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JUNE, NINETEEN HUNDRED AND TWENTY

NOTES ON RECENT MISSOURI CASES

CONTRACTS—"MERGER" OF CONTRACT TO CONVEY REAL ESTATE IN DEED. *Barger* v. *Healy*.[1]—This was an action to compel specific performance of defendant's written contract to convey certain parcels of real estate by warranty deeds. After the plaintiff had introduced in evidence the written contract providing for the delivery of general warranty deeds by defendant, he proved that when the time came for the defendant's performance by the giving of the deeds, the defendant sent to his agent quitclaims, reserving for himself the mineral rights in the land. The plaintiff objected to the form of the deeds and requested general warranties as was provided in the contract. These the defendant refused to execute. The plaintiff, on the faith of his contract with the defendant, had contracted to sell the timber on the land to third parties. So, he finally took the quit claims and placed them on record notifying the defendant that he was taking them under protest and that he would hold defendant to strict compliance with the terms of the written contract. The trial court found for the plaintiff and entered a decree for specific performance of the contract

1. (1918) 276 Mo. 145, 207 S. W. 499.

to convey by warranty. In the Supreme Court the judgment was reversed and the petition ordered dismissed,—Faris, Blair and Williams, JJ. dissenting.

The majority of the court reached a result adverse to the plaintiff on the theory that the entire transaction was "merged" in the deeds which bespoke the final agreement, and whatever rights plaintiff had must be found in the deeds. The general statement is made that executory contracts to convey land are merged in subsequently executed deeds which have been delivered to and accepted by the purchasers.[2] It is said: "The rule applicable to all contracts, that prior stipulations are merged in the final and formal contracts executed by the parties, applies of course to a deed based upon a contract to convey. When a deed is delivered and accepted as a performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties." [3] One theory would deny an action on the contract on the ground that it has been superseded by a subsequently single written memorial, i. e. the deed; another takes the view that the deed has been accepted as performance of the vendors contract and hence no action can be maintained on that contract. In *French* v. *McMillion*[4] the court stated that the equitable estate which the purchaser had by virtue of his contract became merged in the legal estate which he secured by virtue of the deed.

It is important to know the basis of this so called merger if proper distinctions are to be made in its application. That the deed is not a subsequent contract seems apparent; the deed is tendered in *performance* of an obligation created by the contract. It may be that the contract requires something additional to the giving of the deed, as for example a conveyance plus a money consideration. Can it be contended that after the deed is given the contract is discharged so that no obligation to give money would still remain? It would seem, therefore, that it cannot be said that the contract to convey is merged in the deed in the same sense that prior or contemporaneous oral or written agreements are declared to be merged in an ultimate written contract under the so-called parol evidence rule.

The question actually before the court in the principal case upon analysis seems to be this: Has the purchaser by the acceptance of the deeds different in nature from the deeds called for by the contract, waived his right to the latter; has he accepted the deed tendered as full and complete performance by the vendor of his contract with reference to the giving of a deed?

2. 13 Cyc. 616.
3. 2 Devlin, Deeds (3rd ed.) 850 A.
4. (1917) 79 W. Va. 639, 91 S. E. 538.

One of the first Missouri cases in which it was contended that the doctrine of merger should be applied was that of *Minor* v. *Edwards*.[5] In that case the purchaser had accepted without objection a deed from the vendor and had placed it on record. The purchase price was payable upon the execution of a deed conveying title in fee. This action was to recover the purchase price. The defendant proved the existence of the certain judgment liens at the time of the acceptance of the deed. The Supreme Court, throughout, treated the case from the view-point of waiver. It held that the burden of proving a waiver was on the vendor who was asserting it and sent the case back for re-trial on the theory that "if the jury believed from the evidence that Edwards (the purchaser) received the deed tendered him by Pau'sel's (the vendor) agent, without objection, and placed it on record with a knowledge at the time that such deed did not convey an unincumbered title, or if Edwards subsequently ascertained the existence of the incumbrances and did not within a reasonable time thereafter make any objection to the defective title, such acts are an acceptance of such defective title in lieu of the one his contract secured to him."

The court in *Matheny* v. *Stewart*[6] stated that when a conveyance of real estate becomes complete the parties make and accept the conveyance therein as measuring the liability on the part of the grantor and the compensation awarded the grantee in case of breach, and that the contract becomes merged in the deed and the remedy for losses when sought in its covenants must be confined to such as they give. Inasmuch as the action in this case was one for breach of a covenant contained in the deed, it cannot be regarded as an authority for the proposition involved in *Barger* v. *Healy*.

In *Wheeler* v. *Ball*[7] there was an unequivocal acceptance of the deed tendered to the purchaser and there was nothing in the case to indicate that the deed tendered was not in full compliance of the contract. It is in fact suggested by the court that the plaintiff might successfully bring an action on the covenant in the deed.

The Kansas City Court of Appeals in *Wilson* v. *Wilson*[8] refused to apply the rule of merger to the facts in the case before it. But Johnston, J., said: "The acceptance of the deed completes the execution of the contract, and, save in excepted cases the accepted deed is the final conclusive evidence of the real contract made by the parties, and all prior verbal or written agreements are extinguished by it, not however on account of any peculiar sanctity inhering in a deed, but because it is the last written expression of their agreement made by the parties." Such a

5. (1848) 12 Mo. 137.
6. (1891) 108 Mo. 73, 17 S. W. 1014.
7. (1887) 26 Mo. App. 443.
8. (1906) 115 Mo. App. 641, 92 S. W. 145.

view results, it seems, from a confusion of the contract itself with the performance of the contract by one of the parties. In *Smyth* v. *Boroff*,[9] there was an acceptance of a general warranty deed. It was held that after such acceptance the plaintiff could not recover for a breach of a stipulation in the contract to convey by good and proper conveyance. Inasmuch as the plaintiff received a general warranty deed, a good and proper conveyance, it is difficult to see where there was any breach of the stipulation. In a very recent case[10] the Kansas City Court of Appeals held that the plaintiff, after accepting a warranty deed from a third person in lieu of one from the vendor, and after acknowledging in writing that he accepted such deed as performance of the vendor's contract, could not recover on the contract in an action against the vendor.

All of the Missouri cases cited above with the exception of *Frisbie* v. *Scott* were cited by the Supreme Court in arriving at the result in the case under discussion. An analysis of these cases seems to reveal the absence of factors present in *Barger* v. *Healy*. In none of those cases did the purchaser by any acts or statements indicate any objection to the performance tendered by the vendor; yet in one case,[11] even though there was no objection made by the vendee, the court put the burden of showing a waiver in fact on the vendor.

Two cases squarely in point from other jurisdictions are *Bull* v. *Willard*[12] and *Porter* v. *Cook*.[13] In both cases there was an acceptance by the purchaser of deeds inferior to the ones called for by the contract, an acceptance under protest. In the former it was held by the Supreme Court of New York that an acceptance of a deed, even though under protest, as a matter of law, precluded the purchaser from insisting on a further compliance. The Wisconsin court in *Porter* v. *Cook, supra,* admits the possibility of a situation in which the vendor might have given the deed and the purchaser accepted it with the understanding that it was given and accepted subject to the adjustment of the disputed rights. In such a case the court indicated that the presence or absence of a waiver of the performance required by the contract would be a question of fact. The court construed the tender of the deed by the vendor as an offer which had to be accepted like any contractual offer, unconditionally. Such a construction of an attempted or partial *performance* of a contract as an offer seems open to criticism.

There are numerous authorities which support the general proposition that the contract to convey is merged in a subsequently accepted conveyance.[14] Upon analysis these decisions will be found to have dealt with

9. (1911) 156 Mo. App. 18, 135 S. W. 973.

10. *Frisbie* v. *Scott* (1918) 199 Mo. App. 131, 201 S. W. 561.

11. *Minor* v. *Edwards,* Note 5, *supra.*

12. (1850) 9 Barb. 641.

13. (1902) 114 Wis. 60, 89 N. W. 823.

14. *Carter* v. *Beck* (1867) 40 Ala. 599; *Bryan* v. *Swain* (1880) 56 Cal. 616; *Enos* v. *Anderson* (1907) 40 Colo. 395,

situations in which the purchaser's acceptance was clean-cut and unambiguous.

In *Slocum* v. *Bracy*,[15] cited by Woodson, J., in the principal case, the actual decision was to the effect that the evidence conclusively showed an acceptance by the purchaser. But the language of the opinion indicates that the court was basing its decision upon the fact that the purchaser had, as a matter of *fact*, waived the performance required by the contract. The court points out a very clear distinction between merely accepting the instrument as a conveyance and accepting it as performance of a contract. That the situation, conduct and intentions of the parties at the time the deed is accepted, are all factors to be weighed in determining the existence of a waiver, is the rule formulated in Kansas.[16]

In a Massachusetts case[17] the defendant contended that the plaintiff by accepting a deed without objection had waived his right to the deed called for by the contract. Said the court: "We think that a waiver is not conclusively shown as a matter of law. It is to be noted that the waiver set up is not of a condition precedent, or of the time or place of the performance of a contract. If it can be called a waiver at all it is a waiver of the right to require the conveyance of all the estate which the defendant had agreed to convey. It is true that the plaintiff took the deed with the knowledge that it did not convey all that he was entitled to receive, but whether he took it as a full and satisfactory performance of the contract, or as only partial performance reserving the right to insist upon damages as to the part not performed, was a question of intention; and the burden[18] of showing the waiver was on the defendant." [19]

93 Pac. 475; *Brewer* v. *Mueller* (1912) 254 Ill., 315, 98 N. E. 548; *Essex* v. *Hopkins* (1912) 50 Ind. App. 316, 98 N. E. 307; *Creekmore* v. *Bryant* (1914) 158 Ky. 166, 164 S. W. 337; *Lawson* v. *Mullinix* (1906) 104 Md. 156, 64 Atl. 938; *Clifton* v. *Jackson* (1889) 74 Mich. 183, 41 N. W. 891; *Re Brown's Estate* (1914) 126 Minn. 359, 148 N. W. 121; *Matthews* v. *Emdin* (1915) 93 Atl. 881 (N. J.); *Norment* v. *Turley* (1918) 174 Pac. 999 (N. M.); *Cathedral Court Co.* v. *Sun Construction Co.* (1911) 72 Misc. Rep. 408, 130 N. Y. S. 154; *Farrant* v. *Troutman* (1914) 42 Okl. 418, 141 Pac. 776; *Manley* v. *Noblitt* (1915) 180 S. W. 1154 (Tex.); *Knight* v. *Southern Pac.* (1918) 172 Pac. 689 (Utah); *Investment Co.* v. *Foundry* (1910) 59 Wash. 601, 110 Pac. 417; *William James Sons Co.* v. *Hutchinson* (1916) 79 W. Va. 389, 90 S. W. 1047; *Oliver Refining Co.* v. *Portsmouth Oil Refining Co.* (1909) 109 Va. 513, 64 S. E. 56.

15. (1893) 55 Minn. 249, 56 N. W. 826.

16. *Loftus* v. *Reed* (1910) 82 Kan. 485, 108 Pac. 850. See note to this case in 31 L. R. A. (N. S.) 457.

17. *Sessa* v. *Arthur* (1903) 183 Mass. 230, 60 N. E. 804.

18. As to presumptions arising from the acceptance of a deed and burden of proof see *Slocum* v. *Bracy*, note 15, supra, and *Houghtaling* v. *Lewis*, 10 Johns. 297, (N. Y.), also note in 31 L. R. A. (N. S.) 457.

19. See also: *White* v. *Murray* (1914) 218 Fed. 933 (D. C.); *Thordson* v. *Kruse* (1915) 173 Iowa 268, 155 N. W. 334; *Taylor* v. *Railway Co.* (1911) 27 S. D. 528, 132 N. W. 152; *Davis* v. *Lee* (1909) 52 Wash. 330, 100 Pac. 752.

Barger v. *Healy,* the principal case, involved the right of the promisee of a contract to convey to accept a partial performance and reserve a right to insist upon a complete performance. The existence of such right should be determined, it is believed, independently of any fiction—and the term merger seems nothing more than a legal fiction—which beclouds the real issue presented. It is the well settled rule of law in this state that before a waiver will arise there must be the intent to waive.[20] The trial court by its finding for the plaintiff must have found that as a matter of *fact* the plaintiff did not accept the quit-claim deeds as full and satisfactory performance of the defendant's obligation under the contract. Under the holding and language of *Minor* v. *Edwards* the Supreme Court, it is submitted, might have reached what seems a more desirable result than that attained under the theory of the merger of contract in the conveyance as a matter of law. The court should not be zealous in its protection of one who in violating his contract may say to the other party to the contract, "you take what I want to give, or nothing." If the performance called for by the defendant's contract involved the transfer of something other than a deed, as for example, a chattel, it is not believed that the court would have been concerned with the question of merger. The fact that a written solemn instrument is the means by which title is to be transferred should not affect the solution of what seems the real problem involved, to-wit: The waiver by the purchaser of his right to the performance for which he contracted.[21]

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APPEAL AND ERROR—REMAND—LIMITATION OF NEW TRIAL. *Schroeder* v. *Edwards et al.*[1]—Has an appellate court the power to remand a case for a new trial upon a single issue,[2] leaving the verdict upon the remaining issue to stand?

It has been said that this power did not exist at common law.[3]

20. *Burke* v. *Murphy* (1918) 275 Mo. 397 l. c. 411, 205 S. W. 32; *Hays* v. *Manning* (1914) 263 Mo. 1, 172 S. W. 897.

21. Under the ruling of the principal case the plaintiff is evidently without remedy at law as well as in equity; this note has not dealt with any possible distinction between an action for specific performance and one for damages for breach of contract.

22. Mr. Liberman is a graduate of the School of Law, University of Missouri, and a member of the Kansas City, Missouri, Bar.—Ed.

1. (1918) 205 S. W. 47.

2. Issue is here used in the sense of an issue of fact, arising generally in a single count, and not in the sense of separate count. The loose use of the term has caused some confusion in the cases. *Lavelle* v. *Corrignio* (1895) 33 N. Y. Supp. l. c. 380.

3. 33 Harvard Law Review 249; *Parker* v. *Godin* (1729) 2 Str. 813.

Smith, C. J., in *Yazoo & M. V. R. Co.* v. *Scott*,[4] after a careful examination of the English authorities, reports no case allowing a partial new trial prior to 1700. However, the objection that the verdict was indivisible seems to have been overcome in later English cases,[5] and that procedure has been allowed. The question has been definitely settled in England by a rule of court: "A new trial may be ordered on any question without interfering with the finding or decision upon any other question." [6]

In this country, by the weight of authority, a new trial of a single issue may be granted.[7] This in some jurisdictions has been by statute;[8] in others it has been thru court decisions.[9] In the leading case of *Lisbon* v. *Lyman*,[10] Doe, J., justified this innovation on the ground that the appellant is entitled, not to a new trial but to a correction of the error. The correction is the end, the new trial is the means, and if the error was such that it could be corrected without prejudice by the retrial of a single issue, leaving intact those properly adjudicated, he deemed it just and expedient to do so.

The basis of the contrary rule is expressed in *Cerney* v. *Paston & G. Co.*[11] where, after refusing a new trial on the single issue of damages and commenting on the above case, the court said: ". . . . . until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficient effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries." In short, the argument is that the *amount* of damages may be the result of a compromise between the jurors who favored larger damages and those who desired a verdict for the defendant.[12] This reasoning has been extended to issues other than damages, the emphasis being laid on the "omnibus" character of the verdict.

The point at variance between the opposed decisions is whether a single issue may be separated *without prejudice* for retrial. The technical objections of the English common law judges should have no force in this country.[13]

Missouri courts when there are several counts have frequently reversed the judgment and remanded a cause for a retrial on a single

4. (1915) 108 Miss. 871, 67 So. 491, L. R. A. 1915 E. 239.

5. *Thawites* v. *Swainsbury* (1831) 7 Bing. 437; *Yazoo & M. V. R. Co.* v. *Scott, supra,* and cases there cited.

6. The Annual Practice (1915) p. 713.

7. L. R. A. 1915 E. 240 and authorities there collected. 4 C. J. p. 1194.

8. Ga. Code, 1895, Sec. 5498. Mass. Gen. St. c. 112, Sec. 11, 2 Rev. Laws c. 156, Sec. 11. U. S. Rev. St. Sec. 701, 4 Fed. St. Ann. 458.

9. In *Hill* v. *Am. Surety Co.* (1900) 107 Wis. 34, the court seems uncertain whether this can be attributed to a constitutional devolution of appellate jurisdiction, or to the general supervising control of superior over inferior courts.

10. (1870) 49 N. H. 553, l. c. 600.

11. (1908) 83 Neb. 88, 119 N. W. 14.

12. See *Simmons* v. *Fish* (1912) 210 Mass. 563, 97 N. E. 102.

13. L. R. A. 1915E, 247.

count, where the error affected that count alone, leaving the judgment as to other counts to stand.[14] Similarly a judgment has been affirmed as to one defendant and reversed as to another.[15] This does not appear anomalous or radical in view of the statute[16] which allows the *trial* court, in its discretion, to order separate trial of different *causes of action* united in the same petition.[17]

The case of *Schroeder* v. *Edwards,*[18] was an attempt by creditors of an Illinois corporation to subject amounts unpaid on capital stock to their claims. Their judgments against the corporation were obtained in the State of Illinois by confession, the clerk entering the judgments during vacation. No proof of a statute authorizing this was made and the case was remanded for a trial upon this issue or question alone. At the second trial the appellant sought to introduce evidence upon other issues but he was denied this privilege. After a second appeal division number two of the Supreme Court through Roy, C.,[19] said that the Supreme Court had "undoubted right" to limit a new trial to a single issue. This was an equity case in one count and the issue was one of fact decisive of the whole cause.

Two cases, *McLure* v. *Bank of Commerce*[20] and *Butler Co.* v. *Boatmen's Bank,*[21] were cited by Roy, C. *Butler Co.* v. *Boatmen's Bank* was twice before the Supreme Court.[22] A comparison of the decision upon the first appeal with the decision upon the second appeal discloses that the court did not hold that there may be a new trial as to a single issue. The McLure case, *supra,* was in point.

The Supreme Court in *Third National Bank* v. *Owens,*[23] in reversing the judgment and remanding the cause for an error of the trial court in striking out the defense of fraud, confined the next trial to that issue

14. *Willis A. Roberts* v. *Central Lead Co.* (1902) 95 Mo. A. 581, 69 S. W. 630; *Sparks* v. *Dispatch Transfer Co.* (1891) 104 Mo. l. c. 543, 15 S. W. 417.

15. *Westcott* v. *Bridwell* (1867) 40 Mo. 147, l. c. 148.

16. Sec. 1971 R. S. Mo. 1909: "Where there are several causes of action united in a petition, or where there are several issues, and the court shall be of the opinion that all or any of them should be tried separately by the court or jury, it may, on the application of either party, direct separate trials, which may be had at the same or at different terms of the court, as circumstances may require. In all cases where there are separate causes of action united as aforesaid, the court shall award separate costs against the unsuccessful party, unless for good cause it shall otherwise order. The judgment upon each separate finding shall await the trial of all the issues."

17. Note that the statute reads "several causes of action united in a petition, or where there are several issues." But it would appear from *Needles* v. *Burk* (1889) 98 Mo. l. c. 476, that *issues* has been considered as synonymous with *cause of action.*

18. (1916) 267 Mo. 459, 184 S. W. 108.

19. (1918) 205 S. W. 47.

20. (1913) 252 Mo. 510, 160 S. W. 1005.

21. (1901) 165 Mo. 456, 65 S. W. 715.

22. (1897) 143 Mo. 13.

23. (1890) 101 Mo. 558, l. c. 585, 14 S. W. 632.

alone. The suit was one against sureties on a bankteller's bond and a referee had made a finding of the facts.

In *Chandler* v. *R. R.*[24] the judgment was reversed on the ground that the widow of the deceased had not established her right under the statute to sue. Lamm, J., in refusing to confine the subsequent trial to that issue alone, said: "In equity where the issues rest with the chancellor, and a jury fills no office of substance, the course is sensible where occasion demands . . . . . but in a case at law triable to a jury, to send the case below on one question of fact to be tried out before another jury, leaving other issues of fact foreclosed by a former verdict, is contrary to our statutory scheme for jury trials. . . ." No authorities are cited for the latter proposition.

This decision denying the practice in actions at law because *contrary to the statutory scheme of jury trials* is reconcilable with *Third National Bank* v. *Owens, supra.* There the facts were found by a referee.[25] Another trial upon a single point, had been granted in several prior *equity* cases.[26]

However, in 1894 the St. Louis Court of Appeals in an action against the sureties on a builder's bond, granted a new trial as to the sole issue whether when they signed the bond the sureties knew that it referred to the contract in question.[27]

The reasoning of Lamm, J., is similar to that of the Nebraska court in *Cerney* v. *Paxton & G. Co., supra,* eg., due to the "omnibus" character of a jury's verdict the single issue could not be retried *without prejudice.* The decision in the Chandler case, *supra,* is of binding force only as to the facts in that case. It must be confessed, however, that it was entirely practicable to retry that case on the single issue in question, viz.: whether there were minor children in whom the cause of action rested.

It would seem that in accord with the weight of authority the Supreme Court should even in an action at law, limit the subsequent trial to a single issue, whenever it appeared that it was practicable to do so. It is a somewhat chimerical fear that no issue may be separated without prejudice. In the words of Doe, J., it is to be remembered that the appellee has rights as well as the appellant In no case found has a distinction been taken between the right of an appellate and trial court to exercise this power.[28]

24. (1913) 251 Mo. 592, l. c. 602, 158 S. W. 35.

25. *Hill* v. *American Surety Co.* (1900) 107 Wis., l. c. 34, 82 N. W. 691. Wisconsin seems to draw a similar distinction between actions in law and in equity, basing it upon the inability of the appellate court to decide questions of fact in the former case.

26. *Leeper* v. *Taylor* (1892) 111 Mo. l. c., 326, 19 S. W. 955; *McLure* v. *National Bank of Commerce* (1913) 252 Mo. 510, l. c. 524, 160 S. W. 1005; *Chouteau* v. *Allen* (1879) 70 Mo. 290 l. c. 344.

27. *Oberbeck* v. *Mayer* (1894) 59 Mo. App. l. c. 298.

28. L. R. A. 1915E, 258 and authorities there collected.

It is submitted that within the sound discretion of the court the power in legal or equitable actions to direct the retrial of a single issue, without disturbing those properly tried, is a salutary one, saving time, money, and needless litigation, and should be encouraged.

J. A. W.

JUSTICES OF THE PEACE—SUFFICIENCY OF APPEAL NOTICE FROM JUSTICE COURT—*Davenport Vinegar & Pickling Works* v. *Shelley*.[1]—On October 26, 1909, judgment for $203.90 was obtained before a justice of the peace in St. Louis. The defendant filed a counter-claim on the day of the trial and judgment on the counter-claim was for plaintiff.

A notice of appeal was served on plaintiff's attorneys who signed an acknowledgment of "due and timely service of within notice."

The notice set out the date of judgment as Oct. 21, instead of Oct. 26, the amount as $203.62 instead of $203.90 and omitted any mention of the counter-claim.

Plaintiff's attorneys appeared in the circuit court "for the purpose of the motion only" and moved to affirm the judgment on the ground that appellant failed to serve appellee with notice of appeal as required by section 4074 R. S. Mo. 1899, referring in the motion to the "so-called notice" mentioned above and setting it out in full.

After various vicissitudes the case was finally certified to the Supreme Court by Allen, J., dissenting from the opinion of the St. Louis Court of Appeals affirming the judgment for want of a proper notice of appeal.

The Supreme Court, speaking thru White, C., applied a rule of liberal construction to section 7582 R. S. Mo. 1909[2] (which is section 4074 R. S. Mo. 1899) and held the notice sufficient. The court, in its opinion, mentioned the fact that the attorneys for plaintiff in effect admitted, by their inclusion of the "so-called notice" in their motion to affirm, that notice was served in and referred to the particular case.

The opinion noticed many of the opinions of the courts of appeals in which a rule of strict construction had been applied. But that attitude had not always been present, and thus a lack of certainty as to what constitutes notice was evident and possibly this was reflected by the delay in the disposition of the case in the circuit court.

1. (1920) 217 S. W. 267.

2. Sec. 7582 R. S. Mo. 1909, reading "If the appeal be not allowed on the same day on which the judgment is rendered, the appellant shall serve the appellee, at least ten days before the first day of the term at which the cause is to be determined, with a notice in writing stating the fact that an appeal has been taken from the judgment therein specified. The notice may be served in like manner as on original writ or summons, or by delivering a copy of the same to appellee by any person competent to be sworn as a witness, or if appellee shall have appeared to the suit before the justice, either by agent or attorney, said notice may be served on said agent or attorney; . . . . . (R. S. 1899, sec. 4074)."

Where the judgment was against two persons and the notice of appeal named but one of them, following his name with "et al," it had been held insufficient.[3] And where default judgment was obtained against J. J. Taylor and the notice of appeal was in the name of C. C. Taylor, it had also been held insufficient.[4] The same was true of one signed J. Henry Baer when judgment recited that it was rendered against Henry Baer.[5] But notice of appeal to plaintiff as "J. W. Teasdale" when judgment was rendered for "J. W. Teasdale and Co., a corporation" had been held sufficient.[6] Where there is error in stating in the notice the date the judgment was rendered, it has been held both sufficient[7] and insufficient notice.[8] But an omission to state any date, the notice otherwise being complete, did not make the notice insufficient.[9]

As said by White, C., in his opinion, most of the decisions giving a strict construction claim support from *Tiffin* v. *Millington*.[10] Appellant Tiffin in that case was a garnishee against whom judgment was rendered by a justice of the peace. As defendant he had notice of appeal served on respondent by having the notice read to the latter by a deputy constable. The statute[11] provided for notice in writing to appellee and the court held that reading the notice to appellee was not sufficient, citing "a late case decided at Fayette" [12] as a former direct ruling. The court also said that had the notice been given in writing, it would not have been good as "it is obviously a notice which does not describe the cause, and belongs properly to some other suit between the parties."

It is submitted that that dictum is not a proper basis for the strictness in construing the statute on this subject, as shown in the cases referred to and that the Supreme Court has done an excellent thing in holding that a notice which notifies is sufficient and that extrinsic facts may be considered to discover whether the notice of appeal was actual notice that an appeal had been taken from the judgment in question.

3. *State* v. *Hammond* (1902) 92 Mo. App. 231.

4. *McGinnis etc. Hdw. Co.* v. *Taylor* (1886) 22 Mo. App. 513.

5. *Stone* v. *Baer* (1900) 82 Mo. App. 399.

6. *Teasdale* v. *American Fruit, etc. Co.* (1906) 120 Mo. App. 584, 97 S. W. 655.

7. *Collier* v. *Langan, etc. Co.* (1907) 128 Mo. App. 113, 106 S. W. 593.

8. *Hammond* v. *Kroff* (1889) 36 Mo. App. 118; *Cooper* v. *Northern etc. Co.* (1906) 117 Mo. App. 423, 93 S. W. 871; *Clay* v. *Turner* (1909) 135 Mo. App. 596, 116 S. W. 480.

9. *Holschen Coal Co.* v. *Missouri etc. Ry. Co.* (1892) 48 Mo. App. 587; *Munroe* v. *Harrington* (1902) 99 Mo. App. 288, 73 S. W. 221.

10. (1834) 3 Mo. 419. The notice read as follows: "Mr. Jeremiah Millington take notice that I have taken an appeal to the next term of the Circuit of St. Louis County, from a judgment rendered against me by Patrick Walsh in a suit wherein you was plaintiff and *I was defendant* Clayton Tiffin, Nov. 12, 1832." (Italics ours, Ed.)

11. p. 481 Rev. Code, 1825.

12. Probably *Newberry* v. *Melton* (1832) 3 Mo. 121, a case in the Fayette district, one and one half years before, decided exactly on that point by the same judge, Hon. Robert Wash.

This is the position taken in several other states[13] having like statute and would seem to be much the better position in view of the professed simplicity of the procedure before justices of the peace and the desirability of keeping matters of practice as simple as is possible.

B. W.

GARNISHMENT—BONA FIDE CREDITOR AS GARNISHEE. *Leonard et al* v. *Martin, Shannon County Bank et al, Garnishees.*[1]—The Shannon County Bank had a bona fide debt due it from Martin. An agent of the Bank induced Martin to purchase cattle from the plaintiffs giving in payment checks on the Shannon County Bank in which Martin had no deposit. The same agent also assisted Martin in selling the cattle and the proceeds of the sale were turned over to the bank and applied on the payment of Martin's debt to the bank. The worthless checks given in payment for the cattle were not honored and plaintiffs brought an action against Martin for the purchase price.

An attachment was issued against the property of Martin and the bank was garnished. In answer to interrogatories the garnishee denied having any property of Martin or being indebted to him for any sum whatever. The trial court decided that the issue between plaintiffs and the bank could not be tried in a garnishment proceeding. The Springfield Court of Appeals[2] and the Supreme Court reversed the judgment and remanded the cause for a new trial, holding that the bank was subject to garnishment.

The Supreme Court adopted the decision of the Court of Appeals which relied on *National Tube Works Co.* v. *Machine Co.*,[3] *Kurtz* v. *Troll*,[4] and *Aull* v. *Gaffin*[5] for the principle that "the law will not permit a creditor to hold that which he has applied on his bona fide indebtedness where it has been procured thru a fraud practiced by such creditor and the debtor on the other creditors." In *Aull* v. *Gaffin, supra,* the conveyance involved was from a husband to his wife to whom the court held he owed no debts. In *Kurtz* v. *Troll, supra,* the conveyance in question was to a voluntary purchaser with knowledge that the debtor intended to defraud

13. *Burrows* v. *Norton* (1874) 2 Hun. (N. Y.) 55; *Fricmark* v. *Rosenkraus* (1892) 81 Wis. 359, 51 N. W. 557; *Noall* v. *Halonen* (1893) 84 Wis. 402, 34 N. W. 729; *Hills* v. *Mills* (1861) 13 Wis. *625; *Hender* v. *Ring* (1895) 90 Wis. 358, 63 N. W. 282; *Cawles* v. *Neillaville* (1909) 37 Wis. 384, 119 N. W. 91; *Kirkpatrick* v. *Dakota Central Ry. Co.* (1887) 4 Dak. 481, 33 N. W. 103; *Haag* v. *Burns* (1908) 22 S. D. 51, 115 N. W. 104; *State ex rel* v. *Superior Ct. of Spokane County, et al* (1893) 7 Wash. 223, 34 Pac. 922; *Rutledge* v. *Superior Ct.* (1885) 65 Cal. 85, 7 Pac. 144. *Contra, State ex rel* v. *District Court et al* (1910) 41 Mont. 100, 108 Pac. 580.

1. (1919) 214 S. W. 968.

2. (1915) 192 Mo. App. 350, 180 S. W. 1014.

3. (1893) 118 Mo. 365, 22 S. W. 947.

4. (1903) 175 Mo. 506, 75 S. W. 386.

5. (1911) 234 Mo. 171, 136 S. W. 343.

his creditors. In *National Tube Works Co.* v. *Machine Co., supra,* the conveyance was to a creditor who accepted assets of a corporation in payment of debts due him by the corporation, and also in payment of debts due him by an officer of the corporation as an individual. Conceding that any principle of law deducible from those cases would apply to a case where a creditor accepts only the amount of his just debt, it does not follow that because a creditor will not be permitted to hold that which he procures by a fraud practiced by himself and his debtor upon other creditors that garnishment is a proper remedy.

The Missouri statute on garnishment provides that all persons shall be subject to garnishment who have in their possession goods, moneys or effects of defendant, and all who are debtors of the defendant.[6] This statute is essentially legal and not equitable in its nature and procedure.[7] Therefore, to try the issue between the Shannon County Bank and the plaintiffs in a garnishment proceeding it is necessary to hold that the conveyance of the proceeds of the sale from Martin to the bank did not pass title but that the proceeds are still the property of Martin.

The court referred to *Pile* v. *Bank of Flemington,*[8] where with facts somewhat similar to those of the principal case the defrauded creditor brought an action directly against the defrauding creditor *for money had and received.* Whereupon the court declared: "We can see no reason why that the money in our case (so far as these plaintiffs are concerned) cannot be treated as yet belonging to Martin, as to which a garnishment would avail." It is submitted that in the former case the conveyance by the debtor to the defrauding creditor is treated as passing title to the property. But in the principal case the conveyance was treated as not passing the title, and in so far as *Pile* v. *Bank of Flemington* has any bearing on this case it is against the result reached.

Nevertheless the result reached by this decision seems to be a desirable one and is in line with decisions in some other states.[9] It can be justified by viewing the conveyance of the proceeds of the sale by Martin to the bank as one made to hinder, delay, and defraud creditors and hence void as to them under Sec. 2881, R. S. Mo. 1909.

Hitherto in Missouri the conveyances to bona fide creditors which have been held void as to other creditors have been those in which the bona fide creditor accepted more in money or in money's worth than his

6. Sec. 2413 R. S. Mo. 1909: "All persons shall be subject to garnishment on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees. (R. S. 1899 Sec. 3433)."

7. *Lackland* v. *Garesche* (1874) 56 Mo. 267.

8. (1915) 187 Mo. App. 61, 173 S. W. 50.

9. *Hill et al* v. *Mallory* (1897) 112 Mich. 387, 70 N. W. 1016; *Thompson* v. *Furr* (1879) 57 Miss. 478.

just debt, thus aiding the debtor to conceal his assets from other creditors.[10] And in *Bangs Milling Co.* v. *Burns*[11] it was said arguendo that so long as a creditor accepted only the amount of his just debt, the fact that he aided his debtor in defrauding his other creditors did not render void the conveyance from his debtor to him. The court referred to these remarks but declined to be bound thereby.

It is submitted that the decision in *Leonard et al* v. *Martin* inaugurates a new class of conveyances which are void as to creditors under Sec. 2811 R. S. Mo. 1909.

R. E. MURRAY[12]

HUSBAND AND WIFE—POWER OF A WIFE TO DISPOSE OF HER PROPERTY —*Headington* v. *Woodward*.[1]—The Supreme Court has announced the rule that if a wife secretly, with intent to defraud her husband out of his marital rights in her property, conveys away her property without consideration and retains the beneficial interest in it during her life time equity will treat it as a fraud upon his marital rights conferred by Sec. 350 R. S. Mo. 1909.[2]

The facts were: A, without the knowledge of her husband, as gifts executed and delivered deeds to two parcels of real estate to two nephews. By virtue of the request of A the deeds were not recorded until after her death. During her life she retained possession of the property, paid the taxes and collected the rents. Previous to the execution of the deeds she had executed a will devising to her husband one-half of all the property she owned. No children had been born to the marriage. If the two deeds were a valid disposal of her property the husband in reality would receive nothing as this constituted practically all of her property.

The decision represents an additional step in the application of equitable principles. It was early established that a husband could not convey away his property before marriage for the purpose of preventing the

10. *McVeagh* v. *Baxter* (1884) 82 Mo. 518; *State ex rel Robertson* v. *Hope* (1890) 102 Mo. 410, 14 S. W. 985; *National Tube Works Co.* v. *Machine Co.* (1893) 118 Mo. 365, 22 S. W. 947; *Bank* v. *Fry* (1908) 215 Mo. 24, 115 S. W. 439; *Bank* v. *Montgomery* (1917) 192 S. W. 941; *McNichols* v. *Richter* (1883) 13 Mo. App. 515; *Meysenburg* v. *Distilling Co.* (1885) 20 Mo. App. 21; *Hanna* v. *Finley* (1889) 33 Mo. App. 645; *Meyberg* v. *Jacobs* (1890) 40 Mo. App. 128; *Ball* v. *O'Neill* (1896) 64 Mo. App. 388; *Grocery Co.* v. *Hudson* (1910) 147 Mo. App. 31, 126 S. W. 511.

11. (1899) 152 Mo. 350, 53 S. W. 923.

12. Student, School of Law, University of Missouri.—Ed.

1. (1919) 214 S. W. 963.

2. Section 350 R. S. Mo. 1909. "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

dower rights of his intended wife from attaching.[3] This doctrine was likewise applied to the wife to prevent her from disposing of her property during the treaty of marriage in fraud of her intended husband's marital rights.[4] The Supreme Court had also established the doctrine that a transfer of personal property made by the husband just before death would be set aside.[5] The principal case extends the doctrine to conveyances of real property made by the wife during marriage even tho there be no children born of the marriage.

The "Twin Statutes" (Secs. 350-351 R. S. Mo. 1909) have been interpreted to confer upon husband and wife equal rights in each other's property.[6] Thus, if the husband is denied the power to dispose of his property in fraud of his wife's marital rights the same rule must also be true of her. They are, however, on an equal basis only so far as the rights which they acquire under these two statutes are concerned.

Independent of Sec. 351, the wife is entitled to dower which is fundamentally different from the statutory interest to which the husband is entitled.[7] She is entitled to a life estate in one-third of all the real property of which he may become seized during marriage. The right attaches immediately upon marriage and cannot be destroyed without her consent. It is in every respect a legal right.

The estate by curtesy acquired by the husband independent of the statute differs in extent and depends upon different conditions. The estate does not become initiate until the birth of a child capable of inheriting the property. It becomes consummate upon the death of the wife. He has by statute[8] been deprived of the usufruct of the wife's land during her life and his curtesy is simply a life estate in her land upon her death.[9]

The statutory interest accruing to the husband differs from this in that upon her death he becomes the absolute owner, subject to her debts, of one-half of her property both real and personal. The common law curtesy does not come to him burdened with her debts.[10]

3. *Hach* v. *Rollins* (1900) 158 Mo. 182, 59 S. W. 232; *Donaldson* v. *Donaldson* (1913) 249 Mo. l. c. 245, 155 S. W. 1; *Murray* v. *Murray* (1896) 115 Cal. 266, 47 Pac. 37; *Higgins* v. *Higgins* (1905) 219 Ill. 146, 76 N. E. 86; 13 R. C. L. 103.

4. *Hach* v. *Rollins* (1900) 158 Mo. l. c. 187, 59 S. W. 232; *Kelley* v. *McGrath* (1881) 70 Ala. 75, 45 Am. Rep. 75; *Butler* v. *Butler* (1879) 21 Kansas 521, 30 Am. Rep. 441.

5. *Davis* v. *Davis* (1838) 5 Mo. 183; *Stone* v. *Stone* (1853) 18 Mo. 390: "If such a practice was allowed the efficacy of the statute conferring dower in personalty, would depend on the whim or caprice of the husband."

6. *Spurlock* v. *Burnett* (1904) 183 Mo. l. c. 531, 81 S. W. 1221; *Gilroy* v. *Brady* (1906) 195 Mo. l. c. 209, 93 S. W. 279; *Waddle* v. *Frazier* (1912) 245 Mo. l. c. 401, 151 S. W. 87.

7. Secs. 345 and 358 R. S. Mo. 1909.

8. Sec. 8309 R. S. Mo. 1909.

9. *Register* v. *Elder* (1910) 231 Mo. 321, 132 S. W. 699; *Myers* v. *Hansbrough* (1907) 202 Mo. l. c. 500, 100 S. W. 1137.

10. *Myers* v. *Hansbrough* (1907) 202

Just what effect a wife's bona-fide conveyance of property, without the consent of the husband, will have upon his curtesy is perhaps not definitely settled. She can execute a deed which will effectually pass the title to her property,[11] but whether it will be subject to the possibility of her husband surviving and claiming his curtesy has recently been questioned. In discussing this question the Supreme Court said: "Whether a husband's curtesy in such property of his wife is more than an estate for life contingent upon her failure to sell is a question not definitely well settled." [12]

It has been held that the power to destroy this curtesy should be implied from the rights conferred upon the wife by the Married Women's Acts. This seems to be the weight of authority.[13] Our Supreme Court has expressly held that such was not its force.[14] In several cases the Supreme Court has used language, a fair interpretation of which would make the husband's curtesy contingent upon the wife's failure to dispose of her property in a bona fide manner.[15] In *Teckenbrook* v. *McLaughlin* the Supreme Court did not definitely state that the wife could convey and bar her husband's curtesy right, but left the impression that possibly she could do so since the Married Women's Acts. In a case in the Kansas City Court of Appeals a wife had leased her property but it was held that the husband's curtesy was not affected because he did not join in the lease.[16] This would seem clearly to indicate that the tendency in Missouri is to hold that curtesy cannot be destroyed without the husband's consent. The decision in *Ennis* v. *Eager, supra,* perhaps would have been different in a jurisdiction where the majority rule obtains as to the effect of the Married Women's Acts.

The dower and curtesy cases furnish an analogy bearing directly upon the nature of the right of each spouse under the twin statutes in the property of the other. Since the Married Women's Acts taking away from the husband the right to possession of the wife's freehold lands during marriage, the husband, where there are no children of the marriage, would have no marital rights in the wife's property either during marriage or after her death without the statute in question. This statute creates rights of the same nature as those created by the statute giving the wife "dower" in the husband's *personalty* previously alluded to.

The legislative intent was to create an additional *jus mariti* in each

Mo. 495, 100 S. W. 1137.

11. *Kirkpatrick* v. *Pease* (1907) 202 Mo. l. c. 490, 101 S. W. 651.

12. *Teckenbrook* v. *McLaughlin* (1912) 246 Mo. l. c. 717, 152 S. W. 38.

13. *Brown* v. *Clark* (1880) 44 Mich. 309, 7 N. W. 679; Curtesy, 17 C. J. 417.

14. *Myers* v. *Hansbrough* (1907) 202 Mo. l. c. 500, 100 S. W. 1137.

15. *O'Brien* v. *Ash* (1902) 169 Mo. l. c. 294, 69 S. W. 8; *Farmers Bank* v. *Hageluken* (1901) 165 Mo. l. c. 451, 65 S. W. 728; *Kirkpatrick* v. *Pease* (1907) 202 Mo. l. c. 490, 101 S. W. 651.

16. *Ennis* v. *Eager* (1911) 152 Mo. App. l. c. 497, 133 S. W. 850.

spouse to the property of the other which took effect upon marriage as did dower and curtesy at common law. Perhaps the right is less than a perfect vested right, but a so-called inchoate right. Nevertheless it is an interest in property which upon certain contingencies ripens into possession, the chief benefit of ownership of property. It was this inchoate right the court of equity protected in the case under review.

The view that not even inchoate rights of property upon marriage are created by the twin statutes seems a too narrow and literal reading of the statutes. The legislative intent was not merely that the property mentioned would go to the surviving spouse in case it was on hand at death. More was meant. These statutes are not mere statutes of descent and distribution. New *jus mariti* in property were created. The interest of the spouse is not the mere expectancy the prospective heir has in the prospective ancestor's property. It is a right like dower and curtesy subject to the contingency of survivorship and failure to dispose of the property openly and without concealment. This being the nature of the right ample power existed in the Chancery Court to prevent any fraudulent devise by a spouse to destroy the right when no rights of innocent third parties were involved.

The holding of the principal case is clearly in line with the majority rule in other states.[17] An especially well considered case involving this question is *Wright* v. *Holmes*.[18] The decisions do not prevent either party from disposing of property free from the statutory right during his or her life, provided the conveyance is not "a more colorable one" and the benefits are not reserved to the grantor during life.

To make the transaction a mere colorable one it must be an immediate gift in form, but not in fact. The property must be so disposed of that the wife retains the use and profits during her lifetime, but the title passes to her grantee. If she has not parted with the title the husband could take without the aid of a court of equity as she would then die with the property belonging to her. The mere fact that the conveyance is made for the express purpose and with the intent to deprive him of his marital rights is not sufficient.[19] There must be coupled with the intent secrecy and want of consideration. A colorable transaction is one which is secret, without consideration, reserves the beneficial interest during her

17. *Browson* v. *Browson* (1876) 35 Mich. 415; *Walker* v. *Walker* (1890) 66 N. H. 390, 27 L. R. A. 799; *Brown* v. *Crafts* (1903) 98 Me. 40, 56 Atl. 213; 3 L. R. A. (N. S.) Note 774-775.

18. *Wright* v. *Holmes* (1905) 100 Me. 508, 65 Atl. 507; In upholding the right of a wife to make a *donatio causa mortis* of her personal property thereby depriving her husband of a distributive share the court said, "He may dispose of his personal property absolutely . . . provided the transaction is not merely colorable, and is unattended by facts indicative of some other fraud upon her than that arising from his transfer to prevent her having an interest after her death."

19. *Leonard* v. *Leonard* (1902) 181 Mass. 458, 63 N. E. 1068.

life, to the grantor and is done with intent to defraud the husband of his marital rights.

There are some decisions which take the contrary view. The only question, according to the minority view, is whether or not there has been a valid conveyance to the third party. The interest of the husband, it is argued, is not a vested one and if the wife so disposes of her property as to vest title in some one else, there is nothing for her husband. The minority view is well stated in an Alabama case,[20] which holds that it is impossible to predicate a fraud under such circumstances.

The interest which the husband acquires under Sec. 350, *supra,* is not an absolutely vested estate until his wife's death. Since the interest is not strictly vested, since the wife had the power to convey her property and since there was no curtesy because of no children born to the marriage,[21] according to the minority rule, the wife, in the principal case, would have deprived the husband of all interest in her real estate. The deeds were valid between the parties since they had been executed for a sufficient consideration[22] and delivered.[23]

From a strictly legal standpoint, the minority rule would seem to be supported by the better reasoning, but upon equitable principles the Missouri doctrine is sound. The deeds were not an attempted testamentary disposition of the property because they vested a present right to the property in the nephews.[24] Nevertheless, they accomplished that result. The wife retained possession of the property during her lifetime, enjoyed its benefits and upon her death it descended not as the statute directed but contrary to it. Here there was clearly an attempt to evade the statute. The surviving spouse, if the property is not in good faith disposed of during lifetime, has an equitable right that it descend according to the statute.

It is submitted, that the rule in the principal case protects this interest

20. *Lightfoot, ex* v. *Colgin* (1813) 5 Munf. (Va.) 42; *Hatcher* v. *Buford* (1895) 60 Ark. 169, 27 L. R. A. 507; *Williams* v. *Williams* (1889) 40 Fed. 521; *Lines* v. *Lines* (1891) 142 Pa. St. 149, 21 Atl. 809; *Robertson, Adm.* v. *Robertson* (1905) 3 L. R. A. (N. S.) 774, 147 Ala. 311, 40 So. 104; In upholding this doctrine the court quoted with approval the following from *Ford* v. *Ford,* 4 Ala. 142 . . . "He has by law, during his life the most absolute and unqualified dominion over it. The only restriction which has been imposed on him in favor of his wife is in its disposition after his death. It is difficult to conceive how a disposition of property, made in the lifetime of the husband to take effect immediately could be fraudulent against the wife as no right vests in the wife until death."

21. *Lock* v. *McPherson* (1901) 163 Mo. l. c. 498, 63 S. W. 726; *Farmers Bank* v. *Hageluken* (1901) 165 Mo. l. c. 451, 65 S. W. 728; *Kirkpatrick* v. *Pease* (1907) 202 Mo. l. c. 490, 101 S. W. 651.

22. *Masterson* v. *Sheehan* (1916) 186 S. W. 524, 18 C. J. 166.

23. *Sneathen* v. *Sneathen* (1891) 104 Mo. l. c. 209, 16 S. W. 497; *Harvey* v. *Long* (1914) 260 Mo. 374, 168 S. W. 708.

24. *Christ* v. *Kuehen* (1903) 172 Mo. 118, 72 S. W. 537; *Sims* v. *Brown* (1913) 252 Mo. l. c. 66, 158 S. W. 624.

and is in accord with sound equitable principles affording relief against fraud where there is no relief at law.

IRVING C. NEALE[25]

AUTOMOBILES—DEGREE OF CARE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE. *Threadgill* v. *United Railways Company of St. Louis.*[1]—Acknowledgment is made to Mr. Arthur W. Allen, of Springfield, Mo., who has called attention to the fact that Laws 1911, page 330, subsec. 9,[2] under which the above case was decided was repealed by Laws 1917, Motor Vehicles, p. 404, sec. 1, and that under sec. 11, p. 413 of the latter act, the duty of the driver of a motor vehicle is to "drive the same in a careful and prudent manner. . . ."

In a note reviewing the principal case in Law Series 18, University of Missouri Bulletin, mention of the Act of 1917 should have been made as showing that the legislators had themselves seen the fallacy of saying that (so far as the driver of a motor vehicle is concerned) there can be any degree of care other than due care under the circumstances, i. e., the care of a careful and prudent person. But the object of the note was to show the unsoundness of the theory that there can be more than that one degree of care and the use of *Threadgill* v. *United Railways, supra,* was made to exemplify the fallacy of the theory.

It is to be confidently expected that in causes of action involving the duty of motor vehicle drivers to use care, arising since January 31, 1918, at which time the Motor Vehicle Act of 1917 went into effect, such expressions as "highest degree of care" will not be used.

B. W.

25. Student, School of Law.—Ed.

1. (1919) 214 S. W. 161.

2. Provides that motor vehicles shall be driven with "the highest degree of care that a very careful person would use under like or similar circumstances. . . . . ."