct.) 181 S. W. 25, *l. c.* 29. The injustice of the man-of-ordinary-firmness test is clearly shown in the language of the court in *Parmentier v. Pater*, (1885) 13 Or. 121, 9 Pac. 59; "Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be a great injustice to permit them to be robbed by the unscrupulous because they are so unfortunately constituted."

It is true that in cases of alleged duress there is a serious difficulty frequently of determining whether as a matter of fact the person was actually coerced by the threats and, in order to ascertain the reality of the alleged duress, the courts may properly consider as bearing on that question whether a normal person would be coerced under the circumstances. See Pound in 28 Harvard Law Rev. 359: "So far as the objective standard subserves a useful purpose in preventing fraud and so maintaining the social interest in security of transactions, the end may be attained by requiring a proper *quantum* of proof in such cases and treating considerations of what a reasonable person would do as of evidentiary value. The objective standard is a survival of the extreme individualism of the strict law and its reluctance to set aside acts done in legal form."

7. "The courts, however, by a gradual process of judicial exclusion and inclusion, have arranged certain classes of cases on one or the other side of the line." *Joannin v. Ogilvie* (1892) 49 Minn. 564, 52 N. W. 217.

8. In the *Wood* case there was a tripartite compromise claimed to have been procured by duress, the alleged duress being that one party was forced to settle or have a lawsuit on his hands. It is significant in the case, however, that there was a *bona fide* dispute between the parties to the compromise. See particularly 223 Mo. *l. c.* 566.

9. (1891) 155 Mass. 233, *l. c.* 250, 27 N. E. 1010.

knows he has not but acts solely to procure something to which he is not entitled. Can we then say that there is not an abuse of the law's machinery? In Missouri it is now settled that a tort action for malicious prosecution of a civil suit, even without arrest, attachment, or similar process, may be maintained.[10] What is this but a recognition that there is not a right, although there is a power, to institute maliciously and without probable cause such a suit? In the case under discussion emphasis is laid on the proposition that it cannot be duress to threaten to do what one may legally do. But if the wife's property was not subject to attachment for the husband's debt and the plaintiff knew that he had no grounds for believing that it was so subject, it would follow that he was threatening to do what he had no legal right to do.[11]

Nor is authority in other states lacking that it may be duress in particular cases to threaten civil suits and their accompanying processes. For instance in *Weber v. Kirkendahl*[12] there is a distinct holding by the Nebraska court that where there was a threat to attach the stock in trade of the plaintiff for a debt incurred by another, when the defendant knew that the plaintiff and his property were not at all liable for the debt, duress was employed in securing the payment. The court felt unable to see any distinction between threatening to attach and refusing to release from an attachment already made unless the payment demanded was made. It is to be noted that the threat of attachment of the stock in trade of a business man would be peculiarly effective. In *Sartwell v. Horton*[13] it was held that a payment was secured by duress where an action of trover was brought on a claim known by the defendant to be false and the action would not have been brought if the plaintiff had not determined to leave the employ of the defendant, as apparently he had a perfect right to do. In *Rose v. Owen*[14] the plaintiff threatened to institute receivership proceedings against a newly organized corporation, of which he had bought a share for that very purpose, unless the defendant, a heavy stockholder, would contract to pay the plaintiff $35,000. The latter knew he had no cause of action against the corporation and that the statements in the petition he had drawn up were willfully and knowingly false, and he knew that the filing of the petition would seriously injure the corporation and cause the defendant great loss. The court had no difficulty in pronouncing this conduct duress and cancelling the notes. In *Foote v. Depoy*[15] legal proceedings were actually begun by a divorced wife to have a guardian appointed over the property of her former husband. The suit was not instituted *bona fide* to save his property for his use and support but to obtain a large share of the property for the use of their daughter. To have the proceedings dismissed he conveyed considerable property. The court held that the deed was voidable for duress, saying that even if the man were legally competent to execute a deed, the means taken were a flagrant abuse of the machinery of the law for the purpose of securing an unconscionable advantage. With regard to this case notice should be taken that the facts of the case would tend to show that perhaps the

10. *Smith v. Burrus* (1891) 106 Mo. 94, 16 S. W. 81, 13 L. R. A. 59; *Brown v. Cape Girardeau* (1886) 90 Mo. 377, 2 S. W. 302; *McDonald v. Goddard Grocery Co.*, (1914) 184 Mo. App. 432, 171 S. W. 650; *Brady v. Ervin* (1871) 48 Mo. 533.

11. In no Missouri case that has been discovered, where there has been a threat to bring a civil action and to attach, have the facts revealed that the threat was made in bad faith. See *e. g. Wolfe v. Marshall* (1873) 52 Mo. 167. *Dausch v. Crane* (1891) 109 Mo 323, 19 S. W. 61; *Schelp v. Nichols* (1924) (Mo. App.) 263 S. W. 1017.

12. (1894) 39 Neb. 193, 57 N. W. 1026.

13. (1856) 28 Vt. 370.

14 (1908) 42 Ind. App. 137, 85 N. E. 129.

15. (1905) 126 Ia. 366, 102 N. W. 112, 68 L. R. A. 102.

man should have been placed under a guardianship, *i. e.* that there was a real "cause of action" for a guardianship, but yet the court thought that made no difference inasmuch as guardianship of property is instituted for the protection of an incompetent against himself and not for the benefit of the petitioner as in the ordinary civil action. In other words there was a use of the law's machinery for an ulterior purpose.[16] In *Hogan v. Leeper*[17] a mere threat to apply for a guardian was held to constitute grounds for avoiding a deed procured thereby. The only case directly in point that has been discovered, which seems *contra*, is *James C. McGuire v. H. G. Vogel Co.*[18] where there was a threat to replevy certain property; but the court relied to some extent on the circumstance that the complaint apparently negatived the fact that the plaintiff acted under the pressure of the threats.[19] In a number of other cases it has been distinctly held that an arrest on civil process or the levying of an attachment, where the party fraudulently asserted the claim for the purpose of extorting money, the claim being known to be unfounded, was wrongful pressure justifying a recovery of the money.[20] Such cases differ from cases of a threat to attach only in that in the former the pressure is more apt to be effective.

In the case under discussion the court seems to go largely on the ground that a threat to do what one can legally do cannot constitute duress. Statements of this sort are frequently made. However, they are undoubtedly too broad and their incorrectness can be shown by the Missouri decisions. For instance in *Hensinger v. Dyer*[21] it was held that, where there was a threat to prosecute a man criminally for embezzlement unless he would sign a note and deed of trust, the note and deed were voidable even if given for a just debt and that it was immaterial whether the man was guilty of the crime or not.[22] The court quoted with approval from the Massachusetts case of *Morse v. Woodworth*[23] as follows: "It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat.

16. A similar case is *Gill's Trustee v. Gill* (1910) (Ky.) 124 S. W. 875.

17. (1913) 37 Okla. 655, 133 Pac. 190, 47 L. R. A. (N. S.) 475.

18. (1914) 149 N. Y. Supp. 756 (App. Div.).

19. See also on the general subject, 3 Williston Contracts, secs. 1606, 1607; Black Rescission and Cancellation, sec. 232. In several other cases where the claim was found to have been asserted *bona fide* the courts have taken pains to emphasize that if the threat to sue had been made fraudulently with knowledge of the falsity of the claim there would have been duress. *Benson v. Monroe* (1851) 7 Cush. (Mass.) 125; *Turner v. Barber* (1901) 66 N. J. L. 496, 49 Atl. 676. See also *Joannin v. Ogilvie* (1892) 49 Minn. 564, 82 N. W. 217. In *Gates v. Dundon* (1891) 18 N. Y. Supp. (City Court of N. Y.) 149, a threat to file a materialman's lien with knowledge that there was no valid ground for so doing was held to be duress.

20. *Duke of Cadaval v. Collins* (1836) 4 A. &. E. 858; *Chandler v. Sawyer* (1874) 114 Mass. 364; *Spaids v. Barrett* (1870) 57 Ill. 289; *Behl v. Schuett* (1899) 104 Wis. 76, 80 N. W. 73. See also *Richardson v. Duncan* (1826) 3 N. H. 508, where it was held that if an arrest in a criminal case was brought for the purpose of extorting money, a payment secured was obtained by duress, even though the arrest was for a just cause and was under legal authority.

21. (1898) 147 Mo. 219, 48 S. W. 912.

22. The case overrules the earlier decision of *Davis v. Luster* (1876) 64 Mo. 43 and restores *Sumner v. Summers* (1873) 54 Mo. 340. However, the fact that notes and security were given for a just civil obligation under fear of a criminal prosecution for larceny does not make them voidable when no threat to prosecute was made. *Reloson v. De Hart* (1908) 134 Mo. App. 633, 114 S. W. 1122. And if one under a threat of criminal prosecution pays the exact amount of a liquidated civil claim it would seem that the amount paid is not recoverable for he has only paid what he is legally bound to pay. See 3 Williston, Contracts, Secs. 1615, 1616.

23. (1891) 155 Mass. 251.

Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered with reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage under such circumstances is guilty of a perversion and abuse of laws which were made for another purpose . . . . ." And in *Mississippi Valley Trust v. Begley*[24] it was held that notes given by a father-and mother-in-law under a well founded threat to prosecute the son for forgery or even to sue him civilly in such a way as to make known his criminality were voidable for duress.[25]

It is not contended, however, that the result of the principal case is erroneous. Although the wife alleged in her answer that the plaintiff threatened to attach her home, she did not allege that her home was not subject to attachment for her husband's debt and that the threats were made in bad faith, *i. e.* with a disbelief in the existence of a possible right to attach the home. It appears in the dissenting opinion of Bradley, J. (dissenting on the question of fraud) that some time before the threats the home place had belonged to husband and wife and that the husband had conveyed his interest to the wife, and further that the attorney for the plaintiff stated that he expected to try out the question of the husband's interest or ownership of the property. This would seem to suggest that the plaintiff claimed, and perhaps with reason, that the home really belonged to the husband or that his transfer to the wife was made in fraud of creditors and hence was void to them. Furthermore, the wife merely alleged that the threat was to attach her home, which it might well be and yet not be her property even as against her husband.

J. M. M.

CONTRACTS FOR SALE OF TIMBER—PAROL EXTENSION OF TIME FOR CUTTING—STATUTE OF FRAUDS. *Dennis v. Woolsey*.[1] In the above-mentioned case, the Springfield Court of Appeals held that a parol extension of the time for cutting the timber, under a valid written contract for the sale of timber, was within the statute of frauds and invalid. The court said: "It is apparent that the rights of all parties in this case depend upon the validity of the contract for the extension of time to remove timber . . . . . It is clear that the alleged extension was within the statute of frauds for the reason that it attempted to convey an interest in real estate and was not to be performed within one year."[2] No authorities for this statement were cited.

Seemingly, the court declared the parol extension void, not only because it was violative of that part of the statute of frauds applying to sales of land or some interest therein, but also because it violated that part[3] concerning agreements not to be performed within one year from the time of making the same.

24. (1923) 298 Mo. 684, 252 S. W. 76. This case collects many of the Missouri decisions on the matter of duress.

25. See also *Douglas v. Kansas City* (1898) 147 Mo. 428, 48 S. W. 851; *Simmons v. St. Louis* (1917) (Mo. Sup. Ct.) 192 S. W. 394; *State ex rel. v. Reynolds* (1917) 270 Mo. 589, 194 S. W. 878.

1. (1925) 272 S. W. 1014.

2. *Dennis v. Woolsey* (1925) 272 S. W. *l. c.* 1015.

3. R. S. Mo. 1919, sec. 2169.

Clearly this contract is not obnoxious to the latter portion because there are numerous Missouri cases holding that a contract, which may, from its terms, be performed within a year, although actually the performance may take or does take a longer time, is not within the statute.[4] Here all the timber might have been cut within a year from the time of the making of this oral extension. The question as to whether the parol extension is within the former portion of the statute requires further consideration.

Missouri courts have uniformly held that timber is a part of the realty, and that contracts for sale and conveyance thereof must be in writing.[5] But the courts of the various states have never been in accord on this point, and there are many cases holding that a contract for the sale and removal of timber is not a sale of an interest in land within the statute of frauds, but that it should be treated as a contract for the sale of personalty.[6] These cases, in deciding whether a contract for the sale of standing timber is a sale of realty or personalty, take the view that, if the contract of sale contemplates immediate severance of the timber, or severance within a reasonable time, and if no beneficial interest in the land is given by the contract, then it is to be deemed a contract for the sale of personalty, and not within the statute.[7] But if the said contract does not contemplate the cutting of the timber within a reasonable time then it is to be treated as a contract concerning realty and within the statute. There is thus a decided tendency to treat contracts for the sale and removal of timber, where it is to be removed within a short time, like those for the sale of crops.

In the Missouri cases involving contracts for the sale of growing timber, the above distinction has been discussed only once so far as the writer has been able to ascertain. In this case[8] there was a discussion of this distinction but the court held that any contract for the sale or conveyance of growing timber must be in writing, thus rejecting the distinction. So in holding a contract for the sale of timber to be one concerning an interest in land, the Springfield Court of Appeals only followed previous Missouri cases.

But the present case nevertheless may be distinguished from previous cases. The court seemingly overlooked the distinction made by the other courts between an extension of a contract for the sale of timber and an original contract for the sale of timber. This was not an original contract for such a sale, but merely an extension of the time for the cutting of the timber under the original contract. This distinction has been made in at least two other jurisdictions, Michigan and Georgia.[9] The courts in those two states recognize a difference between a parol extension of a contract and the original contract,

4. *Biest v. Versteeg Shoe Co.* (1902) 97 Mo. App. 137, 70 S. W. 1081; *Harrington v. Kansas City Cable Ry.* (1895) 60 Mo. App. 223; *Price v. Haeberle* (1887) 25 Mo. App. 201; *Suggett's Admrs. v. Cason's Admrs.* (1857) 26 Mo. 221.

5. *Cooley v. Ry.* (1899) 149 Mo. 487, 51 S. W. 101; *Lead Co. v. White* (1904) 106 Mo. App. 222, 80 S. W. 356; *Alt v. Grosclose* (1895) 61 Mo. App. 409; *Potter v. Everett* (1890) 40 Mo. App. 152.

6. 27 C. J. 197; 28 Am. & Eng. Encyc. of Law, 541.

7. *Goodnough Mercantile Co. v. Galloway* (1905) 170 Fed. 940; *In re Benjamin* (1909) 171 Fed. 320; *Leonard v. Medford* (1897) 85 Md. 666, 37 L. R. A. 449; *Shorey v. Porter* (1885) 77 Me. 48; *Claflin v. Carpenter* (1842) 4 Metc. (Mass.) 580; *Nettleton v. Sykes*, (1844) 8 Metc. (Mass.) 34; *Robbins v. Farwell* (1899) 193 Pa. 37, 44 Atl. 260; *Ryan Lumber Co. v. Ball* (Texas, 1915) 177 S. W. 226; *West Lumber Co. v. Cummins Co.* (Texas, 1917) 196 S. W. 546; *Hurricane Lumber Co. v. Lowe* (1909) 110 Va. 380, 66 S. E. 66.

8. *Potter v. Everett* (1890) 40 Mo. App. 152.

9. *Morgan v. Perkins* (1894) 94 Ga. 353, 21 S. E. 574; *Gray Lumber Co. v. Harris* (1910) 8 Ga. App. 70, 68 S. E. 794; *Wallace v. Kelly* (1907) 148 Mich. 336, 111 N. W. 1049; *Newberry v. Chicago Lumbering Co.* (1908) 154 Mich. 84, 117 N. W. 592. See also note in 55 L. R. A. 531.

holding that the parol extension is valid and not within the statute of frauds. The Georgia Court said: ". . . . A sale of standing timber is a sale of realty and is within the statute of frauds and consequently requires a written conveyance. Nevertheless, where such a conveyance contains a clause which forfeits the timber for non-removal within a designated time, the right to insist upon the time limit may be waived orally."[10] The Michigan Court said: ". . . . One can sell standing timber only by a conveyance in writing, but it is also true that his right to forfeit the same may be legally waived by parol."[11] Thus in those two jurisdictions it requires a contract or conveyance in writing for the sale of timber, but there may be a valid extension by parol of the time for cutting this timber.

In many specific performance cases involving contracts for the sale of land the courts have held that strict performance may be "waived" orally.[12] Just what is meant by "waived" is hard to determine. Mr. Ewart once undertook to write a book on "Waiver" but instead wrote a book entitled "Waiver Distributed" because he came to the conclusion there was no such category as "waiver" but that the so-called "waiver" cases are all something else. In specific performance cases where time for performance is extended he asserts that in reality the courts require a new contract with good consideration which in part takes the place of the old one.[13] And this the courts call "waiver." But though there is usually a new parol contract, the courts have not seen fit to regard this new arrangement as within the statute of frauds in specific performance cases.[14] The Michigan and Georgia cases, involving the parol extension of time for cutting timber under an original written contract, took this view of the parol extension contract. The Missouri court in the principal case in failing to make this distinction is *contra* to all the other like timber cases that have been found, as well as *contra* to the well settled law as laid down in the specific performance cases above referred to. It is submitted that the court might well have followed the authority of the Georgia and Michigan timber cases, and of the specific performance cases which are at least closely analogous. However, the result reached in the principal case can be easily justified on other grounds.

L. M. E.

INFANTS—VALIDITY OF INFANT'S NOTE GIVEN IN SETTLEMENT OF TORT. *Swoboda v. Nowak.*[1]

Defendant, an infant, slandered plaintiff, and thereafter gave plaintiff his note with a view to settling all damages caused by the slander. In an action

10. *Gray Lumber Co. v. Harris* (1910) 68 S. E. *l. c.* 752.

11. *Wallace v. Kelly* (1907) 148 Mich. *l. c.* 338.

12. 36 Cyc. 716; *Spencer v. McCament* (1907) 7 Cal. App. 84, 93 Pac. 682; *Kissads v. Bowlse* (1906) 224 Ill. 352, 79 N. E. 619; *Staples v. Mullen* (1907) 196 Mass. 132, 81 N. E. 877; *Kimball v. Goodburn* (1875) 32 Mich. 10; *Izard v. Kimmel* (1889) 26 Nebr. 51, 41 N. W. 1068; *Cosby v. Honaker* (1905) 57 W. Va. 512, 50 S. E. 610.

13. Ewart, Waiver Distributed, 131-135.

14. Perhaps the courts consider that the purpose or intent of the statute of frauds is fulfilled sufficiently, if the original contract is in writing, and that said statute ought not be carried out to such a logical extreme as to forbid minor parol changes in the terms of said contract. By using the term "waiver" they avoid the admission that the parol change in the contract is logically itself within the statute of frauds. Probably in fact this amounts to what has been called "spurious interpretation" of the statute of frauds. See on the nature of spurious interpretation, Austin, Province of Jurisprudence Determined, 1023-36, and Pound, Spurious Interpretation, 7 Col. L. Rev. 379.

1. (1923) 255 S. W. 1079.

upon the note, the trial court instructed the jury that plaintiff was entitled to recover thereon unless it was found that there was no consideration for the note.[2] Defendant requested an instruction to the effect that if it was found that he was a minor at the time that he gave the note in suit there could be no recovery against him, but this instruction was refused and the refusal was approved upon appeal. In this connection, the St. Louis Court of Appeals said: "since the law makes the infant liable for his torts, he may be held liable in an action upon his note given in settlement of a tort, so long as the consideration for the note is open to inquiry, in like manner as he would have been held liable upon the original cause of action."[3]

The foregoing statement may mean merely that an infant cannot escape liability because he is sued upon his note instead of in tort, but that he will be held in such an action to the extent that he has damaged plaintiff, up to the amount of his note, if the commission of the tort is proved. On the other hand, the court may be laying down a broad rule that an infant will be bound by his promise to pay a sum of money given to settle his tort, regardless of how much actual damage his wrongful conduct may have caused his promisee. For example, it may have been the fact in the instant case that defendant's slander damaged plaintiff in a much less sum than the amount of his note, yet the Court's statement might be construed as meaning that if defendant slandered plaintiff, and plaintiff proved that fact in *like manner* as he would have had to prove it in an action for slander, then defendant would be liable to the full amount that he promised to pay. Either of the suggested interpretations of the decisions embodies an unusual rule of law, and if the latter be the correct one, it adopts a new policy, which has not generally prevailed in dealing with liabilities of infants.

The modern law is that an infant is not bound by his contract. While such a transaction is not void, it is voidable, and the infant may repudiate his obligations, thereby escaping all liability of a contractual nature, if he does not ratify his contract after attaining his majority.[4] "Infants are supposed to be destitute of sufficient understanding to contract. The law, therefore, protects their weakness . . . . . so far as to avoid all their contracts by which they may be injured . . . . . Upon this principle they may avoid the sale of their chattels or lands, or any contract or agreement to surrender or release their rights . . . . . "[5] An irrebutable presumption has been raised that "infants have not a sufficient discretion to put a just value upon their property or rights."[6] While infants have been protected to this extent, it has never been the policy of the law to exempt them from liability for either necessaries furnished them, or tortious injuries caused others, unless the tort involved "an element necessarily wanting in the case of infancy."[7]

2. 255 S. W. *l. c.* 1082.

3. 255 S. W. *l. c.* 1082.

4. *Robinson v. Floesch etc. Co.* (1921) 291 Mo. 34, 236 S. W. 332; *Shepard v. Atchison Etc. Ry.* (1910) 150 Mo. App. 98, 129 S. W. 1003; *Gordon v. Miller* (1905) 111 Mo. App. 342, 85 S. W. 943; *Tower-Doyle etc. Co. v. Smith* (1900) 86 Mo. App. 490; *Thompson v. Marshall* (1892) 50 Mo. App. 145; *Paul v. Smith* (1890) 41 Mo. App. 275; *Dillon v. Bowles* (1883) 77 Mo. 603; *Betts v. Carroll* (1879) 6 Mo. App. 518; *Baker v. Kennett* (1873) 54 Mo. 82; *Kerr v. Bell* (1869) 44 Mo. 120; *Craighead v. Wells* (1855) 21 Mo. 404. See also Williston, Contracts, sec. 226.

5. Parsons, C. J., in *Baker v. Loreti* (1809) 6 Mass. 78, 80.

6. *Ibid.*

7. Allen, P. J., in principal case, 255 S. W. *l. c.* 1082. See also *accord: McKerrell v. St. Louis etc. Ry.* (1924) 257 S. W. 166 (*dictum*); *Pledge v. Griffith* (1918) 199 Mo. App. 303, 202 S. W. 460; *Munden v. Harris* (1911) 153 Mo. App. 652, 134 S. W. 1076 (*dictum*); *Fears v. Riley* (1898) 148 Mo. 49, 49 S. W. 836; *O'Brien v. Loomis* (1890) 43 Mo. App. 29; *Conway v. Reed* (1877) 66 Mo. 346, 27 Am. Rep. 354.

The prevailing policy which protects an infant from contractual liability is understandable. It is, however, more or less difficult to find a clear distinction between contract cases and tort cases so as to hold the infant in the latter, but not in the former. It is not satisfactory, from a theoretical point of view, to say, as it sometimes has been said, that a tort is not an act of "omission but of commission, and is within the class of offenses for which infancy cannot afford protection."[8] Such a line of reasoning seems to classify the acts of making and breaking a contract as ones of omission, and to differentiate them from the tortious acts, the latter being regarded as acts involving positive wrongful conduct upon the part of the tort-feasor.[9] Even if it be proper to regard all torts as of this nature, the wrong done by an infant in breaking his contract might very well be considered similar in its nature. If an infant deliberately makes a contract, receives the benefits thereunder, and then repudiates his obligation,[10] it can hardly be said that he has been guilty only of acts of omission. As a matter of fact, he has effectively deprived his promisee of valuable property. But in spite of the difficulty of justifying the distinction that the cases make between the two situations, the law is well settled, and the infant is liable in the tort cases, but not so in those of contract. In view of this state of the law, the decision in the principal case, however we may interpret the same, seems unusual, and may overthrow the firmly established policy that an infant, at his election, may escape from his contractual obligations.[11]

The instant case was decideed on the sole authority of *Ray v. Tubbs*.[12] In that case an infant had converted plaintiff's horse and given his note in full satisfaction of his tort. In an action upon the note, the infant defendant was held liable to an amount not in excess of the note and the value of the converted property, but to this extent only, upon proof by plaintiff of the conversion. The court, in the course of its opinion, stated that it saw no reason why the defendant "should not be held liable in an action upon the note to the *same extent* that he would be if the action had been brought upon the cause of action which formed the consideration for the note."[13]

The *Ray* case obviously is not orthodox, because it allowed a recovery against an infant in an action brought upon the latter's promise. At the same time, it establishes no new fundamental principle of substantive law, and overturns no old one. This is believed to be the case because in reality the *Ray* case was not treated as an action upon the infant's note. The court changed the action, originally brought to collect the note, into one for conversion, and by so doing duly observed the legal principles which govern an infant's liabilities upon his contracts.[14] Perhaps such a decision is desirable. It at

8. Marshall, C. J., in *Vasse v. Smith* (1810) 6 Cranch (U. S.) 226, 231. In *Zouch ex dem. v. Parsons* (1765) 3 Burr. 1794, Lord Mansfield said (p. 1802) that the defense of infancy is a privilege, "which is given as a shield and not as a sword . . . 'that it never shall be turned into an offensive weapon of fraud or injustice' . . . ." See also *Huchting v. Engel* (1863) 17 Wis. 230: "The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them . . . ." *Id.* 231.

9. Obviously many torts are founded upon a defendant's failure to act rather than upon his positive wrongful conduct.

10. Under such circumstances there is authority that the infant is not bound to return the value of consideration received if he has lost or parted with the same. See Williston, *op. cit.* sec. 238; *Drude v. Curtis* (1903) 183 Mass. 317, 67 N. E. 317.

11. See *Shaw v. Coffin* (1870) 58 Me. 254: "The note of an infant, given on the adjustment of an account against him is voidable. It is equally voidable, though given on a settlement for damages arising from his torts." *Id.* 256.

12. (1878) 50 Vt. 688.

13. 50 Vt. 695.

14. In *Bradley v. Pratt* (1851) 23 Vt. 378, an

least prevents two suits, and in any event, as already remarked, does not actually enforce an infant's contract. If we assume that the St. Louis Court of Appeals, in the case under review, intended to follow and adopt the decision in *Ray v. Tubbs* and to limit plaintiff's recovery to the actual damage that defendant's slander caused her, the decision probably does no harm, and can be criticized only because it is possibly too liberal from a procedural point of view. But, if the Court means to lay down the broad proposition that plaintiff can recover to the full amount of the note provided only the slander is proved, the case is not in line with the generally prevailing rule, goes far beyond the liberal decision in *Ray v. Tubbs* and overturns a firmly established rule of law.

If the plea of infancy is allowed to defeat an action upon an infant's executory accord, as a rule, no injustice will result to a plaintiff, because he is still free usually to bring his action upon the original claim, which would have been wiped out had the accord been performed. The promise contained in an accord executory does not discharge the original claim; its satisfaction is contingent upon the accord's being duly performed, and, if performance does not occur, the injured party is free either to sue for a breach of the accord or to revive the original cause and sue thereon. "An accord executory without performance is no bar..... The accord must be completely executed to sustain a plea of accord and satisfaction."[15]

While an accord executory does not affect an injured party's original cause of action unless it be performed, it has been held possible to extinguish an original claim by the parties' agreeing to substitute a contractual obligation for the old liability. The essence of such a transaction is the injured party's taking a *promise* in satisfaction of his original cause. The distinction between this kind of a settlement and an accord executory is that in the latter the performance of the accord constitutes satisfaction of the claim, while in the former the agreement itself effects this result.[16]

Suppose that an infant tort-feasor's obligation is satisfied by the injured party's taking his agreement to pay a sum of money in full settlement of the tort, and that thereafter the injured party sues the infant upon the substituted agreement; will any injustice be done if the infant's plea of infancy be allowed or will the injured party, in that event, be privileged to sue upon the original tort?

Whenever an infant elects to avoid his contract, his repudiation has been said to leave "the parties without a contract, and the infant, therefore, has such rights as would exist had there been no contract."[17] Upon this principle, it is generally held that an adult party to a contract, upon the infant's repudiation of the same, is entitled to a return of any consideration, which he may

infant was held liable in an action upon a note given to cover the purchase price of necessaries, but plaintiff was required to show the delivery of the necessaries and that the price agreed to be paid was reasonable. No more than the reasonable value of the articles furnished was permitted to be recovered. The action therefore was not really upon the infant's promise to pay, but was for the reasonable value of necessaries furnished. There is authority *accord* in several jurisdictions; see Williston *op. cit.* sec. 240, note 91. There is a marked similarity between such decisions as *Bradley v. Pratt* and *Ray v. Tubbs*; each seems to involve an effort upon the part of courts to prevent the dismissal of an action upon what was regarded as a technicality and hold an infant to the actual obligation imposed upon him as a mater of law, instead of upon his promise substituted for such legal obligation.

15. *Kromer v. Heim* (1879) 75 N. Y. 574, 576; see also Williston, *op. cit.* sec. 1848 where the cases are collected.

16. Williston, *op. cit.* sec. 1846; note (1906) 12 L. R. A. (N. S.) 1134.

17 *Tower-Doyle etc. Co. v. Smith, supra*, note 4, 86 Mo. App. *l. c.* 494.

have parted with and which the infant still retains in his possession.[18] It would seem that these propositions might very well lead one to say that, when an infant tort-feasor has avoided his promise which he gave in full satisfaction of his wrong, his promisee should have the right to sue again upon the tort. Such a decision would certainly be just in its result, and would be analogous to that which allows the adult party to recover the consideration which he has parted with in performing his side of the agreement. In the assumed case the consideration which the injured party furnished the infant for his promise to pay was either the surrender of his power to sue or a promise not to exercise such power.[19] Why is it not sound to hold that, upon the infant's repudiation of his promise, either the injured party's power to sue is revived, or he is freed from his obligation to forbear suit?

G. F. W.

PUBLIC SERVICE COMMISSION—POWER OF COURT TO AFFIRM ORDER IN PART AND REVERSE IN PART—POWER OF COMMISSION TO PASS ON CONSTITUTIONAL QUESTIONS. *State v. Public Service Commission.*[1] In the case cited, the Supreme Court construed two portions of the Public Service Commission Act. Both constructions, if adhered to, will have important effects on the Commission and its activities. In the case it appeared that in 1909 a 200 year franchise has been granted by ordinance to the Kansas City Terminal Railway Company, hereinafter called the Company, by the city of Kansas City, and the ordinance recited that the Company covenanted that whenever any viaduct or subway across its tracks was reasonably necessary to provide for public traffic the company would construct and maintain the same. In 1923, the City passed an ordinance providing for the extension of a certain street across certain tracks of the Company, and further providing that a viaduct be built across said tracks by the Company according to specifications therein provided. The Company refused to construct the viaduct and the City appealed to the Comission, asking that the Commission grant permission for the extension of the street across the tracks as provided in the ordinance, and that the expenses of the same be borne by the Company as provided in the covenants in the ordinance of 1909. After a hearing, the Commission entered an order granting the requisite permission as to the crossing and directing that the viaduct be built and that the cost be borne by the Company. On appeal, this order was affirmed by the circuit court of Cole County, and the Company then appealed to the Supreme Court. The Supreme Court decided the order must be reversed, because the Commission had here no jurisdiction to apportion costs. The City then made a motion to modify the order so as to affirm that portion of the order which fixed the manner of crossing, and to reverse the portion of the order dealing with apportionment of the costs. It urged that otherwise the City must ask for a new hearing before the Commission, and secure a new order fixing the manner of crossing. The Company

18. *Berry v. Stigall* (1913) 252 Mo. 690, 162 S. W. 126 (*dictum*); *Gordon v. Miller* (1905) 111 Mo. App. 342, 85 S. W. 943; *Zuck v. Turner etc. Co.* (1904) 106 Mo. App. 566, 80 S. W. 967; *Tower-Doyle etc. Co. v. Smith, supra,* note 4; *Price v. Blankenship* (1898) 144 Mo. 203, 45 S. W. 1123; *Craig v. Van Bebber* (1890) 100 Mo. 584, 13 S. W. 906; *Betts v. Carroll* (1879) 6 Mo. App. 518; *Highley v. Barron* (1871) 49 Mo. 103; *Kerr v. Bell, supra* note 4. See Williston, *op. cit.* sec. 238.

19. It might possibly be said, that when the cause of action has been satisfied the power to sue is gone beyond recall; that the discharge of the obligation causes the power to "dissolve"—to disappear into "thin air". *Sed qu.?* See Williston, *op. cit.* sec. 1848.

1. (1925) 272 S. W. 957.

contended that under Section 111[2] of the Public Service Commission Act, the court has power to affirm or reverse an order of the Commission, but no power partially to affirm and partially to reverse an order. Held, that while in form this was one order, yet, since the power to fix the manner of crossing, and the power to apportion costs are two distinct powers, in effect there were two distinct orders; hence the order fixing the manner of crossing should be affirmed and that apportioning expenses should be reversed, and directions were given accordingly.

The decision on this motion to modify seems a wise one. Section 111 says: "Upon such hearing the circuit court shall enter judgment either affirming or setting aside the order of the commission under review." Hence one can argue, as the Company did, that the court can only affirm or reverse the order of the Commission. But the question is, what do the words "order of the Commission", as used in Section 111, mean? The Commission holds hearings which may be so broad in scope as to involve the exercise of a number of different powers, and the final order entered may read as one continuous order. Thus there is one hearing though upon a number of distinct matters. Suppose the Commission enters an order fixing rates and also directs the installation of a small amount of additional equipment. Because this latter portion is erroneous, must the court reverse the portion fixing the rates? The statute ought not be so interpreted unless no other reasonable interpretation is possible. It is clear from the statute the court was to have only power to review the orders of the Commission, hence the direction that it must reverse or affirm the order. The court has no power to enter an order for the Commission or in place of the order of the Commission. But where the order of the Commission is in substance two orders, then the substance ought to be regarded rather than the form. Hence the court, after noting here that there was nothing relating "to apportionment of cost that could have been properly considered ..... in determining the manner of crossing," held there could be no possible objection to the affirmance of the one and the reversal of the other. The decision seems reasonable and quite in accord with the intent that the court have only reviewing power in respect to order of the Commission. Conceivably cases may arise in which there may be difficulty in determining whether, in substance, there is one order or two but no such difficulty appears in the instant case.

The decision on the other point is not free from difficulty. The City contended that the contract contained in the ordinance of 1909 was valid and that therefore the Company should bear the whole cost of the viaduct, and asked an order to that effect.[3] The Commission admitted that, if there was a binding contract as to costs, then it had no discretion as to apportionment of costs.[4] But the Company contended "the franchise is not binding upon the Commission as it has exclusive jurisdiction under the statute to exercise the police power to determine the necessity of the crossing and to apportion the costs thereof, and that in passing upon these questions, the Commission should disregard the terms of the franchise."[5] The Company also contended that because of the natural configuration of the land, none of the costs could be imposed upon it (assuming the contract invalid, because just as

2. Mo. R. S. 1919, sec. 10522.
3. See *Kansas City v. Kansas City Terminal Ry. Co.*, (1923) 13 Mo. P. S. C. 364.
4. 13 Mo. P. S. C. 381.
5. 13 Mo. P. S. C. 380.

large a viaduct would have been required had its tracks not been there. As to the issue thus raised, the Commission said, "The city contends that the cost of construction and maintenance both of the viaduct and approaches thereto, should be apportioned against the Terminal Railway for the reason that the franchise ordinance so provides, and that this agreement is binding on the Commission. On the other hand, the Company contends: first, that the franchise contract does not so provide; and, second, even if it did, *it has no legal binding force and should be disregarded by the Commission, and that it should act under the spirit and letter of the statute giving jurisdiction over the subject-matter to the Commission.*"[6] The Company also insisted that to impose all the costs on it would violate its constitutional rights. The Commission first decided that the contract was void as being in derogation of the police power of the state,[7] and therefore it had power to apportion costs; that though the contract was invalid its terms were highly "evidential of what an equitable assessment would be, and clear and convincing evidence must be introduced to rebut the evidential force of the agreement"[8]; that because of the weight of the evidence from this agreement the whole cost should be imposed on the Company; that the order as entered was not contrary to the Company's constitutional rights. The effect of the order thus entered was to specifically enforce the very contract, which the Commission had first held was invalid.[9] This rather long statement of facts is necessary because of the manner in which the court treated the case.

The Supreme Court in its opinion said that certain questions including the question "whether the cost of constucting the viaduct, if imposed on appellant, would unduly burden interstate commerce were questions which the Commission was incompetent to consider or determine. These questions were therefore improperly injected into the proceedings before the Commission."[10] Then after pointing out that the parties may agree as to apportionment of costs,[11] in which case there is no question of apportionment for the Commission to consider, the court said:[12]

> "If either assumes the whole burden, or if they agree upon the proportionate part each shall pay, there is no occasion for submitting the question of apportionment to the Commission.[13] In other words the existence of a controversy as to the apportionment of expenses is a

6. 13 Mo. P. S. C. 387-389. Italics ours.

7. It so held on authority of *State ex rel. v. M. K. & T. Ry. Co. v. P. S. C.*, (1917) 271 Mo. 270, 197 S. W. 56. In this case a contract under which the city was to bear half the cost was held void as to the city, on the ground it was a limitation on the exercise of the police power. But does it necessarily follow that a contract imposing all the cost on the railroad is void as to the latter?

8. 13 Mo. P. S. C. 390.

9. It seems unreasonable to consider the fact a void contract was made, as the controlling evidence on the equitable apportionment of costs, and it seems the order might have been properly reversed on this ground alone.

10. One would infer from the language used that the court considered that the Commission had no power to decide a constitutional question. But under sec. 111 of the Public Service Commission Act its orders can be reviewed only in the manner specified in the act, and the state courts are forbidden to review, correct, annul, suspend or enjoin any order of the Commission except as therein provided. Hence, as pointed out later on, if the Commission enters an unconstitutional order, relief can be had in state courts only on appeal from the order.

11. The parties may agree to apportion costs but is the agreement binding on either of them in any case?

12. (1925) 272 S. W. 962.

13. This may be true assuming said agreement is binding, but if not there is then every occasion to apportion. The court here denies the Commission's jurisdiction to pass on the validity of an agreement, the validity of which certainly is questionable, yet the decision of this question one way would mean the Commission ought to proceed to apportion costs.

prerequisite to the exercise by the commission of its jurisdiction with respect thereto. In the instant case there was a controversy, but one of which the Commission could not take cognizance.[14] No apportionment of expense in any proper sense was sought. The city was insisting upon the railroad paying all the expenses of construction and maintenance on the ground that it had bound itself by contract so to do.[15] The Commission should therefore have determined and prescribed the manner, including the particular point, of crossing, and left questions pertaining to the construction and enforcement of the alleged contract for determination in a forum where the requisite jurisdiction existed."

In point nine of the syllabus it is stated that *no apportionment was sought.* Now it will be noted from the extracts above taken from the opinion of the Commission, that the Company and the Commission, and seemingly even the City, thought there was a controversy over the validity of the contract and a further controversy over apportionment if the contract was not binding. The Company insisted, and the Commission held, that that contract was void, and the Commission therefore had jurisdiction to apportion costs. The Commission admitted that if the contract was valid no apportionment could be made. If there was not a controversy as to who should pay the expenses of this viaduct it is difficult to say what constitutes a controversy. Furthermore, it seems that the matter was litigated by both parties and was in fact one of the chief matters in controversy at the hearing.[16] Does the court mean if apportionment is not demanded in the petition, the question cannot be raised by the defendant? Certainly not, for it disclaimed any such intention by stating:[17] "On the question of jurisdiction in the instant case we are not so much concerned with the form and substance of the complaint as with the nature and extent of the order made and the considerations upon which it is based." Does the court mean that though the defendant insists in its pleadings on apportionment of costs, that the Commission has no power to pass on the validity of the contract and cannot apportion costs until some other tribunal had adjudicated this question? If so, then resort to the commission, in case there is an alleged contract in the way, cannot be made, though that has certainly not been the law prior to this decision.[18] If so, then the court has taken a long step towards the destruction of the effectiveness of the Commission for the Commission will be unable to act in any case where either party can set up

14. Does this mean if there is a void agreement, the Commission can't apportion costs? If so, several cases in which the Commission has first held an alleged contract void, and then proceeded to exercise one of its powers, have been before the court and the point was never suggested. The court in each case proceeded to review the correctness of the Commission's decision as to the validity of the agreement, and if affirmed as to this, the court then examined the order from the standpoint of reasonableness. See *Sedalia v. P. S. C.*, (1918) 275 Mo. 201, 204 S. W. 497 and S. C. 288 Mo. 411, 231 S. W. 942; *Fulton v. P. S. C.* (1918) 275 Mo. 67, 204 S. W. 381; *Harrisonville v. P. S. C.* (1922) 291 Mo. 432, 236 S. W. 852; *St. Louis v. P. S. C.* (1918) 276 Mo. 509, 207 S. W. 799; *Kansas City v. P. S. C.*, (1918) 276 Mo. 539, 210 S. W. 381.

15. It is submitted that the statements quoted from the opinion of the Commission show there was a controversy. The court makes no reference to these contentions of the Company.

16. See opinion of Commission, 13 Mo. P. S. C. 378-395.

17. (1925) 272 S. W. 957 at 960.

18. See cases cited in note 14 *supra.* In *Southwest Missouri Ry. Co. v. P. S. C.* (1919) 281 Mo. 52, 219 S. W. 380, the Commission entered an order refusing to act on a petition of a Railway Company for permission to abandon spur tracks, on the ground the Company was bound to operate by its franchise contract. On appeal from this order the Supreme Court held that the contract was not binding on the Commission and reversed the order of the Commission.

an alleged contract controlling the matter in controversy, until after the validity of such contract has been settled by a decision of some competent court. The same may be said of the assertion that the Commission has no power to pass on the constitutionality of the order it is about to enter.[19] Does the court mean there was in substance no controversy here except over the validity of the contract? If so, the writer agrees with the Commission that there was a controversy over the costs. The city insisted there was none because the contract was binding, but the Company raised the issue as to the validity of the contract, and contended that as the contract was invalid the Commission could and ought to exercise its power to apportion costs. Then both parties introduced evidence and presumably argued points of law and covered the whole ground of apportionment, after which the order was entered imposing the whole cost on the Company. Yet the court says there must be a controversy as prerequisite to the jurisdiction of the Commission and that here none appeared. It is submitted that there was such a controversy shown in the opinion of the Commission, unless such opinion is inaccurate. It is submitted the Commission quite properly passed on the validity of the contract, and the correctness of its ruling on this should have been passed upon by the court. At least the court has so acted heretofore under similar circumstances.[20]

Whether or not this particular contract was valid or void is a question of some difficulty in view of previous decisions. Though the parties may agree as to apportionment of costs, yet if any part is by said agreement to be borne by the city, then clearly that contract is not binding on it at least[21] and it is not clear that in such case the contract would be enforceable against the Company. Of course it does not follow that a contract imposing the whole cost on the railroad is void merely because one imposing part of the cost on the city is void, but nevertheless the question is one of difficulty, for the Company must collect the money from rates imposed on the public, and hence in any case the public ultimately will pay. It is only a question whether the public generally will pay or whether that part of it in Kansas City will bear part of the cost. If such a contract as this is not binding on the Company (and the broad principle on which previous cases have been recited would certainly justify such conclusion) then it follows the court was in error in saying the parties could agree as to apportionment of costs for clearly the parties here could make no binding agreement as to costs. Had the court held the contract binding on the Company then the order of the Commission would have been erroneous for that reason, but this the Commission admitted. Had the contract been declared not binding on the Company, then the question of the reasonableness of the order would have been before the court. Probably this order was properly reversible on the evidence, because the Commission regarded the void contract as the controlling evidence and in effect enforced it specifically. Hence while the decision of the court reversing the order appor-

19. Certainly the Commission should not ignore such questions. They arise and must be decided in the course of a great many proceedings before the Commission. The Commission exercises many powers which in a sense are judicial, and some which were probably once thought of as being exclusively judicial. No clear line can be drawn between legislative, judicial and executive matters anyhow.

20. See cases cited in notes 14 and 18 in which no such lack of power was suggested, but on the contrary such powers were assumed.

21. *State ex rel M. K. & T. Ry Co. v. P. S. C. supra.* Likewise a contract by which a public utility binds itself to furnish services at fixed maximum rates is not binding on such utility. See cases and discussion in 31 Mo. Law Bull. 44-45.

tioning costs can be sustained as to result, yet the grounds given, it is submitted, may well be criticised.

If the court in the instant case intended to hold that there was actually no demand for apportionment of costs by the parties, but only a controversy over the validity of the alleged contract, and that therefore the Commission improperly passed on the validity of the contract in question and on the constitutionality of the order it subsequently entered because it had no jurisdiction to apportion costs here, then one may insist that the opinion of the Commission shows there was a controversy and that apportionment was involved at the hearing to a sufficient degree to invoke the powers of the Commission. But from the general tenor of the court's opinion, and the references made to questions which it declares are "judicial and beyond the scope of the Commission's jurisdiction" and "of which the Commission could not take cognizance," one might well conclude the court was laboring under the influence of the dogma of separation of powers and considered that this administrative body had no power to pass on "judicial questions." If so, and if this is hereafter the view taken by the court, then the Commission's days of usefulness are over. No administrative body can be given charge of extensive and important matters such as entrusted to the Commission, without necessarily giving to it by implication, if not expressly, full power to pass on all questions of law which are necessarily involved in the proper exercise of its powers. In order to fix a rate, or to apportion costs, or to exercise others of its powers, it may have to first pass on the validity of an alleged contract; it must and does continually pass on the constitutionality of the orders it enters, both under state and federal constitutions. Hence in the instant case if asked to apportion costs, it must first pass on the validity of the contract. Otherwise it would either be compelled to wait until the validity of the contract had been adjudicated in some separate law suit before it could exercise its power to apportion, or it must exercise its power to apportion as if no such alleged contract was in existence. The former course would produce long and needless delay; the latter would possibly result in the apportionment of costs in face of valid contracts to the contrary for, if not appealed from, the order could not be attacked collaterally in the state courts. As to constitutional questions the situation would be much worse. Here a preliminary suit could not be brought to determine the constitutionality of an order to be entered by the Commission at some future hearing, the nature of the order being unknown. All the Commission could do would be to act as if no such question were involved and enter its order. If appealed from, would the supreme court pass on the constitutional points? If it should, it would often be compelled to reverse orders which would never have been entered had the Commission considered the question of constitutionality, hence an appeal would always be necessary when an aggrieved party desired to raise a constitutional question.

JAMES W. SIMONTON

USURY—COMMISSION PAID TO AGENT AS USURY. *Verdon v. Silara.*[1] One Abramowitz borrowed $400 from Ruth B. Runkle for six months and gave as collateral security a $900 note together with the deed of trust securing the same. It appeared that the loan was arranged by one Kratz, who charged Abramowitz a commission of $15, which he kept himself. At the same

1. (1925) 274 S. W. 79.

time, interest at the rate of 6% was deducted in advance and retained by Runkle. The Supreme Court held the transaction usurious, and, at the instance of plaintiff, who was Abramowitz's assignee, ordered the collateral surrendered up because tainted with usury.

From the evidence considered by the Court, it appeared that Abramowitz applied to Kratz to procure a loan from some third party for him, and that Kratz agreed to do this if Abramowitz would pay him a commission of $15, and the lender 6% interest. With this understanding Kratz went to Runkle, applied for and procured the loan. So far as the evidence disclosed, Kratz was not in the employ of Runkle, but merely brought the two parties to the transaction together. Runkle, however, did know that Kratz was to receive a commission from Abramowitz for his services, and advanced the $400 less the interest with this knowledge. In making its decision, the Court does not give the matter any extended consideration. It is merely stated that the loan was usurious, because Kratz received a commission, and the collateral accordingly was declared void under the statute.[2] Unless there was evidence in the record,

2. "The parties may agree in writing for the payment of interest, not exceeding eight per cent per annum, on money due or to become due upon any contract." R. S. Mo. 1919, sec. 6492.

"No person shall directly or indirectly take for the use or loan of money ... above the rates of interest specified in the three preceding sections.... Any person who shall violate the foregoing prohibition of this section shall be subject to be sued, for any and all sums of money paid in excess of the principal and legal rate of any loan by the borrower....." *Id.* sec. 6494.

"Usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness." *Id.* sec. 6495.

"In actions for the enforcement of liens upon personal property pledged or mortgaged to secure indebtedness.... or in any other case when the validity of such lien is drawn in question, proof upon the trial that the party holding or claiming to hold such lien has received or exacted usurious interest for such indebtedness shall render any mortgage or pledge of personal property, or any lien whatsoever thereon given to secure such indebtedness invalid and illegal." *Id.* sec. 6496.

In the principal case the interest retained by Runkle plus the commission paid to Kratz exceeded eight per cent upon the indebtedness for the period of the loan. The court evidently was of the opinion that the payment of the commission to Kratz was the same as Runkle's exacting a usurious rate of interest. The Court cited as authority for its decision on this point *Kreibohm v. Yancy* (1900) 154 Mo. 67, 55 S. W. 260; *Keim v. Vette* (1902) 167 Mo. 389, 67 S. W. 223; *Western Storage and Warehouse Co. v. Glasner* (1902) 169 Mo. 38, 68 S. W. 917; *Quinn v. Van Raalte* (1918) 276 Mo. 71, 205 S. W. 59; *G. M. A. Corp. v. Weinrich* (1924) 262 S. W. 425; *Mo. Discount Corp. v. Mitchell* (1924) 261 S. W. 743. *In Kreibohm v. Yancy* and *Quinn v. Van Raalte*, the lender took from the borrower a note or notes whereby the latter agreed to pay the former a sum, which in the aggregate exceeded, the amount of money then due plus the legal rate of interest. It was held in each case that the transaction was usurious. In *Keim v. Vette*, it was conceded that the loan was usurious; the only question was as to the availability of this fact as a defense. *G. M. A. Corp. v. Weinrich* and *Mo. Discount Corp. v. Mitchell* deal with sales of automobiles on credit and the validity of so-called finance charges. The transaction in each case was held free from usury. In *Western Warehouse Co. v. Glasner* the lender loaned money through her brother, as her agent, at the legal rate of interest. The lender did not pay her agent for placing such loans, but the latter, without the knowledge of the lender, charged the borrower a certain percentage of the amount of the loan, which sum he retained. Such loan was characterized as usurious. It would seem that none of the foregoing cases deal with the problem that was presented for decision in the principal case, and are therefore not controlling authority. The only case which at all approaches the situation in the case under review is that of *Western Warehouse Co.*, but there the agent was the agent of the *lender*, and this is the express reason for the court's ruling.

which the Court does not set forth in the opinion,[3] the case must be taken as standing for the proposition that where one hires an agent to secure a loan for him and agrees to pay a commission if the loan is effected, such loan will be usurious, if the commission is paid, and the lender knows of this fact when he makes it.[4]

Usury has been defined as a sum charged or exacted for the use of money loaned, which exceeds the legal rate of interest. A contract will be tainted with usury whenever such a charge is made. Usury, under the statute, is the act of taking or stipulating for a greater profit to the lender than the amount of interest allowed. The policy involved is that it is unconscionable to charge more than the legal rate of interest; the vice in the transaction is the greater profit to the lender.[5] It follows from the foregoing definition that where a borrower pays the lender's agent a commission, and this sum together with the rate of interest to be paid for the loan exceeds the legal rate of interest, the loan may be regarded as usurious. It can be said in such a case that the borrower is paying the lender's agent for services rendered to the lender. The act of the agent in taking the commission can be characterized as the act of the lender; the payment may be regarded as made in his behalf, and the transaction held usurious. There is abundant authority to sustain this view,[6] and it

3. Runkle testified as follows:
"Q.—Who represented you in making this loan of $400 to Mr. Abramowitz? A.—Mr. Bert Kratz.
"Q.—Did Mr. Kratz represent you as your attorney in making the loan? A.—He came to me for the money; asked if I could make the loan.
"Q.—Did you know what commission he was charging? A.—No, I believe he said something like $15.
"Q.—You understood that he was to get that $15? A.—For his commission." 274 S. W. *l. c.* 82.
Kratz testified as follows:
"Q.—Tell the court the facts about the loan that was made by Ruth Runkle..... A.—Max (*i. e.* Abramowitz) came to me and wanted to borrow $400.....
"Q.—(Continuing) Max came and wanted to borrow $400, and offered to put up as collateral for the $400, the note of Vernie Verdon.....
"Q.—Did he have that note there? A.—Not that day. Later on, I told him what he would have to do and told him what I would charge for making the loan and the rate of interest—charged $15 commission and six per cent interest on that note.....
"Q.—What did you charge him for that? A.—$15 commission and 6 per cent interest. I took that out of the $400 leaving him $373 cash; paid him at the bank.
"Q.—On the $400 note, you gave him $373? A.—Yes sir,
"Q.—And this note exhibit 2 was delivered to you for Ruth Runkle? A.—Yes, sir.
"Q.—As collateral security to the $400 note? A.—Yes sir.
"Q.—Did you deliver this note and the $400 note to Ruth Runkle? A.—Yes, she was at the bank at the time that Max got the money." *Id.*

4. It is believed that, in any event, the opinion will generally be so understood by the profession.

5. *Coleman v. Cole* (1900) 158 Mo. 253, 59 S. W. 106. Definitions in *accord* abound and can be found in all of the decisions.

6. *Western Storage & Warehouse Co. v. Glasner, supra* note 2; *Little v. Hooker Steam Pump Co.* (1907) 122 Mo. App. 620, 100 S. W. 561; *Siegelman v. Jones* (1903) 103 Mo. App. 172; 77 S. W. 307; *Wintergirst v. Collateral Loan Co.* (1895) 60 Mo. App. 166; *Brown v. Archer* (1895) 62 Mo. App. 277; *Bean v. Runville* (1918) 69 Okl. 300, 172 Pac. 452; see also Webb, Usury, sec. 88; note (1922) 21 A. L. R. 850.

Suppose that the lender's agent, without the authority or knowledge of the former, charges the borrower a commission; should the plea of usury be available, if the commission is retained by the agent? There is authority to the effect that the transaction is usurious. See, *Western Storage & Warehouse Co. v. Glasner, supra.* "The contention that Mrs. Smith (the lender) got no part of this excess and did not even know of it is no defense ..... For her brother (the agent) had full power to act for her, and to lend her money without consulting her. He was therefore an *alter ego*.... his exactions or receipts, in any form or by any name, of a greater amount of interest than the law permits, makes the transaction as usurious as if she had acted herself.... The statute is levelled against taking usurious interest in any form." *Id.*, 169 Mo. *l. c.* 48. *Little v. Hooker Steam Pump Co., supra, accord. Cf. Landis v. Saxon* (1886) 89 Mo. 375: "An agent for loaning money may take a reasonable commission from the borrower, even with the knowledge of the lender, and still the transaction will not be usurious, though the amount of interest reserved to the lender be the full lawful

would seem to be sound, if the fact is that the agent is actually serving the creditor to the exclusion of the borrower.[7]

When a borrower employs a broker or agent to procure a loan, agreeing to pay the lender full legal rate of interest and at the same time the broker a commission, it is difficult, as a matter of principle, to justify a holding that the agreement or loan is tainted with usury. The commission does not accrue to the benefit of the lender; it brings no profit to him. "What the borrower pays to *his own agent* for procuring a loan is no part of the sum paid for the loan or forbearance of money and cannot therefore be usury."[8] If the writer, therefore, is correct in his interpretation of the evidence in the instant case, the decision seems unsound, and extends the definition of usury and the operation of the statute to a new group of cases.[9]

Such an extension of the statute's operation so as to include within its sweep commissions paid to a borrower's own broker is deemed to be unfortunate and unwise. It is a matter of common knowledge that the services of a loan broker are essential to many borrowers of money. Such services are usually rendered to the borrower and not to the lender. It takes no effort to persuade a man who needs money and wants to borrow it to take a loan. On the other hand, it often requires skill and tact to bring a lender to the borrower's terms, or sometimes even to bring the borrower to the prospective lender's attention. Does the Supreme Court intend to lay down the rule that if a borrower pays *bona fide* for the services, which bring about the completion of the loan, he is free to invoke the usury statute and repudiate his obligation to this extent? If this is the case, the rule should be thoroughly understood, so that proper readjustment may be made in the business world. But it is to be hoped that no such rule is to prevail. It would impose a hardship on such of the public as have money to lend. It is likely to hamper future and upset existing business ventures, regarded to date as legitimate and entirely reputable.

The fact was brought out by the evidence in the principal case that Runkle, the lender, knew that Kratz, the agent, was to receive a commission

interest." *Id.* 380 (*dictum*) The foregoing statement does not represent the law in this state, but led Nortoni, J., to dissent in the *Hooker Steam Pump* case *supra*. That case was certified to the Supreme Court, but apparently was never disposed of there. There is authority holding that, if the lender does not know that his agent has taken a commission from the borrower, the transaction will not be regarded as usurious, so long as the commission has not been authorized, and has been retained by the agent for his own benefit. See *Call v. Palmer* (1885) 116 U. S. 98; *Greenfield v. Monaghan* (1892) 85 Iowa 211; *Acheson v. Chase* (1881) 28 Minn. 211. "It is settled that when an agent, who is authorized by his principal to lend money for lawful interest, exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious." *Call v. Palmer, supra,* 116 U. S. *l. c.* 102. "For when two persons, the agent and the borrower, conspire together and for their own purposes violate the law, how can punishment for their acts be justly imposed upon the innocent third party, the lender?" *Id.* 102.

7. See *Acheson v. Chase, supra,* note 6, and *dictum* quoted in that note from *Landis v. Saxon. Cf: Eddy v. Badger* (1878) 8 Biss. 238, Fed. Cas. no. 4,276, where the court (Harlan, J., on circuit) clearly intimates that in any case where the lender authorizes his agent to receive a commission from the borrower, the transaction will be objectionable.

8. *Fahlberg v. Keaton* (1889) 51 Ark. 534, 544, 11 S.W.878.

9. See, *contra,* holding such loans valid, *Allen v. Newton* (1924) 266 S. W. 327 (Mo. App.); *Osborn v. Payne* (1905) 111 Mo. App. 29, 85 S. W. 667; *Siegelman v. Jones* (1903) 103 Mo. App. 172, 77 S. W. 307. "It is the rule in this state that, where a broker is acting as the agent of the borrower, he may exact a commission from such borrower, and such exaction, in addition to the principal loan, does not render the loan usurious." *Allen v. Newton, supra* 266 S. W. *l. c.* 329.

from Abramowitz, the borrower, at the time the loan was made.[10] Perhaps the case carries an intimation that had Runkle not known this fact, the loan would have been valid. It is urged that the transaction cannot properly be characterized as usurious whether Runkle knew or did not know of the payment of the commission. There is only one fact to be determined, namely, did Runkle profit by the commission and in so doing, get more than legal interest for the use of his money? This question must be answered in the negative. This being so, Abramowitz paid Kratz for legitimate services rendered to him, and the question whether or not Runkle had knowledge of such payment should be immaterial.[11]

I. N. S.

USURY—SALE ON CREDIT AT A HIGHER PRICE THAN THE CASH PRICE. *General Motors Acceptance Corporation v. Weinrich.*[1]

Usury, under the Missouri statute and decisions, is the exacting of more than the legal rate of interest for the loan or use of money.[2] Accordingly, a transaction can not be characterized as usurious unless it involves a loan. The courts have uniformly held that the sale of property on credit at a higher price than that which is normally charged when the same is sold for cash can not be usurious, because there is no loan. In cases of sale on credit the parties are free to make the best bargain that each is able to. This doctrine has been applied to sales of tangible and intangible personal property, as well as sales of real estate.[3]

In the principal case a dealer sold defendant an automobile. The cash price always charged was $1,450, but the car was sold on time, and defendant promised to pay in instalments $1,501, giving his note for this amount secured by a mortgage. The difference between the cash price of the car and the time price exceeded the legal rate of interest upon the cash price for the period of time that credit was extended. The dealer sold the note and mortgage to plaintiff and received therefor the cash price of the car. The result of the transfer was that plaintiff, although it parted with only the cash price, held defendant's note for the greater amount, and the court held that plaintiff could recover the greater sum. It was said that there was no loan between the parties; the dealer was privileged to sell the car at the higher figure; and plaintiff, as successor to the dealer's rights under the note and mortgage, could enforce the same. In view of the well recognized definition of usury, the decision is inevitable, and in *accord* with other authority.

Where, however, a transaction, although it has the outward appearance, of a sale is actually a loan, the usury law will apply. In such a case, the form

10. *Supra* note 3.

11. See *Brown v. Archer, supra,* note 6 *(dictum)*; *Kihlholz v. Wolf* (1882) 103 Ill. 362; *Secor v. Patterson* (1897) 114 Mich. 37, 72 N. W. 9, *accord*. "The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes to find a purchaser of the property. The loan broker is entitled to his commissions when he has procured a lender who is ready, willing and able to lend the money upon the terms proposed." *Secor v. Patterson, supra,* 114 Mich. l. c. 40.

An exhaustive note, covering the entire question under discussion, will be found in 21 A. L. R. 850.

1. (1924) 262 S. W. 425.

2. See *supra* pp. 62-63.

3. *State v. Boatman's Sav. Inst.* (1871) 48 Mo. 189; *Coleman v. Cole* (1900) 158 Mo. 253, 59 S. W. 106; *Priest v. Garrett* (1917) 191 S. W. 1048; *Huber Mfg. Co. v. Ellis* (1918) 199 Mo. App. 96, 201 S. W. 931; *Holland-O'Neil Mill Co. v. Rawlings* (1925) 268 S. W. 683; *Davidson v. Davis* (1910) 59 Fla. 476, 52 So. 139. See also note (1910) 28 L. R. A. (N. S.) 102.

"will not change the substance of the transaction, nor hide the usury."[4] Obviously this rule is proper; if a purported sale is a sham, and the real transaction is a loan at an usurious rate, such concealment should not prevent the statute's application.

The instant case involves no difficult question of law. At the same time, it raises the interesting question: what, as a practical matter, do the usury statutes accomplish when it comes to protecting a debtor? Where a buyer can pay the normal cash price he gets an automoble or other property for a lower price than if he buys on credit. If he buys for the greater price on credit, there is no usury even though the greater price exceeds by ever so great a sum the rate of interest that could be charged for the loan of the cash price over the period of time that credit was extended. No money is loaned in such a case, hence there can be no usury. But suppose that the buyer had borrowed the cash price and bought the automobile at that figure, and had agreed to pay his lender for the use of the money a sum equal to the difference between the cash price and the time price; under such a state of facts the plea of usury would have been available, and any security for the payment of the loan would have been voidable under the statute.

It is said that the purpose of the usury statutes is to protect the borrower from a "rapacious lender."[5] Does the borrower-debtor need any more protection in the case last assumed than does the buyer-debtor in the case under review? Is the lender-creditor any more "rapacious" in the one case than the seller-creditor is in the other? It is hard to answer either of the questions in the negative. If sound policy demands protection of one type of debtor the identical policy demands it equally in the other. The fact is that usury statutes do not, and possibly can not,[6] uniformly carry out the purposes for which they were designed.

Moreover, such concerns as plaintiff, by discounting paper, are getting large returns on their investment—returns that may be far in excess of the legal rate of interest. A simple device, namely that of purchasing the buyer's paper, which is payable to the dealer, prevents the transaction from being a loan and makes it unassailable under the statutes. If plaintiff, in the principal case, had loaned defendant the cash price of the car, and had exacted in return a promise to pay the time price, it would have been usury. But technically plaintiff did not do this. Defendant gave his note to the dealer; the dealer sold the same to plaintiff for the cash price, and the latter while parting with only this lesser sum collected the time price. Of course, there was no loan; yet in substance, plaintiff, following out a preconceived plan, let defendant have the use of the cash price of the car to buy the same in return for defendant's promise, given primarily to the dealer's order, but immediately made available to the plaintiff, to pay the price of the car plus a sum which exceeded the legal rate of interest thereon.

I. N. S.

4. Trimble, P. J., in the principal case, 262 S. W. *l. c.* 428. See also *accord: White v. Anderson* (1912) 164 Mo. App. 132, 147 S. W. 1122; *Quinn v. Van Raalte* (1918) 267 Mo. 71, 205 S. W. 59.

5. Trimble, P. J. in principal case. 262 S. W. *l. c.* 428.

6. If one be permitted to speculate, the opinion is ventured that any legislative attempt to regulate contracts for the sale of property on credit, and to restrict the seller's price might result in unconstitutional interference with the seller's right to contract.